

IN THE MATTER OF AN ARBITRATION
(Under the *Canada Labour Code*)

BETWEEN:

BELL CANADA

("Bell")

-AND-

UNIFOR, LOCAL 6007

("Union")

AND IN THE MATTER OF an arbitration of Union Policy Grievance #200149 regarding the Bell Canada Attendance Management Program and "Administrative Letters", under the collective agreement between the parties.

BEFORE: G. T. SURDYKOWSKI – Sole Arbitrator

APPEARANCES:

For Bell: Janine Liberatore, Counsel (on June 20, 2018); Nadine Zacks, Counsel (on all other dates); Julia Sydorenko, Articling Student (on June 20, 2018); James Davis, Articling Student (on all other dates); Howard Anderson, Senior Consultant, Labour Relations; Tomassina Eremita, Senior Consultant, Human Resources; Aurora Mazzulla Colette, Team Leader, Residential Loyalty (on June 20, 2018); Ronald Singh, Team Leader, Residential Loyalty

For the Union: Micheil Russell, Counsel; Sonny Malhotra, Local Union President; Fazal Vankalwala, Chief Steward; Randy Kitt, National Representative.

HEARING HELD IN TORONTO, ONTARIO ON JUNE 20, OCTOBER 15,
NOVEMBER 1 AND DECEMBER 3, 2018.

AWARD

I. WHAT THIS CASE IS ABOUT

1. As originally styled in the grievance the Union's focus was on the "Administrative Letters" concerning absences which have been issued by Bell as part of its Attendance Management Policy ("AMP"). The Union alleged that the Administrative Letters are being issued in a manner that is unfair, unreasonable, arbitrary and contrary to the collective agreement. At the hearing the Union modified this somewhat by adding that the entire AMP is discriminatory, as well as unfair, unreasonable, arbitrary and contrary to the collective agreement, and also contrary to what is referred to in labour relations shorthand as the *KVP* principles (established by the *KVP Co. Ltd. v. Lumber & Sawmill Workers' Union, Local 2537*, (1965) 16 L.A.C. 73 (Robinson) decision). In his opening statement, Mr. Russell cited Articles 1 (Employment Equity – specifically Article 1.02 (Discrimination), 9 (Sickness Absence), 12 (Discipline), 27 (Management Rights), Part III of the *Canada Labour Code*, and the *Canadian Human Rights Act* in support of the Union's allegations.

2. The Union submits that Bell's AMP or use of the Administrative Letters in issue must be struck down and seeks appropriate Declarations and Orders in that respect.

3. Bell denies that there is anything in its AMP or about its use of the Administrative Letters that is contrary to the collective agreement, legislation, or unreasonable, arbitrary or discriminatory or otherwise contrary to labour relations principles. Bell submits that its approach to attendance management is reasonable and necessary for legitimate workplace management purposes, and to offer employees appropriate health and safety support in a timely way.

4. Although the grievance itself is undated the May 9, 2017 Step 2 grievance meeting response in evidence (Exhibit #2, T2) establishes that it was filed before then. Some of the evidence presented post-dates the grievance. Because policy grievances like this do not focus on a particular decision that the Union takes issue with, post-grievance evidence is more readily admissible than it is in, for example, a discipline case. Such evidence is in any event admissible to the extent that it sheds light on and assists in the determination of the real dispute between the parties (*Cie minière Québec Cartier v. Quebec (Grievances arbitrator)*, [1995] 2 SCR 1095, 1995 CanLII 113 (SCC)).

II. ATTENDANCE MANAGEMENT PROGRAM (“AMP”) PRINCIPLES

5. As a practical matter, it is impossible to completely eliminate workplace absenteeism. The fact is that human beings occasionally suffer illness or injury sufficient to prevent them from attending work. The goal of an appropriately structured AMP is to monitor and manage attendance with a view to reducing workplace absenteeism.

6. There is nothing inherently threatening, intimidating or coercive about a properly structured and administered AMP. The employment relationship, whether governed by a collective agreement or not, is fundamentally an exchange of work by employees in return for compensation from the employer. Regular attendance at work as scheduled by employees is an essential element of every employment relationship. Having contracted with employees for their labour the employer is entitled to expect and rely on them to attend work as scheduled to perform the work they have been hired to do. Absenteeism tends to have a negative impact on workplace productivity (and cost to the employer) and morale (as other employees are called on to cover for absent employees). Accordingly, an employer has a legitimate interest in monitoring and managing workplace attendance and absenteeism. This often challenging problem is appropriately addressed in the form of an AMP.

7. Some employers seek the Union’s agreement to an AMP. Many do not. In the absence of a specific collective agreement requirement, an employer has the management right to unilaterally create an AMP. An employer is under no obligation to obtain the union’s agreement, or to seek the union’s input into an AMP. A unilateral AMP is not inherently contrary to human rights, health and safety, or other legislation. The employer is free to create an AMP unilaterally. However, an employer is not free to manage attendance in any manner it likes. An AMP cannot violate the collective agreement or legislation, and *KVP* principles as applicable for the purpose must be satisfied.

8. In addition to being consistent with the collective agreement and relevant legislation, *KVP* principles require that it be an AMP must be clear and brought to the attention of employees before it is applied. It must be clear, reasonable and administered reasonably and consistently. Although the consistent enforcement criterion may seem problematic because of the flexibility and discretion inherent in a properly structured and administered AMP, it applies in the sense that an AMP must include sufficient flexibility and discretion to permit it to be administered fairly with consistent due regard for individual circumstances, such that employees in substantially the same circumstances are treated in substantially the same manner. An AMP may be void and unenforceable to the extent that it violates legislation or the collective agreement, or is inconsistent with *KVP* principles.

9. Although AMPs are often couched in terms which state their objective as being to support and assist employees to regular attendance at work, this is generally subsidiary to the employer's true objective; namely, to reduce the cost and negative impact on productivity of workplace absenteeism. There is nothing necessarily wrong with that. Both are legitimate objectives, and so long as employee rights and legitimate interests are not undermined by the employer's motivation to reduce absenteeism it matters little which is given prominence in the wording.

10. There is no one acceptable form of AMP. But there are elements that are essential to an appropriate AMP, and things that are unacceptable. And when it comes to an AMP, words and actions both matter, but only actions matter more. An employer must "talk the AMP talk". Most modern employers are sufficiently sophisticated know how to do this. But as has often been observed, "talk is cheap". Without appropriate action words become meaningless. Words matter, but actions matter most. An employer must "walk the AMP walk".

11. There are things that an AMP should do. An AMP should provide employees with clear and unambiguous notice of the philosophy and objectives of the AMP. In order to satisfy *KVP* principles there are things that an AMP must do. Employees must be given fair notice of the components of the AMP and how it is intended to operate. An AMP must differentiate between the various kinds of absences. The most basic level of distinction is between non-culpable and culpable absences. There are also different kinds of non-culpable absences, some of which are not properly the subject of an AMP, and some which merit differential treatment based on the nature or reason for absence. For example:

- Absences authorized under the collective agreement or by statute (such as the Ontario *Employment Standards Act*, or the *Canada Labour Code* in federal jurisdiction) are not properly considered for AMP purposes at all.
- An AMP must distinguish between absences for non-medical or transient medical conditions (flu, cold, etc.), and WSIB, LTD, chronic medical condition, and other disability-related absences. The latter are properly included in an AMP, but the Program must recognize the special considerations that apply to each.
- As a general matter, multiple day absences should not be conflated with single day absences for AMP purposes.

12. A threshold for entry is fundamental to the proper structuring and essential to the proper administration of an AMP. The management right to establish an AMP necessarily includes the right to establish a reasonable absenteeism threshold which triggers its application. An appropriate threshold for entry operates as an objective standard against which employee absenteeism can be measured and satisfies the *KVP* test.

13. There is nothing wrong with cautioning employees that their employment may be terminated for culpable or non-culpable absenteeism, including the failure to achieve a reasonable degree of regular attendance because of illness or injury. Although every employee should know that s/he may be subject discipline up to and including discharge for culpable absenteeism, it is appropriate for an employer to warn employees that that is the case, either through an AMP, or preferably through a program of progressive discipline of which employees are given clear notice. Not only does such notice not constitute a threat or intimidation, it is consistent with the *KVP* criteria. Indeed, as a matter of general principle it is not only appropriate but necessary to give employees fair warning that their employment may be in jeopardy, together with the reason(s) why the employer considers that to be the case – if only to counter any George Costanza “I didn’t know that” defence.

14. Unauthorized non-culpable absenteeism is the primary target of an AMP which operates to both assist the employee to improve attendance and provide a progressive warning system to an employee that his/her employment may be in jeopardy if reasonably regular attendance cannot be achieved and maintained, even if the absenteeism is for disability-related reasons. It is quite appropriate for an AMP to caution employees that their employment may be subject to non-disciplinary termination for excessive non-culpable absenteeism. The basis for non-disciplinary termination is frustration of the employment relationship. As I noted in *York University* (paragraphs 34-35), it is well established (including by the Supreme Court of Canada in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 S.C.R. 161, 2007 SCC 4 (CanLII)), and *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, [2008] 2 SCR 561, 2008 SCC 43 (CanLII)) that an employer may terminate employment when there is no reasonable prospect that the employee will be able to attend work and perform the essential duties and responsibilities of an available job with reasonable regularity in the foreseeable future even with accommodation to the point of undue hardship. The Supreme Court of Canada has confirmed that the duty to accommodate does not require an employer to create a job or change working conditions in a fundamental way. An employer’s duty is limited to arranging the workplace or the employee’s duties and responsibilities to enable the

employee to do his or her work without causing itself undue hardship. The employer's duty to accommodate and obligation to continue employment end when it becomes apparent that it is unlikely that the employee will be able to fulfill the basic obligations associated with the employment relationship in the foreseeable future. Because this may not be commonly understood by employees, an AMP should contain an appropriate caution in this respect.

