

## Member's Quarterly

## Spring 2025 Edition

### Feature

# Reducing Vacation for Absentee Employees

*Keep accurate records to avoid unnecessary payouts*

**I**n Alberta, all employees are, at a minimum, entitled to vacation time and vacation pay calculated using formulas based on the employee's length of service. However, for some employees who are constantly absent from work, is it fair that they receive the same amount of vacation time and vacation pay as their colleagues with perfect attendance?

Section 44 of the Alberta *Employment Standards Code* is a mechanism for employers to balance the scales. Section 44 says, "When an employee is absent from work, an employer may reduce the employee's vacation and vacation pay in proportion to the number of days the employee was or would normally have been scheduled to work, but did not."

However, this provision is targeted at absences and not where the parties agreed to different types of work arrangements. One early arbitration decision, *Greater St. Albert Catholic Regional Division No. 29 v. C.E.P., Local 72-A*, 1998 CarswellAlta 1568, was about employees who only work 10 months per year versus 12 months. The union argued that the 10-month employees were not employees normally scheduled to work for 12 months and then chose not to work for 2 of those months. The arbitrator stated that, "I agree with the union that although article 44 speaks to prorating vacation or vacation pay based on an employee's absence from work, the clause only deals with circumstances where the employee was or would normally be scheduled to work, but did not."

In another early arbitration decision, *Federated Co-operatives Ltd. v. Miscellaneous Employees Teamsters, Local 987*, 2004 CarswellAlta 1139, the arbitrator implies that employees who are on statutory leaves may potentially be subject to such proration, by stating, "The Code's parental leave provisions addressing return to work, section 53(7), does not protect vacation accrual during the leave". Although there may be an argument based on this decision that an employee on leave would "normally" be scheduled to work but for their statutory leave, it may be risky to take such an interpretation, because an employer would not be permitted to schedule an employee who is on statutory leave. There does not appear to be any clear guidance from Employment Standards or decisions that confirm whether employees on statutory leaves can have their vacation entitlements reduced in this manner. Considering the *Employment Standards Code* is a remedial legislation, it would unlikely be interpreted in a way that is detrimental to the employee.

In more recent decisions, they demonstrate the importance of the employer showing that the employee was normally scheduled. In the employment standards appeal decision, *Harcourt Personnel Inc. v. Nicholls*, 2011 CarswellAlta 2407, the umpire stated, "my reading of section 44 of the Code does not assist the employer. The words used in that section are 'the number of days the employee was or would normally have been scheduled to work, but did not'. There was no schedule to work and no fixed number of work days or number of days of vacation in this relationship... and also no number of days the employee was or would normally have been scheduled to work".



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It would seem, perhaps, that this provision may be best used to claw back overpayment of vacation pay. In the employment standards appeal decision, *McMillan-McGee Corp. v. Borth*, 2008 CanLII 54689, the employee was not employed long enough to be entitled to time off, but he already took three weeks off with pay. The umpire found that section 44 of the Code allowed an employer to reduce an overpayment of salary or earnings from the earnings otherwise due on termination of employment.

#### Key Employer Takeaways:

Although section 44 of the Employment Standards Code offers a mechanism to prorate an employee's vacation entitlement if they were or would normally have been scheduled to work, but did not, this is likely only applicable to employees who were absent without authorization and is

likely without practical value. Because if the employee is absent without authorization, they are unlikely to be paid for their absence. Since vacation pay is calculated as a percentage of wages, if the employee was not paid, they would not receive any corresponding vacation pay in any event, so their vacation pay would effectively be prorated, unless this provision is to be interpreted to reduce additional vacation pay from the employee as a form of discipline, which appears unlikely.

Separate from vacation pay, section 44 may also be useful in prorating vacation time, but this is likely to have limited value for the employer dealing with an employee who only has 2 to 3 weeks of vacation time per year, unless the employee is absent for a long period of time.

The scenario where section 44 is likely the most useful, as discussed in the *McMillan-McGee Corp.* decision, is where vacation pay was already paid in advance, but the employee never ended up earning it. However, since November 1, 2020, employers are now able to deduct a recovery of vacation pay paid to the employee in advance of the employee being entitled to it from their earnings without the need of the employee's consent, which effectively renders section 44 of no real use, other than being read in conjunction with section 12(1)(a.2) to establish that the employee did not earn the vacation pay in question, because they were absent.

Nonetheless, this is a reminder to employers to keep accurate records of an employee's work schedule, their absences, vacation time used and vacation pay paid. Otherwise, it will be difficult to establish any vacation pay overpayment and corresponding deduction.

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