GOVERNMENT LICENSED PROFESSIONALS

PEA BULLETIN

DUTY TO ACCOMMODATE AND EMPLOYER POLICY REGARDING PART TIME RETURN TO WORK

Medical Information

As an employee, your medical information is generally considered private and confidential. However, it is well established in law that an employer is entitled to access sufficient information for legitimate purposes, including ensuring that an employee can continue to work or return to work, or to provide appropriate accommodation.

An employer is only entitled to information which is reasonably necessary for the purpose (return to work or accommodation) and must be gathered in the least intrusive way. As the Employer states in the BC Public Service COVID-19 Response FAQs ("FAQ"), an employee's diagnosis is confidential, so in most circumstances an employee will only have to disclose a prognosis for accommodation purposes (at #8).

More information is generally required, and a greater intrusion on employee privacy is therefore necessary, when accommodation is the issue. An employer has a legitimate need for sufficient information for it to discharge its duty of accommodation. An employee cannot expect accommodation where they refuse to disclose the necessary information.

However, the information requested by an employer must relate to the operation of the workplace and the job duties of the employee and be relevant to the time period of the absence.

Arbitral law shows that the following information has been required for the accommodation process:

1. The nature of the illness and how it manifests as a disability.

2. Whether the disability (or illness) is permanent or temporary, and the prognosis in that respect (i.e. the extent to which improvement is anticipated, and the time frame for same).

3. The restrictions or limitations that flow from the disability (i.e. a detailed synopsis of what the employee can and cannot do in relation to the duties and responsibilities of her normal job duties, and possible alternative duties).

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4. The basis for the medical conclusions (i.e. nature of illness and disability, prognosis, restrictions).

5. Whether a treatment or medication the employee is taking will affect the employee's ability to perform job duties in a satisfactory and safe manner.

The Employer has outlined in the FAQ's (at #8) that the BCCDC advises that people with certain chronic health conditions may consider protective self-separation since they are at a higher risk of developing more severe illness from COVID-19. This section implies that employees with chronic health conditions will be accommodated and permitted to continue working from home if they so choose.

As an employee, once you have provided enough medical information to show the nature and extent of the accommodation you require, the Employer has a duty to accommodate you to the point of undue hardship, which can include continuing to work from home.

Family Status

Family status is a protected ground of discrimination under human rights legislation that is commonly experienced but rarely litigated. Despite the prevalence of conflicts between family responsibilities and work, there have been relatively few examples of successful claims challenging discrimination and requesting accommodation on the basis of family status in British Columbia.

The definition of "family status" includes both "relatives" (the familial relationship to a particular individual) or "absolute" family status (for example being a parent or child).

So, employees who are concerned about returning to the office because of child care issues or concerns over family members with chronic illnesses in their households, may need to be accommodated based on their family status. However, in British Columbia adjudicators have taken the path of trying to restrict the right.

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The Campbell River test is the leading case for determining discrimination based on family status in BC. For an employee to make out a case of discrimination they must show that a change in a term or condition of employment imposed by the Employer results in a serious interference with a substantial parental or other family duty or obligation. Convincing and complete evidence of one's family responsibilities will be required to show that accommodation is required.

The test set out in Campbell River for a finding of prima facie discrimination is far more restrictive than the test for other grounds, which places serious limits on those trying to access the protections of the Code.

Several provisions of the FAQs address potential family status issues employees may face with the return to the office plan. At #25 the Employer says that it will address daycare and family issues through open dialogue with supervisors and a problem solving approach. At #9 the FAQs say that not returning to work because of a concern for someone in your home with a chronic health condition does not have a medical basis. However, both of these concerns should be raised with a supervisor in hopes that an agreement or accommodation can be reached.

In summary, the law on family status in British Columbia remains unsettled so it can be difficult to determine which family status situations will attract a duty to accommodate.

Don't Want to Return

Unfortunately, employees not wanting to return to work part-time (while continuing to work their remaining hours at home) for reasons unrelated to a protected ground (i.e. medical or family status) does not give rise to the Employer's duty to accommodate. It is within the Employer's right to set hours and place of work, and therefore, to mandate the return to work of employees.

However, this Employer right is subject to reasonableness and the right of employees to refuse unsafe work. Given that the Employer has a detailed COVID-19 Safety Plan that will likely meet the requirements set out by WorkSafe BC, it is unlikely that you could refuse to work on the basis that it is unsafe.

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The FAQ guide provided by the Employer suggests that employees speak to their supervisors about the reasons they do not want to return to work. FAQ #25 states:

An open conversation about the barrier to return to work is important. It may arise from daycare, public transit concerns, family issues or apprehension. It is recommended supervisors use a coaching approach to support employees in problem solving the situation.

However, the Employer has no duty to accommodate employees in most of those circumstances (they may have a duty to accommodate in relation to family issues as discussed above). Conversely, it is (as discussed above) likely that a health concern related to possible serious effects of exposure to COVID-19 would require the Employer to consider accommodation.

The Employer has said that where they are not required to make an accommodation, individual ministries may consider alternative work arrangements depending on operational requirements and the employee's individual circumstances (FAQ, #7). But, the Employer is not required to make alternative arrangements.

As an employee, you can ask to go on an unpaid leave because they do not want to return to work in-office, but again, the Employer is under no legal obligation to grant a leave request.

Duty to Accommodate

The Employer has a duty to accommodate an employee who possess a protected characteristic under the BC Human Rights Code (i.e. physical or mental disability, family status, etc.).

The Employer's FAQ, at #7, nicely summarizes the steps in the duty to accommodate:

[The Employer] must determine whether there is a duty to accommodate and must assess the employee's situation in light of the information, including medical information, they are able to provide as to why they cannot work at the workplace. The supervisor should have a discussion with the employee about their circumstances, including their limitations and restrictions, and should discuss safety procedures at the worksite.

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Some of the factors to be considered in determining whether an employer has accommodated an employee to the point of undue hardship are as follows:

1. Interchangeability of the workforce and facilities;

2. Whether the employee's job itself exacerbates the disability;

3. The extent of the disruption of a Collective Agreement;

4. The effects on the rights of other employees;

5. The effect on the morale of other employees;

6. Costs to the employer of the proposed accommodation, including impact on efficiency, wage increases and other direct financial costs to be incurred; and

7. The impact on the safety of the individual, other employees or the general public.

As discussed above, in order for the Employer to accommodate an employee, an employee will be required to provide personal information, including personal medical information, to the Employer.
Arbitral law demonstrates that employers must first assess the extent of an employee's disability in their actual work situation, which is done in part by gathering medical information. Then, consideration should be given to whether any aspect of the job, including the hours and place of work, can be modified so that the employee can still perform it.