

IN THE MATTER OF AN ARBITRATION

BETWEEN:

VANCOUVER COASTAL HEALTH AUTHORITY

(the “Employer”)

AND:

BC GOVERNMENT & SERVICE EMPLOYEES’ UNION (“BCGEU”),
CANADIAN UNION OF PUBLIC EMPLOYEES (“CUPE”),
HOSPITAL EMPLOYEES’ UNION (“HEU”),
HEALTH SCIENCES ASSOCIATION (“HSA”),
UNITED FOOD & COMMERCIAL WORKERS (“UFCW”)

(the “Unions”)

ARBITRATOR:

Vincent L. Ready

COUNSEL:

Adriana Wills for
the Employer

Esther Ostrower for BCGEU
Justin Schmid for CUPE
David Tarasoff for HEU
Lindsay M. Lyster for HSA
Chris Buchanan for UFCW
the Unions

HEARING:

June 15 and August 26, 2011,
October 30 and 31, 2012
and November 5, 2012
Richmond, BC

DECISION:

January 18, 2013

THE ISSUE

The British Columbia Government and Service Employees' Union ("BCGEU"), the Canadian Union of Public Employees ("CUPE"), the Hospital Employees' Union ("HEU"), the Health Sciences Association ("HSA") and the United Food and Commercial Workers ("UFCW") (collectively, the "Unions") have grieved the implementation of an Attendance and Wellness Promotion Program (the "AWP") by the Vancouver Coastal Health Authority (the "Employer" or "VCH").

THE AWP

The AWP is well summarized in a table that was produced by the Employer. There are a number of stages of the AWP, as described below. I must note that if a disability is confirmed, the Employer's policy makes clear that the stages summarized below are not followed, but that the Employer will then consider accommodation options, to the point of undue hardship. The summary explains the AWP stages as follows:

The Review Stage: Employee is above VCH paid sick leave average

Review with employee:

- Work and Leave Calendar
- Scheduling medical, dental appointments outside of working hours when possible
- Disability
- Wellness strategies
- Next AWP state

Stage 1: Overtime Ban and Medical Certificate: Employee remains above VCH paid sick leave average

Review with employee:

- Work and Leave Calendar
- Disability
- Wellness Strategies

- OT Ban
- Medical Certificate after 3 consecutive sick days

Stage 2: Overtime Ban and Medical Certificate: Employee remains above VCH paid sick leave average.

Discussion topics remain the same, with the addition of:

- Hours will be reduced at Stage 3

Stage 3: Reduced Hours (Non-Culpable): Calculation based on paid and unpaid sick time. Employee remains above VCH paid sick leave average as well as their Collective Agreement average.

Discussion Topics remain the same, with the addition of:

- Employment in jeopardy

Non Culpable Dismissal: Employee remains above VCH paid sick leave average as well as their Collective Agreement average.

- VCH 20-11/12 union paid sick leave average is 5%
- Employee, Manager/Designate, HR Advisor and Union invited to attend each meeting. VCH is committed to preserving the confidentiality of information discussed.

POSITIONS OF THE PARTIES

The Unions argue that the AWP is invalid as currently written as it improperly imposes overtime bans, contemplates the reduction of full time hours (“FTE”), and promulgates the termination of employment for non-culpable conduct. Further, the Unions argue that the AWP, as currently drafted, incorrectly contemplates the termination of employment for employees whose absenteeism remains above the average absenteeism rate during the course of the AWP. The Unions also submit that the punitive aspects of the AWP violate the longstanding principles enunciated in *KVP Co. Ltd. v. Lumber & Sawmill Workers’ Union, Local 2537 (Veronneau Grievance)*, [1965] O.L.A.A. No. 2 (Robinson) because of the Collective Agreement prohibitions on discipline

without just and reasonable cause, principles also found in the *Labour Relations Code*.

The Employer argues that it is well established law that employers have the right to develop and introduce practices and policies relating to absenteeism in the workplace. The Employer submits that the AWP is an attendance and wellness program that was well researched and thoughtfully implemented and is one that resolves many of the issues that pervaded the previous attendance management program. The Employer submits that the facets of this program that the Unions object to are not punitive in nature, but rather corrective with a principle view to support employees while at the same time striving to encourage that employees attend work consistently and regularly. The Employer takes the position that the Union's "aggressive attack" on the AWP is disproportionate with the objectives and purposes of the AWP and the Unions' grievances regarding their challenge to three aspects of the AWP ought to be dismissed.

DECISION

I agree with the arguments presented by the Employer that it is generally accepted principle that employers have the right to introduce rules and policies at the workplace, as long as such rules do not contravene the Collective Agreement and comply with the factors cited in *KVP, supra*. I agree with the Employer that the jurisprudence also supports the right of employers to introduce attendance management programs. In fact, I applaud this Employer for also focusing on wellness as part of the program at this workplace and I find that this AWP was researched and implemented in good faith by the Employer, after consultation with the Unions. With respect to the issue of managing short term attendance issues, I further agree with Arbitrator Foisy who stated:

Short-term absenteeism is costly and there is no issue in my mind that an employer can develop and implement a program in that regard if it does not violate the collective agreement or the law. There is no need for an employer to wait for a problematic situation concerning absenteeism to develop. There is nothing wrong for management acting in a prospective manner and putting in place a system which is designed to efficiently manage short term absenteeism...

