Employers Should Be Cautious In Enforcing Return-To-Office Policies

Companies can't afford to ignore requests to work from home for those who require accommodation protected by human rights legislation.

We have often extolled the benefits of employees returning to the office. Given the resistance many employers are encountering, it is critical they incentivize their staff to reenter the workplace while being fair to those employees who cannot.

In response to return-to-office policies or increased in-office days, many employees take to the Internet to complain. A common source of their frustration is the cost and time associated with commuting to work, especially when their day is filled with virtual meetings which they could just as easily have attended from home. Other employees claim to be more productive working from home, as they avoid unnecessary office chatter and overbearing micro-managers.

We disagree. In-office presence benefits employers and employees in significant ways, including more facetime, familiarity and mentorship, faster career development and growth opportunities for both the business and the individual. Our docketed hours went down 35 per cent when employees went home in March 2020 and rose again as soon as we reopened. Reports to the contrary by commentators and pollsters are generally subjective, if not wishful thinking.

Much of the disgruntled commentary can be ignored as it will fall off the radar into the abyss of social media.

What employers cannot afford to ignore though are requests to work from home by employees who require accommodation based on grounds protected by human rights legislation.

A pharmaceutical company, Octapharma Canada Inc., recently learned this when the Ontario Human Rights Tribunal awarded an applicant, Lidia Cosentino, more than $100,000, including $25,000 for general damages, based on the finding that it had failed to meaningfully engage in the accommodation process.

Cosentino worked as a health sales representative responsible for conducting in-person meetings with health care providers. During COVID-19, she began working remotely from home.

In August 2020, this nine-year employee formally requested accommodation to care for her mother who was undergoing chemotherapy and radiation treatment for cancer. As the only family member capable of caring for her mother, Cosentino asked her employer for flexibility in her work schedule to allow time to drive her mother to appointments. In making this request pursuant to her family status, Cosentino assured her general manager that she would make herself available whenever needed.

Initially, Octapharma accommodated Cosentino and allowed her greater flexibility in her working hours – at least for several weeks, until the company suddenly demanded Cosentino return to the office because of "business requirements" (which it did not specify).

The directive coincided with her mother's deteriorating health. During a phone call with her manager in October 2020, Cosentino explained that she could not attend the office as her mother was immunocompromised and she wished to limit her exposure to the COVID-19 virus. In response, the manager told Cosentino to "drop the COVID nonsense." For the tribunal, this was a hard pill to swallow, coming from a company specializing in immunotherapeutic pharmaceuticals.

After this phone call, Octapharma ceased communications with Cosentino. It offered no further options or flexibility. It ignored Cosentino's vacation request one month later. When she self-accommodated by continuing to work from home, Octapharma terminated her employment by couriered letter.

Cosentino's mother died less than three months later.

The tribunal was critical of Octapharma's conduct. It found that the company's lack of action to engage in the accommodation process was a failure of the employer's duty to inquire about the potential accommodation needs of Cosentino based on her family status obligations. Her allegation of reprisal was also successful, with the tribunal finding that Cosentino's attempt to self-accommodate was a factor in the decision to terminate her employment.

The decision offers employers a dose of reality in navigating the challenges of returning to in-office work and addressing requests for accommodations for family status.

Employers should be familiar with the meaning of "family status," which involves "the status of being in a parent and child relationship" and can encompass a diverse range of caregiving relationships, such as stepchildren or an extended elderly or disabled family member. Discrimination on the grounds of family status can be made when an employer's change to a term or condition of employment results in interference with a substantial parental or other family obligation.

A common issue we have observed is employees relying on their childcare obligations to thwart their employers' efforts to reinstate in-office work. It is imperative that employees show they have made all reasonable efforts to meet their childcare responsibilities before requesting accommodation. This means exhausting all available options, including canvassing the availability of daycare centres, making arrangements with extended family members and considering a nanny or babysitter.

Employers should maintain ongoing dialogue with an employee regarding a requested accommodation, specify why in-office attendance is necessary and propose alternate arrangements such as a hybrid work schedule and flexible hours. Of course, it is the employee's responsibility to provide information as to the nature of one's family responsibilities. It is impossible for an employer to engage in the accommodation process if it is unaware of the specifics behind the request. Simply advising one's

employer that he or she requires accommodations for “family reasons” is insufficient.

Employees must keep in mind that not every conflict between a family and work obligation is discriminatory. An employee only has the right to refuse to return to in-office work for legitimate necessary reasons based upon a legal human rights accommodation.

The Octapharma case illustrates the importance of employer-employee dialogue in addressing such requests.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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