



Innocent Absenteeism

How to Handle Employee Absence
Due to Illness or Disability



When you own or manage a business, your focus is always shifting between the big picture and the day-to-day details. In this constant back and forth, invariably, some things get missed. Unfortunately, some of those missing pieces don't get noticed until it's too late.

In our experience, compliance with employment laws is one of the pieces that can sometimes fall through the cracks. That's where we come in: We advise employers on the big and the small of employment law, identifying and solving problems so you don't have to. We also like to empower our clients, sharing our knowledge so that you can deal proactively with potential employee-related problems.

In the paper that follows, we cover a few of the foundational, "need to know" employment law concepts on how to handle employee absence due to illness or disability. We hope it will be of some assistance to you in structuring your workplace policies and procedures.

Sincerely,

A handwritten signature in blue ink that reads 'S. Kent'. The signature is stylized and fluid, with a long horizontal stroke extending from the end of the name.

Simon Kent

Owner

Kent Employment Law

Innocent Absenteeism: How to Handle Employee Absence Due to Illness or Disability

At one time or another, all employers have had to deal with employee absenteeism. A certain amount of employee absence is to be expected: reasonable business owners understand that we are all human and, inevitably, there will be events in our personal lives requiring that we miss work now and then. However, absenteeism that becomes *chronic* can test the management skills of even the most experienced employers. Whether an employee is frequently late or absent, or is on a prolonged leave from work, employers will have to deal with issues regarding staffing, workload, and production.

Managing employee absence due to illness or disability raises a myriad of business, human resources, and legal challenges.

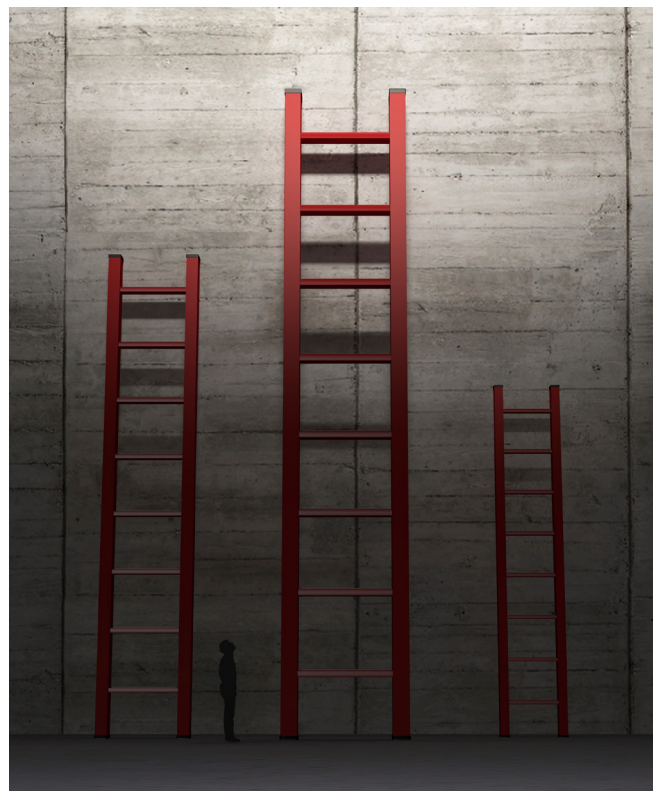
Sometimes the chronic absenteeism is “culpable”, meaning that the employee is responsible for the absences and has no reasonable excuse for them – for example, the employee routinely sleeps in or misses her bus to work. In these cases, the employer’s options are relatively straightforward: warn, discipline, and/or dismiss.

But what about when the absenteeism is “innocent”, or justifiable, such as when the employee is away for health reasons? The issues business owners face in these situations can be much more complicated. Managing employee absence due to illness or disability raises a myriad of business, human resources, and legal challenges. Employers can often feel paralyzed as they try to achieve their simultaneous, but sometimes

conflicting, goals of employee wellness and retention and commercial success.

We frequently advise business owners about their legal rights and obligations when an employee goes on sick leave. Common employer questions include:

- How much, and what type, of medical information should I request from the employee?
- Can I dismiss the employee while she is off on disability?
- What if the employee and I do not agree about the severity of his illness?



Not surprisingly, the answers to these questions are not always straightforward. However, there are a number of well-established principles regarding employee absenteeism due to illness or disability that all employers can, and should, become familiar with. We walk you through some of these key concepts below and, in the process, answer the above questions (and a few others).

Employer Requests for Medical Information

It is not only reasonable but prudent for employers to request that an absent employee provide details regarding her illness or disability. Employers can and should ask for all relevant information regarding the employee including her:

- prognosis for recovery
- estimated return to work date
- ability to perform job duties
- capabilities to perform alternate work
- requirements for accommodations at the workplace

To facilitate the disclosure process, we typically encourage our clients to provide the employee with a letter he can give to his physician, along with a medical certificate for the physician to complete regarding the employee. In many cases, we will assist the employer in making its request. This can help reduce any potential stress to both the employer and the employee in gathering the information, as well as ensure that there is no confusion about what the employer is seeking.

Once the request is made, a number of related issues can arise: Can an employee (or his physician) decline to provide certain information? What if the information ultimately provided to the employer is insufficient – can you dismiss the employee on that basis? What if the information is sufficient, but you still want to dismiss the absent employee?

Deciding whether to dismiss a disabled or ill employee can be difficult, and we consider in the next section of this article some of the primary considerations for employers contemplating termination.