Air Canada (Policy Grievance: CAMS Program), unreported, October 22, 2002 (Foisy)

I also concur with the Employer that the mere fact that communications, both oral and written, in the context of an AWP are uncomfortable does not necessarily render them disciplinary. I take no issue with the fact that this Employer has implemented a program whereby employees who are deemed to have excessive absenteeism are asked to meet and discuss wellness and attendance. Nor do I take issue with the fact that the policy speaks to taking progressive, corrective action to address short term absenteeism in the workplace. I do, however, take issue with other aspects of the AWP that has been implemented by this Employer that are more punitive than corrective and, when strictly applied, do not accord with the law respecting attendance management or non-culpable terminations. I will deal with each in turn.

1. The Overtime Ban

The law is clear that in non-culpable situations, punishment is not an appropriate response because, as would make sense, if the situation is beyond the employee's control, no amount of punishment will result in a change of behaviour. The Employer asserts that first, there has been no violation of a Collective Agreement, and therefore it is entitled to implement an overtime ban as part of an attendance management policy. And second, the Employer argues that because overtime is voluntary (unless an emergency is declared) and not an entitlement under a Collective Agreement, the Employer is well within its rights to restrict it, as implemented in the AWP. The Employer relies on *Health Employers' Assn. of British Columbia*, [2002] B.C.L.R.B.D. No. 112

and *Coquitlam (City) and International Assn. of Firefighters, Local 1782*, [1997] B.C.C.A.A.A. No. 499 (Hickling) to support these assertions. In the alternative, the Employer argues that if the automatic overtime ban is unreasonable, that it could be cured by implementing a discretionary overtime ban, where individual circumstances so warrant.

The Unions assert that refusing overtime to an employee, who has entered Stage 1 of the AWP, is punitive in nature. I agree. The AWP, the way it is presently structured, automatically denies employees who enter Stage 1 the opportunity to work overtime, unless so ordered by the Employer. I appreciate that at this workplace overtime is voluntary, but in my view automatically denying an individual the opportunity to volunteer for overtime as a blanket response to a non-culpable issue, is punitive in nature and will have obvious financial implications to those in the AWP.

Both parties to this dispute referred me to *Health Employers' Association* decision, *supra*, in considering the issue of whether the overtime ban is reasonable. In *Health Employers' Association, supra*, the B.C.L.R.B. considered the validity of an attendance management plan and made clear that although an employer is not entitled to penalize employees for non-culpable absenteeism, it is able to take corrective action. In that case, the B.C.L.R.B. states at para 65:

...The first basic principle relating to dismissal for non-culpable cause is that an employer is not entitled to punish employees whose absence is due to circumstances beyond their control or who are innocent of fault: *Massey-Ferguson Ltd.* (1969), 20 L.A.Ca. 370 (P.C. Weiler); *Outboard Marine Corp.* (1970) 22 L.A.C. 108 (Simmons); *Alberta Wheat Pool*, July 25, 1979 (unreported), (Black). It is obviously unjust and unreasonable to do so. Punishment would serve no useful purpose. That does not mean that an employer is not entitled to take corrective action of a non-punitive character, such as counseling, referral to an employee assistance program, further training, a transfer to work that the

employee will be able to perform satisfactorily, or in the case of alcohol and drug dependency, making continued employment conditional on attendance at a treatment centre.

(emphasis added)

I cannot find that the automatic response to deny overtime to any and all employees at Stage 1 of the AWP to be anything but punishment for the fact that they were absent from work for non-culpable reasons. I cannot and do not view this response as a corrective measure in the nature of the responses discussed above in *Health Employers' Association*. I further agree with the Unions that the fact the Employer reserves the right to force employees to work overtime, even when an employee is subject to an overtime ban under the AWP, suggests that the ban is punitive rather than corrective in nature.

Whether the reduction of overtime may be an acceptable, corrective response in some circumstances would be a very individual analysis. I can understand a situation where an employee meets with his/her Supervisor and Union Representative at Stage I of the AWP and it is communicated that the employee's overtime shifts may have contributed to that employee missing regularly scheduled shifts would be a relevant consideration. In that case, curbing the overtime available may be a response that is reasonable and corrective in nature. Where there is no correlation between overtime and missing regularly scheduled shifts, I cannot see how denying overtime opportunities could serve to correct the employee's absenteeism, which by its very nature is non-culpable.

2. FTE Reduction

After reviewing the submissions of the parties and reviewing the case law, I am persuaded that, in some instances, an employer may be permitted to reduce employees' hours or convert an employee to part-time status as a corrective attempt at curbing excessive absenteeism and keeping an employee

employed. What I cannot accept is that an FTE Reduction would be an automatic response that occurs to each employee at Stage 3 of the AWP, as suggested by the AWP literature. If the FTE reduction in hours is indeed automatic, it is my opinion that it would necessarily lead to the conclusion that it is levied as punishment because of an employee's poor attendance record rather than applied, after thoughtful consideration, as a measure intended to correct absenteeism and hopefully avoid a non-culpable termination.