15. An AMP will fail the *KVP* test (and probably not be successful) if it is a mystery to employees. It is essential that the AMP be fully explained to employees, and that employees be able to easily access the AMP for information, including about where they stand in the AMP. Clarity of AMP purpose and operation is essential. An AMP must succinctly state its philosophy and objectives in clear and easily understandable language, and include a statement to the effect that its application is subject to the collective agreement and applicable legislation. An AMP in the collective agreement context must address the following key elements:

1. The AMP must define what is and what is not considered to be an "absence" or "absenteeism" for purposes of the Program. There are many types of absences. An employee may be absent from work on a scheduled vacation, on a statutory holiday, or on some other collective agreement or statutory authorized leave. An employee may be unable to report for work due to inclement weather. Or an employee may be absent from work as a result of a work-related and non-work-related illness or injury, or for personal reasons. An AMP should focus on absenteeism that is disruptive to the workplace. It should clearly delineate which absences will and which absences will not be subject to the AMP. Scheduled vacations, statutory holidays, and authorized leaves of absence are by definition not disruptive and cannot be treated as "absences" for AMP purposes. Absences due to suspensions imposed by the employer should not be included. But unscheduled absences, late arrivals and early departures are properly considered to be "absences" for AMP purposes because these tend to be disruptive to the workplace.

2. The AMP must define and distinguish between "culpable" and "non-culpable" ("innocent") absenteeism. It is essential that an AMP define and distinguish between culpable and non-culpable absenteeism. The difference between culpable and non-culpable absenteeism is significant and requires that they be treated differently. It is therefore important to classify absences and clearly describe how they will be dealt with.

- “Culpable” absenteeism is fault-based blameworthy absenteeism reasonably within an employee’s control for which the employee can be held responsible by means of a progressive disciplinary response.
- “Non-culpable” (or “innocent”) absenteeism is not fault-based or blameworthy. It is exactly what an appropriate AMP is intended to deal with. A disciplinary response is inappropriate. Non-culpable absenteeism justifies non-disciplinary progressive coaching and offers of assistance, and may engage the duty to accommodate. Reasonable expectations and appropriate progressive non-disciplinary steps must be established to encourage and assist employees to reasonably regular attendance at work. A process for dealing with accommodation issues must be established. It is essential that the AMP describe the steps that will or may be taken, and the assistance that is available to employees.
- Because employees are obliged to attend work as scheduled with reasonable regularity and the employer has statutory obligations with respect to absences due to both workplace and non-workplace-related disability, verification and classification of absences is essential. The employer is entitled to be reasonably informed about the reason(s) for an employee’s absences and any work restrictions or accommodation the employee requires in order to attend work and to do his/her job. It is appropriate for an AMP to clearly describe an employee’s obligations to provide medical or other documentation with respect to absences, including when and what information is required at each step of the Program. An employer’s right to an employee’s confidential medical information is limited and varies with the circumstances, and an employer is in any case obliged by law to protect the confidentiality of that information. The AMP should note that privacy, human rights, or other legislation may affect the employer’s right to both medical and non-medical information.

3. The AMP must inform employees about when medical documentation may be requested, why it may be requested, the nature of the medical documentation and information that may be requested, the manner in which the medical information will be treated, when an employee will be obliged to provide medical documentation (and the potential consequences if it is not provided) and when an employee is not obliged to do so even if requested (and the possible consequences).

- The primary purpose of our health care system is to preserve mental and physical well-being by medical and allied health professionals who work to prevent, treat, and manage illness and injury, not to support employer attendance management programs. It is generally recognized that it is not always medically necessary and perhaps contraindicated for an employee to seek medical attention for a transient minor illness or injury which renders him/her unable to attend work as scheduled for a day or even several days. Concomitantly, it is generally unnecessary and inappropriate to vex an employee who is better off recovering at home, and to distract and further burden our overloaded healthcare system with petty demands for medical notes for the purpose of papering an employer's files. In the absence of a specific strictly construed collective agreement requirement, it is impractical, unnecessary and inappropriate to require a rarely absent employee to provide a medical note to justify a short absence due to a minor illness or injury, particularly one readily apparent before the absence or when the employee returns to work. This is why it is now well established that the test of reasonable necessity limits an employer to the minimum medical information reasonably necessary to satisfy the employer for the purpose, whether it be to establish that the employee was in fact absent due to illness or injury in circumstances where the collective agreement clearly entitles the employer to such justification, or the employer has cause to suspect that the absence was not justified. (See, for example, *Canadian Bank Note Company, Limited v. International Union of Operating Engineers, Local 772*, 2012 CanLII 41234 (ON LA) at paragraphs 33-34, as cited in *Sunnybrook Health Sciences Centre*.) What is permissible for an employer to require of employees as a general matter (i.e. in an AMP) is more not less restrictive than what an employer may require of an individual employee in a particular case. This highlights the importance of including a significant element of individualized treatment in the construction and discretion in the administration of an AMP.
- Similarly, while assisting employees to better wellness for attendance management purposes is a legitimate objective there are limits of what an employer can require as opposed to offer employees for that purpose, either generally or in an individual case. As Arbitrator Knopf observed in *Sunnybrook Health Sciences Centre* (paragraph 40), there is nothing wrong with offering to assist employees to better wellness, but an employer cannot insist that an employer accept such assistance, however well-intentioned or well-advised such an offer is. As Arbitrator Knopf noted:

“... The key is that the employee must agree to such help. The case law is clear that an employer steps over the bounds of propriety and reasonableness

when it attempts to engage in the private relationship between an employee and his/her physician.”

And as Arbitrator Simms wrote in *Peace Country Health v. U.N.A.*, (2007) 898 C.L.A.S. 107 (paragraph 157):

“... the employer is overreaching its management rights when it seeks to impose a right to contribute to or participate on an employee’s health care decision making to help them get better. ... Accepting employment, even with income maintenance plans, does not entail an encroachment on one’s right to make one’s own medical decisions in privacy and without an employer’s help. Other reasons may justify compromising that privacy, but the employer’s desire to become “part of the employee’s health care team” does not.”

- It is not unreasonable for an employer to seek to provide medical services support and assistance to employees through an AMP with a view to reducing workplace absenteeism. However, even in accommodation situations there is a fine line between support and undue intrusion into the personal lives of employees, regardless of the motivation. As Arbitrator Etherington pointed out in *Middlesex-London Health Unit* (in paragraph 90):

“... There must be an appropriate balance between making support and counselling available to those employees who choose to make changes to attempt to improve their general health and wellness, while at the same time not allowing an employer to mandate a change in lifestyle as a condition of employment, with a disciplinary response for failure to comply. ...”

An employer may, even must, inquire whether an employee requires accommodation, but an employer’s duty to accommodate does not extend to forcing accommodation on an employee who does not want it (or who fails to cooperate in an employer’s efforts to accommodate).

- An AMP should include a caution that employment may be terminated for frustration of the employment relationship if an employee has been unable to attend work with reasonable regularity and there is no reasonable prospect that the employee will be able to do so in the foreseeable future even with available accommodation to the point of undue hardship – whether that is due to a compensable or a non-compensable disability.

4. The AMP must include an absence reporting system. An AMP should describe employee obligations to report an absence, including how absences must be reported, and provide for the regular review by the employer of employee

attendance records. An absence reporting and tracking system which distinguishes between different kinds of absences is essential to the operation of an appropriate AMP.

5. The AMP must have clear thresholds for entry into, progression through and exit from the AMP. The AMP should clearly describe how individual employee and comparator group absenteeism rates are determined and compared, including the comparison model which is being used (appropriate averaging is an acceptable comparison model) and set out a threshold for entry into and progression through a coaching process. It is essential that an AMP set an absenteeism “threshold” for entry into the Program, and for moving through each stage of the coaching process up to and including non-disciplinary termination. Such thresholds are typically based on a specified number of days or hours of non-culpable absences within a defined period of time. Once an employee meets the initial threshold and enters the AMP, there should be an escalating series of information and coaching sessions, triggered by progressive thresholds. An AMP must also provide for a way out of the Program, and specify the improvements necessary to regress through the steps and exit the program. It is important that the AMP detail each step of the Program. The coaching and assistance sessions should:

- Reiterate the impact of absenteeism on the business and potentially on the employee’s job opportunities.
- Review the employee’s attendance record and individual circumstances, the need for improvement and the fact that regular attendance is a performance expectation.
- Include an offer to work with the employee to identify the causes, solutions and resources available to the employee.
- Attempt to arrive at agreement on an attendance improvement plan, including targets and expectations.
- Explain the next step in the attendance management process and possible outcomes if attendance expectations are met and if they are not met.
- Advise the employee the last step, if all attempts to improve attendance have failed and there is no apparent possible solution, that his/her rate of absenteeism continues to be unacceptable and must improve within a specified period of time, failing which employment will be terminated.

Each meeting must be documented, and at minimum a written summary should be provided to the employee and the union (whether or not required by the collective agreement).

6. The AMP must preserve the application of discretion. An AMP must preserve the employer's ability to exercise discretion and deviate from a lock-step application of the AMP as reasonably required by the individual circumstances of each case – and to ensure that the employer fulfills its applicable statutory obligations (e.g. its duty to accommodate) as and when required. It is critical that the employer bear in mind its legal obligations under the applicable human rights, workers compensation and privacy legislation, and the collective agreement. An AMP which does not comply with legislation or the collective agreement will be void and unenforceable as a whole or in part to the extent that it does not do so.

III. THE BELL AMP

16. What exactly is the Bell AMP? Is it an appropriate AMP?

17. Bell does not have anything specifically labelled as an “Attendance Management Policy”. It does have a “Policy on Presence at Work” (the “PAW Policy”) which notes on the face of the document in evidence as Exhibit #2, T3 that it is a “Disability Management Board November 2006” document. This is available to all employees on the Bell intranet. However, as practical matter access is limited because employees can only access the PAW Policy while on a break during working hours in a Bell building. The PAW Policy reads in full as follows:

Policy on Presence at Work

Policy

1. Scope

This policy is intended for all Bell staff and must be adhered to by all personnel considered to be employees of Bell. The attendance of individuals working for the company as consultants, entrepreneurs or other is covered by applicable provisions in their work contract.

