MANAGEMENT COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

If an employee expresses reluctance to attend work, the first question to ask is **why?** It is important to get a clear understanding of the basis for the employee's reluctance because this will impact how you respond.

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Managing Employee Work Refusal in a COVID-19 World

The COVID-19 pandemic has created unprecedented challenges for employers and employees. Among the most pressing is employee reluctance to attend work, whether due to health and safety concerns, family obligations, medical restrictions or a desire to remain on government benefits. In this article, we introduce strategies to manage these issues. But, remember – every case has its own facts and context. It is important to evaluate each on its own merits, and not apply a cookie-cutter approach that may expose your organization to unnecessary risk.

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If the reason is fear of COVID-19 in the workplace

Across Canada, an employer has a legal obligation to take every precaution reasonable to protect the health and safety of its employees. An employee may refuse to perform work if the employee holds a *bona fide* belief a physical condition in the workplace constitutes a risk to their health or safety[1]. Generally, this involves concern over equipment or machinery. However, it is possible "physical condition" may also include concern for the spread of a serious illness such as COVID-19.

It is therefore important to have a comprehensive, written "return to work policy or protocol" which you can use to both educate and guide employees.

If the reluctance to attend work is related to a fear of COVID-19 in the workplace, the first step is to **educate** the employee on all the health and safety precautions the employer has taken to reduce transmission of the virus. In many cases, this education will be sufficient to encourage the employee to attend. It is therefore important to have a comprehensive, written "return to work policy or protocol" which you can use to both educate and guide employees.

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If the employee continues to refuse to work, this may be addressed as a work refusal under occupational health and safety legislation. In that case, follow these steps:

- Place the employee in an area where the employee is safe.
- Investigate the circumstances surrounding the refusal. The investigation must include a worker representative of the Joint Health and Safety Committee, as applicable.
- If there is an *objective* risk, address the risk.
- If there is no objective risk, advise the employee of the outcome of the investigation and ask the employee to attend work. If the employee refuses, contact your health and safety authority (*e.g.,* ministry of labour) to perform its own investigation.
- If your health and safety authority confirms there is no reasonable risk, and the employee continues to refuse to attend work, the employee may be disciplined.

If the reason is related to the employee's age, health condition or family obligations

If the reluctance to attend work is related to the employee's age (*e.g.* if over 70), medical condition, or family obligations, the employee may be entitled to a statutorily protected leave under employment standards legislation, or an accommodation under human rights legislation.

At the outset of the COVID-19 pandemic, most Canadian jurisdictions passed legislation to provide unpaid, job-protected leave for an employee unable to work for reasons related to COVID-19 ("COVID-19 leave"). In many jurisdictions, this includes time off to care for a child who is at home due to a school or daycare closure by an emergency order, or a family member who must isolate. If an employee requests a COVID-19 leave, you can request information reasonable in the circumstance to verify the need for the leave (*e.g.,* direction from public health, notice of school closure, *etc.*). However, in most jurisdictions you cannot request a medical certificate.

On the other hand, if an employee's request for time off does not fall within a COVID-19 leave, this may be a request for accommodation under human rights legislation on the basis of age, disability or family status.

If you are not sure whether a request falls under a COVID-19 leave or accommodation, consult with experienced employment law counsel.

If the reason is a general desire not to attend work

If the employee's reluctance to attend work is not related to a specific concern about COVID-19 in the workplace, or a reason that would trigger human rights accommodation, then it may be related to:

- A general fear of leaving home due to COVID-19 (*e.g.,* being in the public, taking public transit, *etc.*); or
- A financial disincentive to attend if the employee's income is relatively equal to, or less than, the monthly Canada Emergency Response Benefit or other benefit.

In these circumstances, continued failure to attend work may ultimately be treated as a resignation from employment[2] or grounds for termination with cause. However, before ending the employment relationship, consider these steps:

- Advise the employee in writing that they are expected to attend work, and failure to do so may be treated as a resignation, or grounds for termination with cause.
- Educate the employee on safe practices to reduce risk, as well as all of the precautions that have been taken by the employer to minimize the risk of workplace transmission.
- Advise the employee if the employee resigns or is terminated for cause, this may impact continued entitlement to government benefits, such as the Canada Emergency Response Benefit and Employment Insurance.
- In a unionized context, consider whether the collective agreement allows you to apply the administrative termination provisions (*i.e.,* if the employee fails to return to work within a prescribed period after notice of recall). Be alert to any provision in the collective agreement that entitles an employee to a leave of absence on request, subject to operational requirements.
- Document the steps taken in the event the termination is later challenged.

For assistance navigating these uncharted waters, seek the help of experienced employment law counsel. The team at Sherrard Kuzz LLP can assist.

[1]Certain groups of employees are not entitled to refuse to perform work on health and safety-related grounds (*e.g.,* police, firefighters, and hospital, long term care or group home employees, *etc.*).

[2]"Deemed resignation" is not without risk; as a resignation must be clear and unequivocal.

DID YOU KNOW?

