Is COVID Justification for Employees to Stay Home and Care for Their Kids?

The answer likely depends on whether schools and daycare centres are open.

During the pandemic, employees have been refusing to come to work so they can take care of their kids. Are they allowed to do that? The answer depends, in large part, on whether the schools and daycare centres are open.

No Discipline of Any Kind Allowed If Schools Aren't Open

First and foremost, you may not discipline or in any way penalize employees for missing work to take care of kids who are stuck at home because their schools or daycare centres aren't open. Since the pandemic began, 11 jurisdictions have adopted unpaid leave for employees to carry out their caregiving responsibilities to kids or family members who contract the virus or are affected by school or daycare closures as a result of COVID (and, in some jurisdictions like ON, BC and NL, any other disease that's resulted in a public health emergency). And even in the other 3 jurisdictions without COVID leave (NS, NT and NU), employees can draw on their other family or compassionate leave rights.

However, COVID leave is unpaid and ends when the caregiving emergency prompting it comes to an end, such as when the schools reopen. Employees also have to give you some kind of notice of the leave and reasons for taking it. And while you can ask for reasonable verification, you can't ask for a doctor's note.

Employees' Rights to Accommodations

Unpaid COVID leave generally isn't available when schools and daycare centres remain open (assuming the employee isn't infected or required to be in self-isolation). However, employees may invoke their accommodation rights under human rights laws which ban discrimination on the basis of family status and require employers to make accommodations for family needs to the point of undue hardship. **The key question:** Is letting the employee stay home a necessary accommodation or undue hardship when schools are still open?

As is always the case when trying to draw the line between reasonable accommodation and undue hardship, the answer depends on the specific circumstances and situation involved. But one of the most important factors is the test that a court or arbitrator will use to rule on the question. There are competing standards used in different parts of the country to determine whether an employer must accommodate an employee's childcare scheduling needs.

1. The Pro-Employer *Campbell River* Standard (BC, NS, SK)

The oldest and most pro-employer standard arose from a 2004 BC case involving a social worker who complained that a shift change requiring her to work late afternoon hours directly interfered with her need to look after her behaviourally-challenged son after school. The employer held to the schedule change and the social worker sued. The question was whether the social worker had done enough to make out a valid case for claimed family status discrimination and deserved the chance to take her claim to trial.

The BC Court of Appeal said no and tossed the case right then and there. The employer's schedule demands clearly affected the social worker's family obligations, the Court acknowledged. But so would just about all employment policies to at least some degree. It would thus be unrealistic and "unworkable" to find a policy discriminatory merely because it affects an employee's family obligations. So, the Court laid down a stricter test. To make out a case of family status discrimination, the employee must prove that:

- The employer imposed a change in the terms of employment; and
- The change resulted in "serious interference" with a "substantial" family obligation.

[*Health Sciences Assoc. of B.C. v. Campbell River and North Island Transition Society*, 2004 BCCA 260 (CanLII)].

The so-called *Campbell River* standard is followed not only in BC but also Nova Scotia and Saskatchewan.

2. Pro-Employee *Johnstone* Test (FED)

Campbell River has been criticized as being too hard on employees. As a result, courts have created rival standards making it easier for employees to bring their family status discrimination claims to trial. The first comes from a federal case called *Johnstone v. Canada (Attorney-General)*, [2007] F.C.J. No. 43, aff'd 2008 FCA 101] finding that it was family status discrimination for an employer not to let an employee work a fixed schedule so she could make childcare arrangements. Under the so-called *Johnstone* test, employees must show 4 things to make out a case of family status discrimination:

- A child is under their care and supervision;
- A childcare obligation is more of a legal responsibility for the child than a personal choice;
- Efforts were made to find reasonable alternatives to meet those childcare obligations but not were available; and
- The employer's policy, e.g., requiring the employee to come to the office, interferes in a way that's more than trivial or insubstantial with the

fulfillment of a childcare obligation.

Bottom Line: *Johnstone* differs from *Campbell River* in 2 important ways:

- It covers all policies, not just *changes in* policies; and
- Employees need only show that the policy had an adverse effect on them to make out a case.

3. Hybrid Tests (AB, ON)

Alberta and Ontario use hybrid tests that are less strict than *Johnstone* but not as lenient as *Campbell River*, called, respectively, the *SMS Equipment* test and *Misetich* test. Click here for more detail and technical analysis of the Alberta and Ontario standards.

Takeaway

Employees who choose to stay home with their kids when the schools and daycare centres remain open will have a hard time making out a case for discrimination. Regardless of which jurisdiction you're in and which test a court would use to decide the question, the employee's mere personal preferences in childcare arrangements aren't enough. The fact that the schools and daycare centres are open reflects the government's judgment that they're safe. To counteract that, the employee would have to show that there's some compelling reason to keep the child home, such as the school's failure to comply with COVID public health guidelines or a diabetic or other condition increasing the child's susceptibility.

Even so, you must take employees' accommodations requests seriously and not dismiss them out of hand. That means asking questions to determine whether the request to stay home when schools or daycare centres are open is just a personal preference or a compelling need.