The current policy is not included in any existing or future collective agreements of Bell Canada and its subsidiaries and may be changed at any time. In addition, its strict application remains discretionary, depending on the circumstances.

2. Policy statement

The following guidelines apply to presence-at-work management:

The Company:

1. acknowledges the role each employee plays and the importance of each contribution within the company.
2. will take appropriate steps to enable its employees to maintain, at all times, the highest possible attendance level. Bell is committed to doing its utmost to maintain working relations with its employees.
3. favours direct methods of communication between employees and their immediate supervisors, regardless of the reason for the absence in question, and agrees that presence-at-work management is the responsibility of the employee manager and provides the employee with the necessary training tools.
4. will provide advice, assistance and support to its managers in terms of the presence-at-work management through the Disability Management Group (DMG), Human Resources, Industrial Relations and Health, Safety and Wellness groups and will namely insure coordination of activities related to employee health.
5. makes all administrative decisions regarding presence-at-work management in keeping with applicable laws, regulations, collective agreements and employment conditions, and according to the circumstances of each situation.
6. ensures, upon hiring, that the employees possess the required skills and qualifications to fulfill job-related obligations.

3. General Objectives

In order to promote effective presence-at-work management, Bell promotes a safe, healthy work environment that is conducive to attendance, taking into account the following objectives:

- **Prevention Plan**

The development of a **prevention plan** for the employees, to include:

- Tools and prevention programs for promoting health and wellness
- Training programs designed to help maintain existing skills and acquire new ones
- Accident prevention programs (APP) to help reduce occupational disease or injury and keep costs as low as possible

- **Continuous management of incidental absences**

Continuous management of incidental absences involves:

- Regularly verifying employee attendance and intervening quickly when an absenteeism profile is detected (repeated absences the day before or after a holiday, absence linked to authorized leave, seasonal absences, etc.) or repeated absenteeism pattern (high frequency)
- Sending out directives to be followed by the employees in the event of incidental absences
- Handling these situations effectively with the employees involved

- **Management of disability cases**

Effective **management of disability cases** by the Disability Management Group and Manulife, in collaboration with the employee's manager and other related stakeholders, aiming at:

- Ensuring fair and equitable application of rules governing compensation plans in the event of disease-related absences
- Reducing the occurrence and duration of absences
- Developing intervention strategies based on changing absence patterns within the company and comparable market studies

- **Work reinstatement (including reasonable accommodation)**

Work reinstatement to help employees absent due to disease safely resume their own job, or an appropriate job, as quickly as possible:

- Taking into consideration the employees' medical restrictions , specific demands of modified responsibilities, the opinion of the health professionals and any other factors that will ensure a successful return to work. This process may, under certain circumstances, call for a progressive return to work.
- Promoting reasonable accommodation, namely, a return to work with modified responsibilities which respects the employee's medical restrictions, both of a temporary and a permanent nature, in the event that such accommodation does not cause the business unit any undue hardship.

4. Acknowledging employee attendance

We recommend acknowledging attendance via simple non-monetary means.

5. Accountability

Even though initial responsibility for ensuring attendance falls to the employee, the employee's manager is responsible for presence-at-work management. Therefore, performance, in terms of presence at work, must be considered during the manager's regular job evaluations.

6. Guidelines and procedures

Guidelines and procedures outlining elements of presence-at-work management are presented in the Health, safety, wellness and presence at work section of the Bell Human Resources site.

(All emphasis supplied.)

18. The Union called 3 witnesses. Sonny Malhotra is a Direct Marketing Associate (“DMA”) in the Household Loyalty Team BU and the Local Union President. Fazal Vankalwala is a DMA in the Household Loyalty Team BU, and Union Chief Steward. And Shahood Haque, who described himself as a Customer Service Representative (which I take to be a DMA) in the Household Loyalty Team BU. They testified about their understanding and experiences with the Bell AMP.

19. Bell also called 3 witnesses. Tomassina Eremita has been with Bell for 26 years. She has been a Senior Human Resources Consultant since 2014. As such, Eremita provides advice and consultation concerning Human Resources policies and performance and absence management, including regarding day-to-day matters, to the Customer Operations BU, for which she has been the primary contact since 2015. Ronald Singh is a Team Leader, Residential Loyalty. As Team Leader, Singh is the immediate supervisor of bargaining unit employees. As such he is effectively a first line manager. He monitors and manages the performance and attendance of some 25-30 employees. Isabelle Roy is a Human Resources Consultant who provides Human Resources performance, absenteeism and discipline management support to Bell Loyalty Teams in Northern Ontario and Quebec. Bell’s witnesses testified about the structure, content and operation of Bell’s AMP; that is, the manner in which Bell approaches and deals with absenteeism.

20. In addition to the PAW Policy the following attendance management documents are in evidence:

- A Bell “STD & Incidental Guidelines Customer Operations HR Team” document revised February 2016 (Exhibit #3 and Exhibit #6, T1) in effect when the grievance was filed, which notes on the title page that it is “**Restricted/Confidential** – for HR use only. Not to be distributed, forwarded or printed” (bolding supplied), and on every page of substance that it is an “Absence Refresher (HRC) | February 2016 | CONFIDENTIAL (**NOT to be distributed or shared**)” (bolding supplied). This document presents 3 “Paths”:
 - (a) A “Not Medically Supported (DID NOT provide a doctor’s Note) DISCIPLINARY PATH” which suggests termination after a 3rd day of absence (even if in one “occurrence”) for an employee with less than 3 months’ net

credited service (“NCS”); and a written warning after a 3rd day of absence (even if in one “occurrence”) and continuing with a disciplinary path for subsequent absences within the same 6-month rolling period, for an employee with more than 3 months’ NCS;

(b) A “Medically Supported (Provided a Doctor’s Note) ADMINISTRATIVE PATH”, which for employee’s with less than 12 months’ NCS suggests that the Team Leader have an immediate discussion to advise the employee that a doctor’s note will also be required for the next absence, followed by a “Serious Discussion” for the next day of absence, a “Written Warning (will act as a FINAL warning)” day of absence #3, and that on day of absence #4 an “NOA” [Notification of Absence] is to be provided to the employee to trigger STD, and consultation with Human Resources is required. For an employee with more than 1 year of NCS no immediate action is suggested, but on day of absence #2 the Team Leader should advise the employee that a doctor’s note will be required for the next absence, and that a doctor’s note is required for day of absence #3. The document goes on to state that if a “medical” (i.e. doctor’s note) is provided no further action is required, but that the Team Leader is expected to have the “standard ‘attendance discussion’” and provides a 5-Step guideline if the Business Unit (“BU”) Team Leader wants to take action. The 5 Steps are:

- require doctor’s note as per day of absence #3, NOA provided to employee to trigger STD;
- “Serious Discussion & 1807(a medical assessment to be provided to the Disability Management Team) request (if applicable)”;
- 1st Administrative Letters; must consult with HR;
- 2nd Administrative Letters; must consult with Human Resources
- “Mandatory File Review meeting with HR & Legal”, 3rd Administrative Letters, termination of alternate next step.

There are also assistive “Important Notes” which specify that: “Even if an employee provides a medical note substantiating their absence, if the # of incidental absences is considered excessive, the BU can still pursue continuing with Admin Action”; and that “if the employee is already on some type of Administrative action for STD, continue with the steps when addressing administrative as a result of incidentals (DO NOT START OVER)”.

(c) A “Medically Supported (BC 1935 supported by Manulife) ADMINISTRATIVE PATH”, for 3 categories of employees based on NCS. This is substantially a STD path. For employees with less than 3 months’ NCS Step 1

- is already “considered excessive due to tenure”, and Step 2 is “Can be terminated immediately” but consultation with Human Resources is mandatory. For employees with more than 3 but less than 12 months’ NCS a 2 part Step 1 includes a request for justification for the absence with a doctor’s note that includes the nature of the employee’s condition and any limitations, and on day #4 of an absence prior to STD an NOA is to be provided to the employee to trigger STD. Step 2 is a “Serious Discussion”; and at Step 3 termination is possible and consultation with Human Resources is mandatory. For employees with more than one year of NCS, Step 1 is the same; the Step 2 Serious Discussion includes an 1807 request (if applicable); Step 3 contemplates a First Administrative Letter in mandatory consultation with Human Resources; and Step 4 contemplates a Second Administrative Letter in mandatory consultation with Human Resources; and Step 5 requires a Mandatory “File Review” meeting with Human Resources and Legal and consideration of a Third Administrative Letter, termination or “alternate next step” (e.g. an Independent Medical examination or “IME”).
- A Bell “Deck prepared for HR to share with BU (Feb 2016)” document (Exhibit #5 and Exhibit #6, T3), which is marked “Absence Refresher | February 2016 | CONFIDENTIAL” on every page of substance, and which reflects but is not identical to the “**Restricted/Confidential** – for HR use only” (bolding supplied) Exhibit #3 and Exhibit #6, T1 document. This is a form of summary of the February 2016 “STD & Incidental Guidelines Customer Operations HR Team” document available to be shared with Business Units. The Disciplinary Path summary indicates that Human Resources is to be contacted after absence day #3 for employees with less than 3 months’ NCS, and a 7 absence day process for employees with more than 3 months’ NCS with indicates that after absence day #2 the Team Leader will advise the employee that a doctor’s note is required for the next absence, that a written warning will be issued after absence day #3, and that the disciplinary path is to be continued after subsequent absences. There are significant Administrative Path differences between the “Deck” and the “STD & Incidental Guidelines Customer Operations HR Team”. These include:
 - (a) There is no reference to any period of review (rolling or otherwise) in the Deck.
 - (b) In the “STD & Incidental Guidelines Customer Operations HR Team” medically supported Administrative Path for employees with less than 12 months NCS the Day 3 absence guideline is “Written Warning (will act as a final warning)” and the Day 4 absence guideline is “NOA provided to employee to trigger STD, MUST consult with HR”. In the Deck, the Day

3 absence guideline is “MUST Consult with HR”, and there is no Day 4 guideline.

