



Workplace accommodation on Covid-19 hinges on 'disability' designation, labour lawyer says

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Erin Kuzz of Sherrard Kuzz LLP says workplace accommodation for employees rests on disability designation

Case law in Canada has yet to definitively decide on whether being diagnosed with Covid-19 is a disability, but human rights tribunals here have generally viewed that it should be, says employment and labour law specialist Erin Kuzz.

“There has been a bit of evolution on the discussion of whether Covid-19 is a disability since it [the pandemic] began,” says Kuzz, founding members of Toronto-based Sherrard Kuzz LLP. Earlier this year, when the novel coronavirus started to spread across the globe, there was a lot of discussion of whether it was a disability or not, that it was simply “was a bad cold or case of the flu.”

However, she says, if you look at how human rights tribunals, such as the Ontario Human Rights Commission, have looked at the concept of a disability – “that there is a serious impediment to engaging in the tasks of daily life, that it is not something common in the population” – Covid-19 meets that criteria, she says.

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“I think as things have evolved, the argument that it's not a disability is not one that's likely to be successful today,” Kuzz says.

Within the context of treating a Covid-19 diagnosis as a disability, it puts into play several factors, Kuzz says. If someone has a positive Covid-19 test, “we obviously can't have them in the workplace,” she says, but they may be healthy enough to continue to do their work from home. “Particularly in a situation where an employer has been requiring staff to work from home, and that has proven successful, it would be pretty challenging for an employer to say we can't accommodate you working from home.”

While most jurisdictions in Canada have given employees with Covid-19 related issues the right to unpaid leave with job protection, the fact that it is unpaid leave might prompt some workers with mild cases of the virus to want to continue to work, with pay and benefits, from home. She adds this wouldn't be an option for someone who works on an assembly line or has a job where they are dealing with the public.

Kuzz also notes that there may be employees who are not diagnosed with Covid-19 but simply feel uncomfortable about returning to the workplace. Kuzz says that while there may be “family status” issues that could oblige an employer to accommodate an employee who asks to work from home, for the most part, Kuzz says employers would have the right to expect employees return to the workplace if public health and safety standards are maintained.

The medical and public health community is getting a better handle on understanding the virus in many ways, Kuzz says. Some of the fears that initially accompanied the pandemic and its spread have been alleviated, and employers have also been proactive in taking precautions, such as putting up plexiglass barriers, ensuring six-foot

social distancing, and working with public health authorities on contact tracing.

Kuzz says that many of the concerns from employees wanting to be accommodated to work from home stem from getting to the workplace, such as using public transit. “In those cases, the underlying concern is someone feeling uncomfortable being out of the home, and nothing to do with the workplace itself,” she says. “A lot of those issues can be solved with education, helping people understand where the risks come from and taking the right precautions.”

Kuzz suggests one way of handling a situation where someone is particularly concerned about getting Covid-19 from a fellow employee or member of the public is moving them to a job where they would have less contact with people. For example, she says in retail, it might be working in the backroom rather than on the floor.

Another issue Kuzz says she is hearing about is parents who want to continue to work from home, because they don’t want to send their children back to school or daycare. “Family accommodation” is guaranteed in cases where there is a proven disability that would compromise a family member should he or she contract Covid-19. But until a human rights tribunal says differently, Kuzz says there “is no obligation for an employer to accommodate all parental preferences and choices,” and that documentation would be needed to show why special accommodation would be needed.

As for how to tell employees about a case of Covid-19 in the workplace, Kuzz says there are privacy concerns surrounding personal health information and what can be disclosed. “It’s a delicate balance,” she says. “Our recommendation is for employers to make an announcement that a colleague contracted Covid-19 and suggest that employees get tested if they are concerned, take precautions, and expect public health contact tracing staff will be in touch if necessary.”

If someone suggests they have a “right to know,” who in the workplace has been diagnosed with Covid-19, Kuzz says the diplomatic response from an employer is to say: “Just as you would want us to respect the privacy of your personal health information, we need to do that with everyone.”

Kuzz will be speaking at *Canadian Lawyer’s* [upcoming webinar: Workplace Accommodation: An Employer’s Duty in the COVID-19 Era](#), which will take place on August 12, 12 pm EST.