The step of reducing an employee's hours would be a step that I suggest should not be taken lightly or automatically as a progressive stage in an attendance management plan. To do so automatically would, in my opinion, be punitive and could not be justified. I am troubled by the AWP literature as it currently reads as it suggests that the reduction of hours is automatic, although the testimony of Ms. Harvey suggested otherwise. The analysis as to whether the employee's non culpable absenteeism could be positively impacted by a reduction in hours would have to be supported by the evidence on an individual basis. Again, I find that a correlation between an individual's circumstances and the reduction of hours, as was presented in *Ottawa Hospital v. Canadian Union of Public Employees (Myre Grievance)*, [2011] O.L.A.A. No. 132, would be necessary to justify the FTE reduction response at Stage 3 of the AWP in a non-culpable absenteeism situation.

3. Termination for Non-Culpable Absenteeism

Finally, I return back to the proposition that it is well established that an Employer can implement an attendance management and/or wellness program at the workplace. It is further well established that an Employer can take non-punitive action to address non-culpable absenteeism and that, where warranted, an employer may terminate the employment relationship where the employer has been denied the benefit of the employment bargain. However, to determine whether the situation so warrants, an employer must demonstrate that (i) the employee has a record of excessive absenteeism; and (ii) the

employee is unlikely to improve in the future. The Unions raise the concern that the policy suggests that such action could be taken if an employee remains above the Employer's average sick leave average as well as their Collective Agreement average without due consideration of the employee's prior record and an employee's likelihood of improvement. The Unions also argue that the measurement used by the Employer in assessing the average number is unclear and inconsistent in the Employer's communications of the AWP.

In its submissions, the Employer agrees that it cannot terminate an employee's employment without meeting the arbitral and human rights principles and asserts that in the four years that the AWP has been in existence, no employee has been terminated for non-culpable absenteeism. The Employer further submits that it is clear that employees are not automatically terminated simply for remaining above the average level of paid sick leave as that would have resulted in one or more non-culpable terminations at the workplace since 2008. It is implied, then, that the Employer considers the average rate of absenteeism as one of a number of factors, and not the sole factor, used in determining whether employees are dismissed for non-culpable reasons.

The Unions and the Employer agree that the policy must meet the arbitral and human rights principles, and the Employer submits that those principles have been adhered to since the policy was developed and disseminated. What is not clear, from the policy as currently written, is that an individual assessment, based on those arbitral and human rights principles, is engaged at the Non-Culpable Dismissal Stage of the AWP. In fact, the AWP as currently written leads one to believe that the process is automatic and that if the paid sick leave time of an employee is above average over the course of the AWP process, the result is Non-Culpable Dismissal. Although I understand that is not the Employer's position, nor has it been the result, the AWP literature leads one to conclude that this is the case.

ORDER

I find that the AWP is flawed with respect to the automatic implementation of overtime bans at Stage 1 and the automatic reduction of FTE at Stage 3. I find both these aspects of the AWP to be unreasonable and punitive in nature.

I further find that the criteria cited in the AWP literature for determining whether an employee should be terminated for excessive absenteeism is inconsistent with the arbitral jurisprudence as well as the principles of the *Labour Relations Code*. Specifically, an employer may terminate an employee for non-culpable absenteeism, however, when doing so, the employer must engage in an individual assessment of the facts and ultimately demonstrate that (i) the past record shows the absenteeism has been excessive; and (ii) that the employee is not capable of regular and consistent attendance in the future. The AWP is currently worded to lead employees to believe that the only consideration is the employee's attendance rate over the prior 24 months, which does not reflect the arbitral or human rights jurisprudence or the Employer's practice.

Further, I am of the view that in reviewing the AWP literature in the context of this award, the Employer may want to take the opportunity to verify that its communications respecting the relevant factors for determining entry, progression and ultimately dismissal for non-culpable reasons pursuant to the AWP are clearly and consistently communicated.

Therefore, I order that:

1. The AWP be reviewed and revised to eliminate the punitive aspects of the current plan – specifically the automatic imposition of an overtime ban and automatic reduction of FTE hours at set Stages in the AWP;

2. Effective the date of this award, those employees who were automatically subjected to an automatic overtime ban or automatic reduction in hours should have those bans lifted and FTE hours reinstated;
3. The AWP literature be reviewed and revised to address the concerns noted above and to clarify the circumstances for which employees may be terminated for non-culpable absenteeism, keeping in mind the arbitral and human rights principles.

Given the length of time that the AWP has been policy and the number of employees that may have been impacted dating back to 2008, I am not prepared to retroactively order that all employees who have been improperly subjected to the terms of the policy be somehow compensated. I am prepared, however, to order that those who are currently subjected to the automatic overtime bans and reduction of hours be immediately relieved of those conditions. I will remain seized with respect to the implementation of the remedies ordered.

Dated at the City of Vancouver in the Province of British Columbia this 18th day of January, 2013.



Vincent L. Ready