- (c) The “STD & Incidental Guidelines Customer Operations HR Team” medically supported Administrative Path for employees with more than one year NCS lists 5 “Admin Action Steps”, including a First Administrative Letter at Step 3, a Second Administrative Letter at Step 4, and a mandatory file review meeting with a “3rd Admin Letter, Termination or alternate next step” to follow. The Deck includes the same Steps 1 and 2, and a “Step & onward” which simply states “MUST Consult with HR”. There is no reference to Administrative Letters.
- (d) The “STD & Incidental Guidelines Customer Operations HR Team” STD – Medically substantiated Administrative Path is also significantly different from the Deck version, particularly for employees with more than 3 months but less than 12 months’ NCS (no reference to termination in the Deck), and for employees with more than one year NCS (no reference to Administrative Letters or a mandatory file review with “3rd Admin Letter, Termination or alternate next step” to follow.
- A “STD & Incidental Guidelines Customer Operations HR Team” document (Exhibit #4 and Exhibit #6, T2) which notes on its title page that it is “**Restricted/Confidential** – for HR use only”. Not to be distributed, forwarded or printed” (bolding supplied), and on every page of substance that it is a “Nov 2017 | CONFIDENTIAL” document. This is much the same as the February 2016 document. The major differences are that it implements a 12-month in place of the 6-month rolling review period in the February 2016 document, and includes a page entitled “TRENDS – Calls in sick before/after scheduled day off” which describes the action steps to be taken when a trend is observed instead of the otherwise applicable Incidental guidelines. At trend absence day #2 the discussion with the employee will address the trend observed, and at trend absence day #3 one of two disciplinary paths is engaged (written warning if no previous “actions” on file; and progressive discipline if there are previous actions on file) unless medical validation is provided or the employee advise that the absence was for medical reasons in which case an 1807 is requested. For subsequent trend absence days, the Team leader is to continue with the disciplinary path.
- 9 compilations of documents concerning the application of the Bell AMP to individual bargaining unit employees, including Administrative Letters issued to

them (Exhibits #6, T9 – T16 (duplicated in part in Exhibit #2, T5 – T11), and Exhibit #8; and,

- An “Absenteeism Report – Percentage and \$” for the period 2017-12-01 to 2018-11-30.

21. Eremita works with Human Resources Consultants and offers advice and assistance with respect to the guidelines and the PAW Policy in general. She testified that employees can access the PAW Policy on the Bell intranet. Eremita testified that the PAW Policy does not apply to culpable absences because those are disciplinary. The PAW Policy refers to the guidelines and procedures concerning presence-at-work management in the “Health, safety, wellness and presence at work section of the Bell Human Resources [web] site”. Exhibit #6, T4 is a screen shot of Bell intranet “Manage absence” page “<http://bellnet.int.bell.ca/humanresources/workplace-and-safety/presence-at-work/managing-absences>”. If this is site referred to by the Policy, it directs users to “Select the appropriate process under management of absence cases in the above navigation bar. You will access a process map and corresponding instructions.” It contains links to the following “process documents”:

- My employee is absent
- My employee is absent on a regular basis
- My employee is absent due to STD
- My employee is absent due to LTD
- My employee returns to work
- Occupational accident and Illness (Quebec)
- Occupational accident and Illness (Ontario)

The linked “My employee is absent” and “My employee is absent due to STD” action step flow chart documents are Exhibit #6, T5 and T6, respectively. Exhibit #6, T7 is another action step flow chart process document which states on its face that it is to be used when “The employee is demonstrating attendance, performance, or other unacceptable behavioral problems, is struggling with alcohol or substance abuse (suspected) and requests a workplace accommodation” [Sic; underlined emphasis supplied.] These flow chart process documents are action step flow charts clearly directed at and for the use of managers – not at or for the use or information of employees. This Human Resources resource documentation contains both Disciplinary and Administrative Paths.

22. The intranet link also captures a “Managing absences” document in evidence as Exhibit #6, T8. It links a verbal description of the “My employee is” action steps to the flow charts.

23. Malhotra says he doesn’t know what Bell’s AMP is, or how Bell administers it. He testified that he has accessed the PAW Policy on the company intranet, but that he was unable to understand from his reading of the Policy what triggers an Administrative Letter, the absenteeism benchmarks that employees are measured against, or what constitutes excessive absenteeism. He has been to “many” meetings with employees where Administrative Letters have been presented and says that when the employee asks why s/he is getting an Administrative Letter the only response is a vague explanation to the effect that “it is from higher ups” or “I’m just supposed to deliver it”, or that the employee’s absences exceed company policy is offered, often along with a statement to the effect that the validity of the absence is not being questioned. He says that the management person (i.e. the Team Leader) who delivers an Administrative Letter is also typically “very vague” about the potential consequences to the employee of the Administrative Letter.

24. Eremita testified that she created the February 2016 and November 2017 current version of the “STD & Incidental Guidelines Customer Operations HR Team” marked “Restricted/Confidential – for HR use only. Not to be distributed, forwarded or printed” as a working reference guide strictly (her word) for use by Human Resources Consultants who support Bell’s Customer Operations BU, which she characterized as her “client”, with a view to ensuring a consistent Human Resources approach to incidental absenteeism. That is, these documents were and are for the use of Bell’s Human Resources Department – not for the information of the Union or employees. The “Deck prepared for HR to share with BU (Feb 2016)” document marked “confidential” on every page of substance is a form of summary of Human Resources disciplinary and administrative action steps for dealing with absences. It is a simplified and less than completely revealing repackaging of the February 2016 “STD & Incidental Guidelines Customer Operations HR Team” version which was “Restricted/Confidential” and strictly for the use of Human Resources. Although this “Deck” highlights some of the reference guide main points, it too is directed at and use by management in dealings with employees. Eremita testified that she created this document for Human Resources as a reference guide to be shared verbally, again to ensure consistency in Customer Operations support. She says this version of the Human Resources resource guide is provided to employees on request, and is also available to employees in the intranet. In any case, Eremita agreed in cross-examination that the “Deck” summary does not provide the detailed attendance management process information contained in the

“Restricted/Confidential” Human Resources reference guidelines documents – something which is readily apparent from even a cursory comparison.

25. Eremita described the connection between the February 2016 “STD & Incidental Guidelines Customer Operations HR Team” and the Exhibit #6, T7 flow chart document and how they are read together. As she put it, the guidelines reference documents are “closely aligned” with the flow chart documents. Yet in response to the very first question asked in cross-examination, Eremita made it clear that the Incidental Guidelines reference document is not available to employees (in any version); that is, that as the document states on its face it is in fact “Restricted/Confidential – For HR use only. ...” Although Eremita testified that notwithstanding the language of the intranet “Managing absences” documents “everyone has access to” them, it is not clear how employees or the Union would access the documents, or why an employee who happened on them would think they are there for his/her information, when they are clearly directed at and for the use of managers. Nevertheless, Eremita testified that the flow chart documents are available to employees on the Bell intranet, and that if an employee has any questions about them s/he can ask the Team Leader for clarification. Eremita agreed in cross-examination that there is no reference to a gateway step to a written warning or First Administrative Letter (depending on the employee’s NCS) in the Exhibit #6, T7 flow chart document. There is no reference to number of days absent or the follow up time frame in the flow chart. Nor is there anything in the flow chart document about the criteria considered at or for the various steps of the absence management process. Eremita testified that these are the sorts of things that the Team Leader would discuss at an absence meeting with an employee.

26. Singh testified in cross-examination that he is not aware of any communication to employees about the operation of Bell’s AMP, but suggested that “a lot of it” is on Bell’s intranet, and that during “wait time” between customer calls an employee can go into the Bell intranet career zone or Human Resources site where there is a “wealth of information available”. It is far from clear why he says this because he conceded that he doesn’t know what information is available to employees on the intranet because he hasn’t actually looked. Indeed, he doesn’t know if there is anything which an employee could access on the Human Resources site which would explain what a “serious discussion” is, what an Administrative Letter is or means, or what any other attendance management Step is or how it is applied. Singh says he explains the issue and what (he considers) is required to employees when he meets with them after an absence. Singh testified that he has never referred an employee to the Human Resources intranet site. Indeed, he explained in re-examination that the Human Resources site might be “too complicated” (again notwithstanding that he apparently has never looked) and that it is easier for him to explain the employee’s situation when he meets with him/her (in a

coaching session). Singh untenably maintained that the “Managing absences” document which is Exhibit #6, T8 which is linked to the <http://bellnet.int.bell.ca/humanresources/workplace-and-safety/presence-at-work/managing-absences> intranet page is available to all employees. He somewhat reluctantly acknowledged that the document is really for him as a manager, but maintained that he could see how it can also benefit an employee. Singh also agreed with Eremita that even if an employee is able to access the Human Resources documents in evidence, there is nothing in them which explains the threshold for entry into the AMP, how absenteeism is measured or compared (i.e. the rolling 12-month averaging comparison), what a “serious discussion” is or means, or anything about Administrative Letters.

27. There is no evidence that any of these documents were proactively shared with the Union or employees prior to the filing of the grievance. Eremita testified that as far as she is aware there was no presentation or rollout or other explanation to employees of the the February 2016 or November 2017 “STD & Incidental Guidelines Customer Operations HR Team” attendance management process.

