Members Quarterly Winter 2016 Edition

Feature

Rethinking Attendance Management

How the language of absenteeism shapes thought

George Raine

A client recently asked an attendance question. A difficult employee had asked for a day off. When told she couldn't be spared, the employee said "I'll just take a sick day then." Her manager said that she couldn't use a sick day unless she was sick. That would be abuse of sick leave. So the employee said, "Fine. I won't be in but don't pay me. No one's abusing sick leave now so you can't touch me."

Linguists speak of linguistic relativity – the idea (and it is a debatable point) that language shapes thought. In the business of managing attendance, the language of "sick days" twists the way we think.

The language we use to discuss absenteeism generally describes how we'll pay people for not working. Here are some examples: she took a day of sick leave; he is off on Long Term Disability; he wants a day off-is it vacation or short term disability?

Using such "pay" language colours the way we think about attendance. Your benefit plan is insurance, not blanket entitlement. "Pay" language clouds our logic. So let's rethink attendance by going back to basics

The four questions

Instead of asking just one question (How many sick days do they have?"), we should be asking the following four questions when someone is off.

Did they notify us properly?

By what right are they not at work?

Should I believe what they tell me?

Do I have to pay them?

Did they notify us properly?

Employers can make rules. Even in a unionized workplace, the employer can make any rule it needs to, provided that:

1. It is not inconsistent with law or an express term of the collective agreement; and
2. It is reasonable, meaning that is not arbitrary, discriminatory or made in bad faith.

We need to define proper notification of absence and make a rule insisting on it. Failure to notify properly can be dealt with progressively as an attendance-related violation, the same as missing work.

A good notice rule is your second line of defence. Good people won't mind following it, but your "lesser lights" will mess it up.

Members Quarterly Winter 2016 Edition

Feature

One example was the case of Stelco Inc. (Stelwire -- Parkdale Works) and USWA Local 5328, 9 L.A.C. (4th) 129 – a termination case I defended at arbitration back in 1990. The grievor claimed his termination for absenteeism was a violation of the Ontario Human Rights Code because he claimed that his absences were all due to his drug addiction.

A strong notice rule made winning the case easy. The grievor could not prove that he was disabled from picking up the phone to call in sick. Therefore the Code was irrelevant.

In upholding the dismissal, Arbitrator Gail Brent said:

If he was medically incapable of notifying the company of absences, then he cannot be blamed for his failure. However, his evidence did not suggest such a state, and there was no medical evidence to the effect that he was so incapacitated during all of the times in question. The onus is on the grievor to establish such an incapacity if he is relying on it as a reason for his inability to meet his [notice] obligation...

By what right are they not at work?

The basic employment bargain is simple- you pay and the employee works. But if working requires showing up AT work, then the duty to show up is part of the deal.

We can imply some limitations on the duty to show up. The case law on this subject says that employees have a duty to report to work unless there is a need to be absent that is significant enough that to a reasonable person, it outweighs the duty to report.

Okay, we'd prefer a laundry list of good reasons to be off, but that's as close as we can get. Ask yourself this question: would a reasonable person, one who took both job and family seriously, feel it necessary to stay home under these circumstances? You have to judge this and judge it reasonably.

Statutory rights may pre-empt judgement. Governments love to pass "leave" laws that grant days off for specified reasons. The "emergency leave" provisions of Ontario's Employment Standards Act are an example.

Such statutes limit management's ability to judge whether an absence is really needed, but only when the statute applies.

For example, an Ontario employee could claim a statutory right to an "E day" to skip work for a child's school play. You can't argue that it's unnecessary. It's a right. But once the employee has used up their "E days," your right to use reasonable judgement is back in play.

When is "sick" too sick to work?

Simply being sick shouldn't automatically justify an absence. Most people can argue that they have some degree of sickness any day of the year. Instead, illness should justify an absence where there is a medical need to be absent from all available work. A medical need to be absent exists where:

The employee is truly disabled from the work [e.g. flu accompanied by nausea]; or

Complete absence is needed to permit recovery [e.g. bed rest is prescribed]; or

The employee has a serious contagious or infectious condition [e.g. measles].

Members Quarterly Winter 2016 Edition

Feature

Note the reference to "all available work." Ask yourself this question: If I have the right to assign an employee to alternate duties, and the employee has no medical restriction that prevents him from doing that work, by what right is he not at work?

Employees can't opt out of work they can do just because it's not what they usually do.

We will examine the other questions in the next issue of IPM Associations Newsletter. This should already give you some reasons to rethink attendance in your organization.

George Raine is President of Montana Consulting Group, a firm that specializes in labour relations, investigations and management development. He can be reached via email at raineg@montanahr.com