By January 1, 2021, an organization with 50 or more employees in Ontario must ensure its websites and web content meet the accessibility requirements under the World Wide Web Consortium Web Content Accessibility Guidelines (WCAG) 2.0, at Level AA.

Court Finds Bank Permitted Employees to Work Uncompensated Overtime Hours Contrary to Canada Labour Code

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In a class action filed on behalf of 31,000 current and former CIBC employees, the Ontario Superior Court of Justice found the bank's overtime policies violated the *Canada Labour Code* (the "*Code*")[1]. The core allegation was that, throughout the 16 years in question, thousands of front-line bank employees were not properly compensated for overtime work. The representative plaintiff sought **$600 million** in general, punitive, aggravated and exemplary damages. The bank was found liable, although the court has yet to determine the amount owing.

This decision is a stark reminder to **all** Canadian employers of the need to accurately track and pay out overtime hours. Although this class action was brought under the *Code* (applicable to federally regulated employers), similar overtime language can be found in provincial legislation across Canada.

The obligation to pay overtime

Under sections 169 and 174 of the *Code,* an employee's standard hours of work cannot exceed eight hours per day and forty hours per week. If an employee is **"required or permitted"** to work more than the standard hours of work, the employee must be paid time and a half. Further, every employer is required to record the hours worked each day by every employee and keep this information on file for at least three years.

The Ontario Superior Court had no difficulty interpreting the word "required". The question was whether "permitted" should be interpreted narrowly in favour of the bank (meaning "impliedly required") or more broadly favouring the employees (meaning "allowed" or "not prevented"). The court chose the latter, relying on a Supreme Court of Canada decision in which that court encouraged a broad interpretation of employment standards legislation:

> The harm which the Act seeks to remedy is that individual employees, and, in particular non-unionized employees, are often in an unequal bargaining position in relation to their employers… Accordingly, an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not.[2]

CIBC's overtime policies

For the most part, CIBC's overtime policies required an employee to obtain approval before working overtime. Only in "extenuating circumstances" could approval be sought after the fact.

In reality, though, approval was rarely sought or received (prior or post). Instead, the evidence before the court was that overtime was expected and often worked without compensation; pre-approval was difficult and impractical to secure; employees were discouraged from filling time sheets that recorded overtime; and many employees were afraid to claim overtime for fear this would negatively impact their employment and/or advancement at the bank.

In short, the evidence was that overtime was often worked but rarely compensated, and CIBC was aware of this. The court found this to be a systemic breach of the overtime provisions of the *Code:*

> The defendant bank … had both a statutory and contractual duty to prevent or not permit [employees] from working overtime hours for which they were not properly compensated or for which the defendant would not pay.
>
> *Did the defendant breach these duties?*
>
> ***Answer:*** Yes
>
> …
>
> There is nothing wrong with an overtime policy that proposes pre-authorization as the preferred corporate norm provided that the policy also makes clear that neither pre-approval nor "post-approval in extenuating circumstances" are preconditions for payment – that overtime must and will be paid whenever overtime hours were required or permitted, full stop.

Lessons learned for employers

CIBC's overtime policies and practices were found to have breached the *Code* in several ways:

- They made it possible for overtime to be worked but not paid
- The bank failed to record actual hours worked each day
- The responsibility to interpret and enforce the overtime policies was left to bank managers, without any guidance or direction

To avoid a similar fate, review the overtime provisions of the legislation applicable to your workplace, and consider these best practices:

- Ensure overtime is properly recorded
- As much as it may be tempting, do not turn a blind eye to, or encourage, unclaimed overtime
- If your company policy requires pre-approval of overtime hours, educate employees on how to obtain approval
- Train managers on how to fairly and consistently administer your overtime policy

For more information and/or assistance, contact a member of the Sherrard Kuzz team.

[1] *Fresco v Canadian Imperial Bank of Commerce,* 2020 ONSC 75
[2] *Machtinger v HOJ Industries ltd.,* [1992] 1 SCR 986.

Please join us at our next HReview Breakfast Seminar:

HReview
Seminar Series

Accommodation Update:

New and Important Decisions in Human Rights Law

Workplace accommodation can be a challenge for even the most seasoned HR professional. Join us as we discuss recent human rights decisions and how they might impact your workplace. Topics include:

1. Disability Accommodation

- Must an employer accommodate an employee's commute-related restrictions?
- Is an employee entitled to the employee's preferred accommodation?
- What, if any, accommodation is required when an employee claims return to work during COVID-19 causes anxiety and discomfort?

2. Family Status Discrimination

- Must an employer accommodate an employee's child care preferences?
- Does COVID-19 impact the decision-making?
- Does an employer "set a precedent" by agreeing to a flexible start time?

3. Drugs and Alcohol in the Workplace

- Can an employee be dismissed for failing to participate in a drug or alcohol test?
- Recent case law on accommodation of a substance use disorder.

DATE: **Wednesday, September 23, 2020. 9:00 a.m. – 10:30 a.m.**
WEBINAR: **Via Zoom** (registrants will receive a Zoom link the day before the webinar)
COST: Complimentary
REGISTER: **By September 11, 2020 here**

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