28. On the other hand, Vankalwalu testified that employees can only access the Bell intranet during breaks at work, when in a company building. Haque acknowledges that there may be attendance management information available on the Bell intranet, but testified that there are thousands of pages on the intranet, that he has no time to look while at work during the two 15-minute breaks or half hour lunch break that employees have or other downtime, and that he has never seen the information Bell claims is available. Malhotra says that as far as he knows bargaining unit employees have not seen these Human Resources documents. He testified that he saw the “Deck prepared for HR to share with BU (Feb 2016)” document for the first time on June 8, 2018 – less than two weeks before the hearing began, and that the February 2016 “STD & Incidental Guidelines Customer Operations HR Team” document was not produced to the Union until June 19, 2018 – the day before the hearing began. Malhotra testified that he did not see the attendance management flow charts in evidence before they were produced in this proceeding, and that he doesn’t know if the attendance policy is being administered in a manner consistent with the flow charts. He says he has not seen or heard anything with respect to the requirements to produce medical notes.

29. Eremita identified a computer “absence tool” (found in the documentation concerning the individual bargaining unit employees – and which Roy testified is not a PAW Policy tool) used by Team Leaders to record absences. This includes a “1964” calendar which records and codes the absence information submitted PAW Forms and IEX, and allows a Team Leader to monitor employee absenteeism on a rolling 12-month

basis. The absence tool identifies absences, and specifically flags absences which “require” a doctor’s note and prompts a Team Leader to ask for one. Eremita testified that it does not prompt Administrative Letter action. In cross-examination, she testified that although the Human Resources reference guidelines include doctor’s notes expectations and that failure to provide a doctor’s note when required can result in discipline, a Team Leader has discretion to make exceptions.

30. Singh testified that he knows what attendance process to follow from training and Human Resources Consultant advice he has received. He says the absence tool recommends every next Step of administrative action, including (contrary to Eremita’s assertion) Administrative Letters, based on an employee’s rolling 12-month period attendance record and the last action taken.

31. Bell waits for an employee to return to full-time work before completing an absenteeism review and considering next steps. Team Leaders review an employee’s file after every absence to compare the total number of days absent and the employee’s individual percentage absence rate to the CP3 (i.e. the average planned work hours absence percentage for all BU employees), to see if the employee’s absenteeism rate is getting better or worse. The benchmark comparison is the employee’s total number of hours lost due to absence compared to the BU average absence hours lost during the 12-month rolling period. Eremita testified that the Team leader will meet with the employee every time the employee is absent. Singh confirmed this, and testified that he meets with an employee to discuss a 1-day absence even if the employee otherwise has perfect a perfect rolling 12-month attendance record, in order to communicate to the employee where s/he stands compared to the rolling BU average.

32. Singh testified that when he considers what to do after an employee returns to work from an absence he takes into account previous coaching logs, the employee’s and the BU’s absenteeism rates for the rolling 12-month period, and any documentation provided by the employee or other information available. Singh described how he proceeds in some detail. Suffice it to say that he decides how to proceed based on the employee’s 12-month rolling rate of absenteeism stands in relative to the BU average and what the available documentation reveals about the employee’s individual circumstances. Eremita testified that Administrative Letters are presented to an employee in person at a meeting which Union is invited to attend. She says and Singh confirms that at such a meeting the Team Leader reviews the situation as summarized in the Administrative Letter and then presents it to the employee. Singh says that whether or not to issue an Administrative Letter is his decision and that if he decides to issue one he inputs the relevant information into the template provided, prints it, and delivers it to the employee with a Union representative present at a meeting convened for the purpose.

33. Eremita testified that Bell involves the Union at the Serious Discussion Step. Singh acknowledged in cross-examination that some managers have taken the position that Union representation is not required at the Serious Discussion Step, and notwithstanding that he personally supports it at every Step, Team Leaders have been told by Michele Barry, Senior Manager, of the Residential Loyalty BU that Union representation was not necessary until the Administrative Letter Step. Singh says he notes the substance of the discussion with the employee in a coaching log during or soon after the discussion (perhaps the next day). Although a relatively recent development (i.e. some 2 years ago, several months before this grievance was filed), employees can now access and comment on their coaching log entries in their individual "Agent Suite". (Although it was suggested to Singh in cross-examination that the Union's Stewards were not aware that employees could access their coaching logs through Agent Suite, he did not agree and there is no actual evidence in that respect.) Singh testified that employees simply acknowledge and accept the coaching notation without further comment. He doesn't recall any employee leaving a comment. He went through and explained the various Administrative Letters in evidence. Singh's explanations serve to illustrate the application of the attendance management process, and are consistent with the evidence concerning the general application of the AMP.

34. Eremita explained that the "Trends" page 5 which she added in the November 2017 "STD & Incidental Guidelines Customer Operations Human Resources team" revision was something that was always there; namely, an instruction to be alert to absenteeism trends related to scheduled days off. This page creates disciplinary paths if a required doctor's note is not provided or if an employee refuses to comply with a request for an 1807. The STD section provides three length of employment-based paths to termination. Eremita clarified that there is no set time when the "Admin Action Steps" are engaged, by which I take her to mean that there is no specific number of days absence, because she also testified that the Action Steps are engaged when the Team Leader identifies an employee's rolling 12-month absenteeism rate as being above what she referred to as the CP3 (i.e. the BU employee) average. She explained that the employee's rate of absenteeism is calculated by dividing his/her number of scheduled hours by the total hours absent during the 12-month rolling period; and the BU average is calculated by dividing the total of planned work hours for the Unit by the total hours absent for the Unit. Eremita testified that Bell has always used this averages comparison as the benchmark for absenteeism management purposes but that they were not used in Administrative Letters until 2017. Eremita was very clear that once on it "... an employee continues on the Administrative Path in a progressive way, and does not go back and forth or to and from the beginning".

35. Singh testified in cross-examination that Bell sets attendance targets, by which he obviously meant how absenteeism is measured and compared (i.e. formerly occurrence-based; now average-based), since individual employee excessive absenteeism is defined as being rolling 12-month absenteeism in excess of the average absenteeism for the BU; that is, it depends on the individual employee rate of absenteeism compared to the average rate of absenteeism of all employees in the BU, which is not in Bell's control. Singh's testimony and the documentation in Exhibit #6, T10-T16 confirms that the AMP is structured in a manner which moves an employee to the next Step of attendance management even two years after the last Step, suggesting that the AMP moves ever forward, never back, unless the Team Leader in his/her discretion (for which there appear to be no guidelines) decides otherwise.

36. The Administrative Letters appear to be and Eremita's testimony confirms are templates with blanks to be filled in (presumably) by the Team leader who signs it. Eremita testified that (notwithstanding the Human Resources reference guidelines) there is no set time for the issue of a First Administrative Letter after a Serious Discussion, but rather that that depends on an assessment of whether the employee's absenteeism rate has improved or gotten worse when the employee is absent again, and that another discussion, perhaps informal, may be all that is merited. She emphasized that although consultation with Human Resources is required, whether or not a First Administrative Letter is issued is up to the Team Leader. She says that Team Leaders always have next Step discretion.

37. Although it is not necessary to get into the individual employee details of the Administrative Letters for purposes of the determinations required in this case – which is about the AMP, not about any individual case – it is useful to look at the “boilerplate” content of the templates. Eremita testified that a First Administrative Letter, the most recent template version of which was introduced in April 2017, always includes the dates of previous meetings, 12-month rolling period absences, the BU average (which she says was always discussed with the employee but was not previously included in the Letter), the documents required of the employee, the services available to the employee, and possible next steps – which may include administrative actions up to termination. The penultimate paragraph in a September 14, 2016 First Administrative Letter (Exhibit #2, T5) reads as follows:

It is critical that you understand the potential consequences of your actions. While we are not contemplating further action at this time, we will have no choice but to take further administrative actions which may include termination of your employment should your absence record not improve significantly to comply with office standards.

A November 17, 2017 1st Administrative Letter example (Exhibit #6, T10, page 7) contains the identical penultimate paragraph.

38. A June 15, 2017 Second Administrative Letter (Exhibit #2, T9; and included, albeit dated June 14, 2017 (the content is the same) in Exhibit #6, T13) was sent more than two years after the First Administrative Letter to the employee. Team Leader Singh wrote:

Further to today's meeting and the first administrative letter you received on June 4th, 2015, your absence demonstrates that you are unable to attend work on a consistent basis and in accordance with your work schedule. Although we do not question the validity of your absences, the number of occasions/days continues to be greater than the office standards and has an impact on the department's ability to provide the service for which we are responsible for.

During the last rolling 12 months, you have been absent on numerous occasions. Your total absence equals 21 days.

Your incidental absenteeism rate of (8.4%) is substantially higher than the business unit's average of 3.2%.

Effective immediately, all future absences must be justified by sending documentation to support your absence to your Team Leader specifying:

- Date you were examined by the doctor (which must be during your medical absence)
- Confirmation that you were unfit for work on the specified day
- Expected return to work date
- Any applicable restrictions preventing you from performing your role

This documentation should not include medical information such as diagnosis. If the documentation that you have obtained contains persona medical information, please send the documentation directly to the Bell Disability Management Group (DMG) by fax at ... or email at ... for review.

It is critical that you understand the potential consequences of your actions. While we are not contemplating further action at this time, we will have no choice but to take further administrative actions which may include termination of your employment should your absence record not improve significantly to comply with office standards.

We thank you for your cooperation and value your contribution to the team.

[Sic except for underlined emphasis added.]

Malhotra doesn't know how this employee's situation was assessed during the 2-year period between Administrative Letters, what triggered the Second Administrative Letter. In cross-examination, he testified that has heard of awareness or other discussions with employees between Administrative Letters.

39. A Fourth Administrative Letter dated June 13, 2018 (Exhibit #2, T11) includes a penultimate paragraph that is slightly different from the one in the First Administrative Letter quoted in paragraph 37 above. This Fourth Administrative Letter, to an employee who was said to have been absent from work for 112 days during the previous rolling 12-month period and whose 46.7% absenteeism rate exceeded the Business unit's average of 12.5%, begins with a reference to a meeting on April 27, 2018 and to Administrative Letters issued on October 30, 2015 and November 1, 2016, and followed the template pattern of a June 15, 2017 Second Administrative Letter. It cautioned the employee that:

It is critical that you understand the importance of improving your attendance immediately and substantially failing which, your employment will be terminated.

