I Want To Leave Work Early To Pick Up My Child. Does My Employer Have To Accommodate Me?



New employee rights, and concomitant employer obligations, are springing up with such frequency that this weekly column barely has room to catalogue them. Following is the latest addition.

Your employer denies your request for an hour shift change to allow you to pick up your child from school each day at 5 p.m. Can you now file a valid human rights complaint for discrimination based on family status? Absolutely. And, however unlikely to succeed there can be no reprisal for making the complaint.

But will you win? In its recent decision in Canada (Attorney General) v. Johnstone, the Federal Court of Appeal made its decision based on the answers to four questions:

Are you responsible for the child's supervision? This is fairly straightforward. If you are the parent, not a second cousin thrice removed, the answer is likely yes.

Have you searched for alternate, even pricier, solutions before asking to rearrange your schedule? You, not the employer, are the parent and you know your needs and are in the best position to find a workable solution. Your employer should ask why you need the change and what alternative options you have explored. For example, have you exhausted all familial resources, including Aunt Ella who doesn't like children and your 12-year-old niece who just got her babysitting licence? Have you also explored more costly options and all available government subsidies that could assist in offsetting additional costs?

Is it your need or responsibility to provide childcare rather than a personal choice? Your selection of childcare is likely a personal choice, regardless of how essential you feel your carbon footprint or vegan snack time is to your child's well being. To demand to be granted a shift (or any other workplace change), your childcare issue must be one you cannot legally neglect without engaging your responsibility under the Criminal Code or provincial legislation.

Requesting time off to attend a school play at 2 p.m. on a Wednesday because your child's school has no respect for working parents is not a legal responsibility, even if it leads to tears because Dad can't attend. Similarly irrelevant to your responsibility as a parent are your child's after school extracurricular activities.

On the other hand, having to leave work early because your child's daycare is closing due to flood warnings, and no one else can supervise the child until your shift ends, would likely trigger your legal child care responsibilities and entitle you to a shift change, at least for the day in question.

But even if your childcare issue is a responsibility rather than a personal choice, your employer is not required to provide you with your ideal schedule or other workplace change, only a change that is reasonable in the circumstances.

To ensure it is not taken advantage of, the employer should be asking about your particular childcare issue. For example, it may not require a permanent one-hour shift change, but rather a 30-minute change twice a week. The employer is entitled to know what flexibility the daycare allows, who else in your family might attend to the child's needs and what other daycare might be available that would not require its accommodation.

Does your current shift schedule interfere with your childcare needs in a more-than-trivial way? Are you seeking a stress free commute with time to swing by the grocery store? Or are you trying to avoid rushing through traffic and still being 30 minutes late for the close of daycare for a third time this week. The latter situation may justify a shift change.

If the answer to all four questions is yes, you might succeed in a human rights complaint against your employer. In each case, take a hard look at your alternative options before asking your employer.

The Federal Court of Appeal found that the employer should have granted Ms. Johnstone's request for a simple shift change three days a week, for which she was unable to secure any form of childcare, live-in or otherwise, near her home or work.

However, employees' increasing requests for special treatment can be far more nuanced and challenging. Employers should speak with employees about their options and seek legal advice before risking a human rights claim, which the publicity of this decision (as well as other recent ones involving elder-care) has just made far more likely.

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