EMOND HARNDEN
LABOUR & EMPLOYMENT LAW
DROIT DU TRAVAIL ET DE L'EMPLOI

Federal Court of Appeal rules attendance management policy not discriminatory – no adverse effect on employees

December 21, 2017

Attendance management policies (AMPs), and in particular what types of absences are included for the purposes of AMPs, are often the subject of contention between unions and employers. A recent decision of the Federal Court of Appeal held that absences due to disability and family status could be included in the calculations under an AMP provided that there was no adverse effect on the employees.

In *Attorney General of Canada v. Randi Bodnar et. al.* (2017), the Federal Court of Appeal was asked to judicially review a decision of the Public Service Labour Relations and Employment Board (PSLREB). The PSLREB decision involved grievances brought by the Public Service Alliance of Canada on behalf of employees of Correctional Service Canada. In the grievances, the union alleged that the employer's AMP breached the non-discrimination provision of the collective agreement by including in its calculations absences due to disability, and absences for which family-related leave was available under the collective agreement. In terms of the latter category of absences, the collective agreement provisions relating to family-related leave went beyond what would be available for family status responsibilities under the provisions of the *Canadian Human Rights Act* (CHRA).

These two types of absences were used in the employer's AMP in two ways. First, they were used to calculate the group average threshold. Second, they were used to calculate an individual employee's absenteeism level. Once an employee's absenteeism exceeded the group average, the AMP required the employee's supervisor to inquire into the legitimacy of the absences and to identify if accommodation was required. If there were questions around the legitimacy of the absences, the employee could be required to attend a meeting with the AMP coordinator. Employees were entitled to have a union representative present when attending the meeting. Following the meeting, the AMP coordinator could take a number of actions. These included determining that no further action was necessary, requiring medical certificates, documenting an employee's file, or imposing discipline in the case of culpable absences. The AMP was however clear that if absences were caused by situations requiring accommodation, no further action would be taken.

Nevertheless the PSLREB held that the group average thresholds and the calculation of individual employee absences constituted a *prima facie* case of discrimination. In terms of absences due to family-related leave, the PSLREB did not distinguish between absences related to family status under the CHRA, and the more generous family-related absences available under the collective agreement. In terms of absences related to disability, the PSLREB again held that the AMP was discriminatory,

notwithstanding the fact that the AMP stated that no action could be taken in respect of disability-related absences. The PSLREB went on to hold that the employer had not established a *bona fide* operational requirement defence and allowed the grievances.

The Federal Court of Appeal disagreed. It stated that the PSLREB ignored an essential pre-requisite for a *prima facie* case of discrimination – "proof of adverse impact by a claimant". It noted that the PSLREB erroneously found that the mere inclusion of absences due to disability and family-related leave in calculations under the AMP was *prima facie* discriminatory notwithstanding that nothing adverse flowed from their inclusion.

In terms of calculating the group average, the Federal Court of Appeal stated that "this is merely the number to which individual employees' statistics were compared." The appellate court further noted that this method of calculation was sanctioned in other cases where the particular AMP was clear that the employer would accommodate to the point of undue hardship.

The Federal Court of Appeal made a similar finding with respect to the inclusion of such absences in the calculation of an individual employee's absenteeism. All that would immediately flow from this calculation was that if the average threshold was exceeded, the supervisor would make inquiries into the legitimacy of the absences and determine whether accommodation was required. If accommodation was required, the employee was removed from the AMP. The Federal Court of Appeal also noted that the "mere identification of employees who exceed a group average threshold and initial discussions with them have been found to be permissible in other cases."

Finally, the Federal Court of Appeal noted that the collective agreement provisions providing family-related leaves were broader than what would be available under the CHRA. In the appellate court's view, the PSLREB made an error when it conflated the two. The proper approach was to consider only family status absences available under the CHRA in determining whether discrimination occurred.

The Federal Court of Appeal proceeded to allow the employer's application for judicial review and remitted the grievances to a newly-constituted panel of the PSLREB for re-determination in accordance with its reasons.

In our view

This decision is positive for employers that have implemented AMPs. Organizations should ensure that adverse consequences do not flow from the inclusion in AMPs of absences that are subject to accommodation under the applicable human rights legislation.

For further information please contact Jennifer Birrell at 613-940-2740 or André Champagne at 613-940-2735 or Raquel Chisholm at 613-940-2755.