Eremita confirmed the obvious; namely, that this paragraph is included to formally advise the employee that there could be further action if there is no improvement in absenteeism, including termination as a "future measure". Eremita testified that termination is considered when an employee's rate of absenteeism has shown no improvement or is even worse, and all assistive measures have been exhausted.

40. Eremita testified that a further Administrative Letter may issue if the employee shows no attendance improvement within a minimum 3-month period since the last Administrative Letter. For example, if the employee is absent again within the 3-month period after a First Administrative Letter but the employee's absenteeism record shows improvement, a Second Administrative Letter will not issue. If the employee is absent again but his/her rate of absenteeism has improved another Administrative Letter is not issued. However, another absence, even more than 3 months after a First Administrative Letter will trigger a Second Administrative Letter if there has been no improvement in the employee's absenteeism rate.

41. Malhotra says he doesn't know when Administrative Letters are removed for employees' files. He has never seen an Administrative Letter "pulled back" at a meeting or subsequently removed. Vankalwalu testified that "most" Administrative Letters stay on file indefinitely because Bell says they are non-disciplinary. Singh's evidence suggests that Administrative Letters remain in an employee's file indefinitely. This is consistent with the ever progressive nature of Bell's approach to attendance management. There is no evidence that Administrative Letters are ever removed from an employee's file. Indeed, even a November 17, 2017 First Administrative Letter (in Exhibit #6, T10)

which was never delivered to the employee is nevertheless in his file. Why was not explained.

42. Eremita testified that at the Step 5 level (of the Administrative Path) there is a (mandatory Human Resources file review with the Legal Department and Disability Management Team (“DMT”) which typically has confidential medical information that Human Resources is not privy to, in order to assess the employee’s situation and collectively determine what the next step should be. (The DMT appears to be a subset of the DMG which receives employee medical information on a confidential (from Human Resources and management) and oversees STD and LTD cases as well.) Next step options include a Third Administrative Letter if the medical information provided does not support the employee’s absences and the employee’s rate of absenteeism is worse than when the Second Administrative Letter was issued. A Third Administrative Letter typically follows the same format as a Second Administrative Letter. In the alternative, a Fourth Administrative Letter might issue, or IME or an 1807 (i.e. a medical assessment to be provided to the DMT) update may be requested. Or there may be only a conversation with the employee, or there may no action taken. Eremita testified that it all depends on the circumstances of the individual case. Eremita testified that termination is considered when an employee’s rate of absenteeism has shown no improvement or is even worse, and all assistive measures have been exhausted. Termination decisions are made by Human Resources in consultation with Legal and the DMG. Eremita is not aware of any termination for excessive absenteeism.

43. Eremita emphasized that consultation with Human Resources on a case-by-case individualized basis is encouraged at every step, and that there must be consultation with Human Resources before an Administrative Letter is issued or employment is terminated. Eremita emphasized that the action taken with respect to an employee’s absence or rate of absenteeism, including whether a doctor’s note is required (and presumably whether medical documentation that is provided is sufficient) is always in the Team Leader’s discretion, regardless of the advice provided by Human Resources. Although the Human Resources reference guide provides apparently separate disciplinary and administrative paths for review of absenteeism purposes, the evidence is clear that all absences are reviewed and that the administrative path can quickly merge with the disciplinary path. For example, although she emphasized all individual circumstances are considered, that there is no “fixed check-list”, and that medical documentation which supports an absence is critical, Eremita testified in cross-examination that an employee who becomes ill with influenza and goes to and is advised by his/her doctor to stay home for 2 days, and even if the employee provides a doctor’s note, the Team Leader has the discretion to issue the employee a written warning in consultation with (but regardless of the advice provided by) Human Resources, if the Team Leader considers that appropriate, and that the

Disciplinary Path would be engaged for that employee. Further, Eremita testified that a written warning, although more formal and involves the Union, has the same effect as an Administrative Letter. This suggests that the converse is also true; that is, that an Administrative Letter has the same effect as a written warning, which suggests a conflation between the disciplinary and administrative paths.

44. Absences are calculated on the basis of the number of days, not occurrences, so that the guidelines give the same weight to a single 3-day absence and 3 separate 1-day absences, and that according to the STD & Incidental Guidelines doctor's notes are required relatively early on considering the collective agreement sick leave provisions. Even an employee with more than one year of service is required to produce a doctor's note after the third day of absence. An employee with less than one year of service is required to provide a doctor's note after a single day of absence. Eremita explained that the medical note requirement is intended to ensure that the employee sought medical attention, and to provide greater insight into the situation for everyone, including the employee's doctor. However, she testified that a doctor's note is not required if there is an 1807 on file sufficient for the purpose, or at the Team Leader's discretion. Eremita confirmed that the disciplinary path is engaged when medical substantiation for an absence is required but not provided.

45. Since February 2016, a Governance Committee composed of representatives from Human Resources (including Eremita from time-to-time), Legal and the DMT has held monthly telephone conference call meetings since February 2016 for purposes of a more general review of absenteeism. Eremita testified that this Committee can also be convened to review individual employee cases. Singh testified that he has weekly absence review meetings with Human Resources.

46. Singh testified that an employee who is unable to attend work as scheduled is required to call a 1-800 number to report the absence. This is the only evidence about the absence reporting system.

47. Roy substantially corroborates Eremita's description of Human Resources' role in Bell's approach to attendance management; including the use of the computer absence tool and recommendations by Human Resources, and that it is ultimately up to the Team Leader to decide the next Step. In explaining her approach to making recommendations based on attendance data and other information available, she testified that she would recommend either discipline, an Administrative Letter, or an 1807 if there was indication that accommodation may be an issue. Regarding the absence tool percentages, Roy testified that if the employee's absence percentage is higher than the BU's average as calculated by the absence tool she would generally go to the next Administrative Letter.

But even if the employee's rate of absenteeism was lower than the BU she would still recommend an attendance discussion, and that the closer the employee's percentage is to the BU percentage the more serious the discussion she would recommend, together with a caution that if the employee's attendance doesn't improve a (further) Administrative Letter may issue. She also testified that although the Team Leader makes the final decision, her expectation is that the Team Leader will "verify and move forward with the recommendation" made. This suggests that the Team Leader AMP discretion may not be as broad as Eremita and Singh profess.

48. Roy identified an "Absenteeism Report – Percentage and \$" (Exhibit #9) for a "pool of employees under Julie Todd". It shows the number of occurrences, percentage days of absence, percentage payroll, and average days per employee of incidental absences; and new case occurrences, number of new cases, percentage days of absence, percentage payroll, and average days per employee of STD absences; and totals for the two categories, by month; and totals for 11 months of the rolling 12-month period December 2017 – October 2018 (no data for November 2018) to illustrate Bell's use of averages for AMP purposes. There is no dispute that this information was not available to the Union prior to the week before the last day of hearing, and that before that the Union was not aware that the percentages for incidental and STD absenteeism were calculated separately. It is not apparent from the Administrative Letters that that is the case.

III. SUBMISSIONS - Summarized

(a) The Union

49. In argument, the Union refined the position asserted in the grievance. It submits that Bell's AMP is unreasonable, arbitrary and a gross abuse of management rights contrary to the collective agreement (specifically Articles 1.02 (Discrimination), 12 (Discipline) and 27 (Management Rights)) and the *Canadian Human Rights Act* (no mention of the *Canada Labour Code*).

50. The Union submits that an AMP must by law be clear and transparent in content and application, and that Bell's AMP is neither. Mr. Russell argues that the Bell AMP presents a Kafkaesque situation because it is not grounded in documents accessible to employees or the Union. He submits that the PAW Policy is very general and offers no concrete information or guidance regarding the administration or mechanics of the AMP, and argues that there is nowhere for an employee to go for such information or to discover where s/he stands in the AMP.

51. The Union submits that there is an absolute lack of clear and transparent notice of the AMP to employees and the Union. The Union points out that employees have not been told where or how to access the Human Resources documents put forward by Bell in this proceeding, and that even Union workplace representatives were not aware of them prior to this proceeding. The Union argues that even if this Human Resources documentation, which it says are intended for managers not employees, could reasonably be accessed by employees and be considered part of the Bell AMP it does not in any event provide employees with any understandable guidance.

52. The Union submits that the Bell AMP attendance standards are indefensible, that the averaging comparison model which typically finds half the employees in an excessive absenteeism position is inappropriate, and that the inexorable march forward through Steps of ever increasing pressure and sanctions with different paths depending on the employee's NCS, including the inappropriate use of the threat of termination in the first of potentially four Administrative Letters without any pathway out is inexcusable. The Union argues that the lines between Steps in the various Administrative Paths are arbitrary, that the apparent triggering of the AMP by even a single absence regardless of the circumstances is unreasonable, and that the demand for medical notes is precipitous, arbitrary, and unreasonable, as is the application of discipline for failure to provide a medical note to justify an absence even if the manager knows the employee was actually ill or injured.

53. In short, the Union submits that the Bell AMP fails the *KVP* test because

- it is contrary to Articles 1.02, 12 and 27 of the collective agreement;
- its standards, absenteeism comparison model, and 1-way constantly escalating computer driven algorithm are unreasonable;
- it is unclear and equivocal;
- it has not been brought to the attention of employees.

54. The Union seeks:

- a Declaration that the Bell AMP is void and unenforceable because it is unreasonable, arbitrary, and contrary to the collective agreement and the *Canadian Human Rights Act*;
- a Declaration that all Administrative Letters that have been issued are void; and
- an Order which requires Bell to produce and give proper notice to employees and the Union of a new (comprehensive) clear written AMP; and specific orders regarding the content and processes of the new AMP.

55. Mr. Russell referred to the *KVP* decision, and to the decisions in *York University v. York University Staff Association*, (2012) 221 L.A.C. (4th) 48 (Surdykowski); *St. Joseph's General Hospital Elliot Lake v. O.N.A.*, (2008) 170 L.A.C. (4th) 115 (Sheehan); and, *Middlesex-London Health Unit v. CUPE*, (2013) 240 L.A.C. (4th) 133 (Etherington) in support of the Union's submissions.