As for whether an employee can refuse an employer's request, there may be cases where an employee claims that certain requested information is "private". However, an employer is entitled to adequate and sufficient medical information from the employee provided its request does not go beyond what the employer is entitled to seek from the employee.

Is Dismissal an Option?

Human Rights and the Duty to Accommodate

Where an employee is on an extended sick leave from work, employers will often wonder about their ability to terminate the employment contract. The first concern for employers considering dismissal in these circumstances is the possibility that such a dismissal will violate human rights. Section 13 of the BC *Human Rights Code* prohibits an employer from dismissing or discriminating against an employee on the basis of mental or physical disabilities.

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The practical effect of section 13 is to impose a *duty to accommodate* on the employer, meaning that employers are generally required to allow lengthy absences from work as a form of accommodation. The exception to this occurs where the employer can show that the dismissal or discrimination is based on a bona fide occupational requirement, which will include demonstrating that it is impossible to accommodate the employee without imposing "undue hardship" on

the employer.

So at what point can an employer argue that a prolonged absence constitutes “undue hardship”? In its 2008 decision in *Hydro-Québec v. SCPF-FTQ*, the Supreme Court of Canada provided employers with some clarity when it concluded:

Thus, the test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test.

Once undue hardship exists and the employer has satisfied its human rights obligations, the next step is to consider the possible financial implications of dismissal.



Wrongful Dismissal and Employer Liability

Generally speaking, if you dismiss an ill or disabled employee for any reason that does not rise to the level of “just cause”, you will be liable to pay the employee a certain amount of severance in lieu of notice, just as you would if the employee had been working when the termination occurred. It is important to note that just because your employee is absent due to illness or

disability, this does not give you just cause under the law to dismiss him.

The employee’s severance entitlement will depend on a number of factors including the terms of any written employment contract with the employee, the nature and length of employment, and the employee’s age and future job prospects, to name a few. The extent of your liability will also depend on whether the employee is receiving benefits under a disability plan. There will also be questions about whether other statutory disability benefits (e.g. WCB, EI) should be deducted from any amounts you pay the dismissed employee in severance. Finally, in some cases, courts have awarded increased damages to an employee who was fired while absent from work on disability. For all of these reasons, we strongly recommend that employers seek legal advice from an employment law lawyer before dismissing an ill or disabled employee.

Frustration

There will be some instances where an employer is able to terminate the employment relationship without incurring any severance liability to the absent employee. This occurs where the employment contract has become “frustrated”.

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Frustration refers to situations where unexpected events occur making it impossible to perform the contract, in which case both parties are excused from further performance of their contractual obligations.

According to the Supreme Court of Canada, an illness or disability which permanently incapacitates an employee from performing his or her duties under an employment contract has the effect of frustrating the contract and bringing it to an end.

What about where the illness or disability is not “permanent”, but temporary and prolonged? At what point can an employer claim that the employment contract has been frustrated? Unfortunately, there is no simple formula for employers to follow in these cases. However, the courts in British Columbia have endorsed a number of factors that will help business owners (and their legal counsel) determine whether an employment contract has been frustrated as a result of the employee’s illness or disability:

- The terms of the employment contract, including the provisions as to sickness pay;
- How long the employment was likely to last in the absence of sickness;
- The nature of the employment;
- The nature of the illness or injury, how long it has already continued, and the prospects of recovery; and
- The period of past employment.

What is clear from the above list of factors, and from the court’s application of them, is that an illness need not be permanent in the sense of lifelong in order for frustration to occur; frustration may still arise where a temporary illness is of a significant duration. Your employment lawyer can advise you as to whether a court is likely to view your particular circumstances as amounting to frustration.

In some cases, the tests for undue hardship and frustration will dovetail. This occurred in a recent BC Human Rights Tribunal decision, where the tribunal found that the employment contract had been frustrated and stated that the employer’s duty to accommodate may end when the employee is no longer

able to fulfill the basic obligations of the employment relationship for the foreseeable future.

Employee-Employer Difference of Opinion

The above discussion presupposes that there is no debate between the employer and the employee regarding the severity of the employee’s illness or disability and describes a scenario where the employer wishes to do, and does, everything possible to accommodate the employee’s illness or disability.

There will be some cases, however, where the employer suspects that the employee’s health issues are not as significant as the employee claims.

There will be some cases, however, where the employer suspects that the employee’s health issues are not as significant as the employee claims. What can an employer do in these situations? One option is to require the employee to attend an independent medical examination or IME with a medical professional chosen by the employer. The employer will pay the costs associated with the IME and the physician will prepare a report that is shared with both the employer and employee. Once the employer has an opportunity to review the report and consider the doctor’s recommendations, it can make a decision about how to proceed.

Conclusion

Keeping track of and managing all aspects of long-term innocent absenteeism can be overwhelming for employers. For this reason, we recommend that employers develop and implement standardized policies and practices to deal with issues such as absenteeism,

requests for information, and accommodation. Having a formal procedure in place to respond to absenteeism due to illness and disability will help reduce the inevitable stress experienced in such situations by providing a welcome degree of certainty to employers and employees alike.



About Kent Employment Law

Kent Employment Law is a Vancouver-based full-service employment law firm advising on all employment-related legal matters, including discrimination and human rights issues. The firm's exclusive employment law focus and proven track record of results has enabled it to develop a sterling reputation and to forge influential relationships throughout the legal community. We serve a variety of British Columbia businesses and regional branches of national companies, and are ideally suited to advise small and medium-sized business clients who benefit from the flexible, personalized approach we take to each particular client situation. We invite you to learn more about us by visiting our website at www.kentemploymentlaw.com or by calling us today at (604) 266-7006.



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