(b) Bell

56. Bell denies the Union's assertions. Bell submits that it has the management right to monitor and manage attendance, and that there is nothing about the way that it has done so that is unreasonable, arbitrary, discriminatory, or otherwise contrary to the collective agreement, the *Canadian Human Rights Act*, or at all. Bell says has formulated and administers its AMP in good faith, within the parameters established by the arbitral jurisprudence. Ms. Zacks reminds me the question is not whether there is a better way, but whether the Union (since it bears the onus) has established that Bell's approach is inappropriate.

57. Bell notes that there is no dispute that the Union was aware of and employees had ready access to the PAW Policy at all material times. I understand counsel's submissions to suggest that the Human Resources flow chart and associated verbal documentation is available to employees on the Bell intranet as an aid to their understanding of Bell's AMP. In any event, Ms. Zacks argues that the PAW Policy, read together with the Human Resources documentation, and the mechanics of Bell's approach to attendance management comply with *KVP* principles in every respect. She submits that Bell's approach to attendance management is clear, unequivocal and reasonable, and that employees have ample notice of the AMP and its operation.

58. Bell argues that there is nothing wrong with an AMP which distinguishes between employees on the basis of length of tenure for attendance management purposes because new employees have yet to demonstrate that they are able to attend work regularly as required. Bell submits that rather than conflating culpable and non-culpable absenteeism, its approach to attendance management clearly separates the Disciplinary Path from the Administrative Path, and that it appropriately distinguishes between incidental non-culpable absenteeism and disability related non-culpable absenteeism, including STD and accommodation situations. Ms. Zacks submits that discipline for failing to comply with a direction to provide medical documentation is not discipline for non-culpable absenteeism, or a mixing of the Disciplinary and Administrative Paths.

59. Bell submits that not only is there nothing wrong with its rolling 12-month averaging comparison assessment of absenteeism, this approach ensures a fair current

comparison. Bell emphasizes the discretionary individualized approach applied by Team Leaders at every Step, including to Administrative Letters, as illustrated by Singh's testimony. Bell submits that there is nothing arbitrary, unreasonable or otherwise inappropriate about its attendance expectations of employees or its requests for doctor's notes or other medical documentation. Bell specifically denies that the Administrative Letter cautions about further administrative actions up to termination are threatening or otherwise inappropriate. Ms. Zacks submits that it is important and necessary to bring Bell's attendance and absence justification expectations, and the possible consequences if those expectations are not met, to the employee's attention. She submits that the coaching session and Administrative Letters fairly and sufficiently inform an employee where s/he stands in terms of absenteeism.

60. Bell submits that employees are made fully aware of the operation and expectations of the AMP and where they stand in it through the individualized discretionary approach taken at every Step. Bell argues that the individualized approach also mitigates the apparent requirements regarding medical notes; that is, that medical notes are not automatically required at the Steps indicated, and that although a medical note may be required for a 3rd absence one won't necessarily be required if there is another justification for the absence.

61. Bell submits that the grievance should be dismissed. In the alternative, Bell submits if I do find that anything in its AMP is problematic, I should make appropriate repair directions, but that no Steps taken in any individual cases should be declared void in any event.

62. Ms. Zacks referred to the *KVP and York University* decisions; and to *Canada (Attorney General) v. Bodnar*, 2017 FCA 171 (CanLII); *Sunnybrook Health Sciences Centre v. Service Employees International Union, Local 1 Canada*, 2016 CanLII 44082 (ON LA – Knopf); *Coquitlam (City) v. I.A.F.F., Local 1782*, 1997 CarswellBC 3170 (Hickling); and, *Ottawa Hospital v. CUPE, Local 4000*, 2000 CarswellOnt 8831 (Craven, Chair) in support of Bell's position and submissions.

IV. DECISION

63. This is a policy grievance in which the issue is whether there is anything legally wrong with Bell's AMP as a general matter, not whether there is anything wrong with the manner in which it has been applied in an individual case. A dispute concerning the application of the AMP in an individual case or cases is properly addressed in an individual or group grievance. Accordingly, I will not comment specifically about any individual case.

64. I am not satisfied that the Bell AMP is *prima facie* discriminatory within the meaning of the *Canadian Human Rights Act*, or Article 1.02 of the collective agreement (which substantially replicates the anti-discrimination provisions in the legislation).

65. The Union does not allege bad faith. I am in any event satisfied that Bell's unilaterally promulgated AMP is a good faith attempt to monitor and manage attendance by means intended to encourage and assist maintain regular workplace attendance by identifying as soon as possible situations where that may be required.

66. The further analysis must begin with the first question asked in paragraph 16, above: what exactly is the Bell AMP?

67. I am satisfied that the PAW Policy and the "Deck prepared for HR to share with BU (Feb 2016)" document constitute the Bell AMP for *KVP* analytical purposes. On the evidence, the former is directed at company-wide attendance management, and is readily available to employees and the Union. Notwithstanding that the latter is marked "Absence Refresher | February 2016 | CONFIDENTIAL" on every page of substance, it has been prepared as a form of (incomplete) summary which to some extent reflects the February 2016 "STD & Incidental Guidelines Customer Operations HR Team" to be shared, if only verbally with employees on request.

68. I am satisfied that neither iteration of the "STD & Incidental Guidelines Customer Operations HR Team" reference guide constitutes part of the AMP for *KVP* purposes. Not only are both iterations marked "**Restricted/Confidential** – for HR use only", the evidence is clear that they were prepared strictly for the use by Human Resources as a reference guide for attendance management purposes. There are also significant differences between the "STD & Incidental Guidelines Customer Operations HR Team" documents and the Deck summary. And neither iteration has been brought to the attention of or been made reasonably available to employees.

69. I am not satisfied that neither the flow chart nor the verbal action Step intranet documents form part of the AMP. There is nothing wrong with an Employer using a flow chart or other process guide for its own Human Resources or other management purposes. However, an Employer cannot point to such a guide which is confidential to Human Resources/management as being part of an AMP. A simplified flow chart can be useful for illustration purposes, but a complex system of Human Resources flow charts will generally not constitute an appropriate AMP. Similarly, appropriate templates can provide a useful AMP tool, but overreliance on such standardization may be counterproductive. In any event, the Human Resources flow chart and complimentary

verbal action step guides are clearly for the use of management, and I am satisfied that they have not been brought or made reasonably available to employees.

70. However, there are problems with the AMP. Although the PAW Policy contains elements of philosophy and objectives appropriately included in an AMP, it reads more like an attendance management mission statement directed at managers than as an AMP document directed at and for the information of employees. More importantly, as constituted, the AMP is opaque to employees. Although employees have a responsibility to make reasonable efforts to inform themselves, I am satisfied that even a diligent employee is unable to discover how the Bell AMP operates, either generally or more importantly how it applies in an individual situation, particularly in the progressively consequential steps of the Program. As the unilateral promulgator of the AMP, Bell bears the primary responsibility to inform the employees. “Inform yourself” is not an appropriate response, and the reference in the PAW Policy to the guidelines and procedures outlining elements of presence-at-work management are presented in the health, safety, wellness and presence at work section of the Bell Human Resources intranet site is insufficient to overcome the deficiency – particularly when (I am satisfied) employees are unable to reasonably access the information available, and that information is not sufficiently informative for the purpose in any event. Nor are the coaching logs maintained by Bell sufficient for information notice purposes. In addition and with reference to paragraph 15 (above), the following are the major key element failures, which make it impossible for even a reasonable employee to understand the AMP:

- The Bell AMP does define what is and what is not considered to be an “absence” or “absenteeism” for purposes of the Program or explain how absenteeism is measured or what is considered to be excessive absenteeism.
- The AMP does not define and clearly distinguish between “culpable” and “non-culpable” (“innocent”) absenteeism.
- The AMP does not inform employees about when medical documentation may be requested, why it may be requested, the nature of the medical documentation and information that may be requested, the manner in which the medical information will be treated, when an employee will be obliged to provide medical documentation (and the potential consequences if it is not provided) and when an employee is not obliged to do so even if requested (and the possible consequences).
- The AMP does not include an absence reporting system.

- The AMP does have clear thresholds for entry into or progression through it, and contains no provision for regression or exit from the Program.

71. Indeed, even if the “STD & Incidental Guidelines Customer Operations HR Team” reference guide, or flow chart and verbal action Step intranet documents could reasonably be considered to form part of the Bell AMP the same major key element failings would exist, with the possible exception of the Step progression thresholds.

72. There are problems in addition to the major key element failings. The Union’s assertion that the Bell AMP is Kafkaesque (marked by a senseless, disorienting, often menacing complexity) overstates the case. But to say the Bell’s AMP is closely managed is an understatement. It is more accurately described as over-managed. Bell’s approach to attendance management is aggressive and paternalistic. (I can’t help but wonder if management absenteeism is managed with the same vigor.)

73. First, it seems that the only way for an employee to avoid the AMP is to never be absent from work. Entry into the AMP appears to be triggered by the first absence, regardless of its length (1 day appears to be sufficient), the reason or justification provided for the absence, or the employee’s attendance record. Even a single day of absence for any reason and regardless of attendance record puts the employee on Bell’s AMP radar. This is unduly aggressive, and cannot be good for employee morale (and therefore for productivity), particularly in light of the sick leave provisions in Article 9 of the collective agreement. However, I do not consider the different length-of-employment contrary to the collective agreement (Article 9 itself provides differential levels of sick pay based on NCS) or otherwise inappropriate.

74. The AMP, either as advertised or as administered, doesn’t recognize (as York University’s AMP did) that some level of absence is normal and to be expected. In real life things which affect the ability to attend work happen to the most conscientious of employees, including illness, injury, or other intervening events, and a proper AMP takes that into consideration. Absences are appropriately monitored, but not every absence needs to be managed. It is not appropriate for every absence, regardless of duration of cause, to trigger entry into an AMP. There must be a rational workplace-based trigger for entry into an AMP. In the absence of an objectively reasonable suspicion that a one or two day incidental absence was not justified, an employee, particularly an employee with more than 1 year NCS with a perfect attendance record should not enter an AMP as a result of such an absence. If an absence is suspicious it is more likely to be potentially culpable and subject to discipline as opposed to non-culpable management that it the proper purview of an AMP.

75. Second, an AMP can include disciplinary (for culpable absences) and non-disciplinary (for non-culpable absences) streams, including the potential for crossover between them, so long as they are appropriately separated and explained – which in this case they are not. Although there is a separation between the Disciplinary Path and the Administrative Path(s) in the Bell AMP, the separation is unclear and in any event insufficient.

76. I am satisfied that the AMP Administrative Letters as a genre are *prima facie* not disciplinary. Individual Administrative Letters can be challenged as being disciplinary in fact if appropriate. I am not satisfied that the Administrative Letters can reasonably be read as threatening. I consider them cautionary. It is not only reasonable but appropriate to caution an employee that his/her employment may be terminated if s/he is demonstrably unable to attend work and perform the essential duties and responsibilities of his/her job with reasonable regularity and is unlikely to be able to do so in the foreseeable future. Of course it is much less likely that the Administrative Letters would be perceived by employees as threatening if this was properly explained in the AMP – which it is not. However, I do consider it premature to include the termination of employment caution in the First Administrative Letter.

77. However, there are points in the “STD & Incidental Guidelines Customer Operations HR Team” reference guidelines which more closely approximates the manner in which the AMP actually operates than the AMP that employees and the Union have notice of (i.e. the PAW Policy and the Deck) at which the Disciplinary and Administrative Paths meet in an arguably inappropriate way.

78. For example, the “Incidental – Not Medically Supported” Disciplinary Path (not so-called in the November 2017 version) provides for termination of an employee with less than 3 months NCS and a progressive discipline path for employees with more than 3 months NCS. The problem here is that it apparently assumes that every non-medically supported absence is culpable and subject to discipline. However, there are non-culpable absences for other than medical reasons. The “Incidental – Medically substantiated” Administrative Path guidelines provide for a “Written Warning (will act as a FINAL warning)” after absence Day 3. This has a disciplinary flavour to it, particularly when there is no direction to consult with Human Resources. An employee cannot be disciplined for a non-culpable absence. The “STD – Medically substantiated” Administrative Path guidelines also provide that an employee with less than 3 months NCS “Can be terminated immediately, MUST Consult with HR” at Step 2, and that an employee with more than 3 but less than 12 months NCS “Can be terminated, MUST Consult with HR” at Step 3. This is only the case if the test approved by the Supreme

Court of Canada is met (see paragraph 14, above), and I am not sure that the direction to consult with Human Resources is sufficient to erase the concern about conflation between disciplinary and non-disciplinary action, notwithstanding that this purports to be in an Administrative Path. And on the “Trends” page of the November 2017 “STD & Incidental Guidelines Customer Operations HR Team” reference guide “Trend Observed” #3 provides two possible disciplinary paths with the only exemptions indicated being a previously provided medical validation, or if the employee advises that the absence was for medical reasons in which case an 1807 is to be requested. If an 1807 is requested and the employee refuses to comply the matter will be dealt with on a case by case basis (which sounds fine, except that the situation will then be reviewed with “legal” via the Governance Committee that Eremita described – which sounds rather more ominous). And recall that an “1807” is a medical assessment to be provided to the DMT, which is something significantly more intrusive than a doctor’s note. A doctor’s note might well be justified but a request for an 1807 is *prima facie* excessive. And an immediate escalation to Governance Committee review (instead of consultation with Human Resources) reads like an excessive disciplinary response.

79. However, Bell’s AMP cannot be said to violate the discipline provisions in Article 12, of the collective agreement. Article 12 simply permits discipline for just cause (except in the case of a probationary employee who may be terminated if “found by the Company to be unsuitable”). Nothing in the AMP prevents discipline from being challenged in accordance with the grievance and arbitration provisions in the collective agreement.

80. Third, the Bell AMP is too aggressive in involving itself, and requiring the employee to permit Bell to involve itself under pain of discipline, in an employee’s health and wellness regimen, both as advertised and in operation. When and how often an employer can request medical verification for an absence, and the nature and amount of confidential medical information that an employer has a right to require an employee to produce must reasonably relate to the particular employee’s individual history of absenteeism. Arbitrators have recognized that the test is one of reasonable necessity, such that what an employee can be required to produce is the minimum sufficient objectively reliable information necessary for the purpose to satisfy a reasonable employer that the employee was or is absent from work due to illness or injury. It is generally accepted by arbitrators that it is not just medically unnecessary but inappropriate for an employee to seek medical attention for a transient illness or injury which renders the employee temporarily unable to attend work as scheduled, and that it is therefore inappropriate for an employer to bother the employee and unnecessarily further burden our already overworked medical health system with what as a practical matter is a petty demand for a doctor’s note. In the absence of a specific collective agreement

requirement or a reasonable basis for suspecting that the employee did not in fact have the medically based excuse given, it is generally unnecessary, inappropriate and impractical to require medical certification for a 1 or 2-day absence of an otherwise rarely absent employee, particularly if illness manifestly apparent before the absence or when the employee returns to work. (See, for example, *Canadian Bank Note Co. v. I.U.O.E., Local 772*, 2012 CanLII 41234 (ON LA – Surdykowski).)

81. As suggested in paragraph 15 #3, above, it is inappropriate, and an unreasonable exercise of management rights to mechanically require every employee to produce medical certificates for all future absences simply because s/he has crossed a particular threshold of absenteeism, without addressing the circumstances peculiar to the employee. Indeed, demanding that any employee whose absence the employer does not suspect is not for legitimate non-culpable reasons for all future absences is unreasonable and unfair – although requiring periodic updates may be acceptable in the case of a chronic medical condition which results in intermittent, perhaps not foreseeable, absences from work. It is unreasonable and unfair to require an employee to go to the effort of attending at a physician’s office (assuming that is even possible in the particular circumstances), particularly for a 1 or 2-day absence. It is demonstrably not necessary and adds undue stress to both the employee and health system, and may even be medically contraindicated for the employee. A request for medical proof of illness or injury must be rationally related to the objectives of the AMP (i.e. to establish the legitimacy of absences when that is in doubt, or for the purposes of disability and accommodation management). The AMP must provide for discretion, and that discretion must be exercised – reasonably.

82. I am satisfied that it is not contrary to the collective agreement or otherwise inappropriate to monitor and manage attendance as the Bell AMP does by comparing a bargaining unit employee’s average rate of absenteeism to the average rate of BU absenteeism on a rolling 12-month period basis. Although this can be characterized, as the Union does, as a “moving target”, there nothing unfair about it because it permits a big picture contemporaneous review, and tends to recognize that rates of absence may vary over the course of a calendar year (e.g. absences due to influenza are more common during some parts of the year than others) such that a degree of absenteeism that is excessive during one part of the year is not excessive during another. Even if it means, as the Union suggests it does, that the absenteeism rate of roughly half of employees will always be higher than the average rate of absenteeism for the comparator group, averaging provides a useful rough and ready tool for monitoring absenteeism for purposes of examining an individual employee’s absenteeism in greater depth.

83. In the result, I am satisfied that the unilaterally promulgated Bell AMP constitutes an unreasonable exercise of management rights, contrary to Article 27 of the collective agreement. The Union is entitled to a Declaration in that respect.

84. I am not satisfied that the Union is entitled to a Declaration that all Administrative Letters that have been issued are void. Subject to the too early caution of the potential for non-culpable termination of employment (i.e. in the First Administrative Letter), there is nothing sufficiently wrong with the Administrative Letters as a class to merit such a generic Declaration. Individual Administrative Letters, whether First, Second, Third or Fourth, are appropriately challenged in an individual grievance.

85. The Union's request for an Order which requires Bell to produce a new clearly written AMP, with specific orders regarding the content and processes in that respect is in the same vein as Bell's suggestion that I should issue repair directions if I find anything in the AMP presented. It is also problematic.

86. There are (at least) two significant problems with the Union's request and Bell's suggestion. First, although an employer is entitled to unilaterally promulgate an AMP in the reasonable exercise of its management rights in a manner consistent with the collective agreement and applicable legislation, an employer is not obliged to do so. Nothing in law requires an Employer to have a formal AMP. Although most (particularly large sophisticated employers) consider it useful to have a formal AMP, no employer is obliged to have one. An employer is entitled to monitor and manage attendance on an informal ad hoc basis, notwithstanding the potential for problems inherent in doing so. Second, Bell's current AMP requires more than tweaking or minor repairs. It requires a significant overhaul. I do not consider it my job as grievance arbitrator to construct a new AMP for Bell. Bell is free to do so with the guidance offered in this Award (particularly paragraph 15, above), and to proceed on an ad hoc basis in the interim.

87. The grievance herein is therefore allowed to the extent that **I DECLARE THAT** the Bell AMP, both as constituted by the PAW Policy and the "Deck prepared for HR to share with BU (Feb 2016)" document (Exhibit #5 and Exhibit #6, T3 – described in paragraph 20, above) and as administered, constitutes an unreasonable exercise of management rights, contrary to Article 27 of the collective agreement, and that it is therefore not enforceable.

88. However and notwithstanding my commentary, including in paragraph 86, in order to avoid a vacuum and potential workplace or Human Resources chaos I consider it appropriate to suspend the effect and operation of my Declaration for a period of 90 days from the date of this Award.

89. I shall remain seized for the purposes of rectification, and to deal with any issue or dispute concerning the implementation or application of this Award.

DATED AT TORONTO THIS 17TH DAY OF JANUARY 2019.

George T. Surdykowski.

George T. Surdykowski – Sole Arbitrator