Readers' Corner

Dear readers, this section of the magazine belongs to you. We welcome your comments on articles in the magazine, IAAC's activities, government policies, and whatever you deem important. You can also ask questions about anything related to fertility, and our experts will be happy to answer. Write to us at info@iaac.ca*

Ask an Expert

Q: I am a regular employee (not part of management) at an Ontario nursing home. I have great difficulty getting time off to undergo fertility treatments and have received very negative feedback from my employer. Is infertility officially recognized as a disease (it is by the World Health Organization) and do I have any legal rights or recourses?

A : Randy Slepchik:

As a legal counsel working primarily with unions, I will address this situation for a unionized employee. The first step for an employee is to submit appropriate medical documentation to their employer speaking to their need for treatment. If the employer is not willing to reasonably accommodate such treatment, the employee should speak with their union representative who may be able to address this matter with their employer. If the employer unreasonably denies the accommodation, the union may very well launch a grievance alleging discrimination and a breach of the employee's human rights.

Under Human Rights law, infertility has been recognized as a disability, not in the practical sense, but for the purposes of triggering an employer's obligations under Provincial & Federal Human Rights legislation. These laws protect employees from discrimination on Human Rights grounds. As my colleague Anatoly Dvorkin mentioned (see page 67), the employer is required to accommodate an employee's disability "up to the point of undue hardship". In a unionized workplace, it is important to note that the obligation to accommodate a disability also falls upon the union. For example, a union may have to overlook seniority rules with regards to shift scheduling if the employee undergoing fertility treatments requires specific shifts or more time off than he or she would normally be entitled to under collective agreement rules for seniority.

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** N.B. These articles ought not be relied on for legal advice, and cannot take the place of consultation with a lawyer.*

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A : Anatoly Dvorkin:

Whether you are part of management and whether infertility is recognized as a disease are irrelevant. What matters is your employment contract (if any), the number of employees at the nursing home, its policies (if any) with respect to personal leave or "sick days" and whether infertility is a **disability**.

In Ontario, the employment relationship is governed by legislation, including the Employment Standards Act ("ESA") and the Ontario Human Rights Code ("Code"), as well as the Common Law. The ESA sets out **minimum** standards for conditions of employment while the Code prohibits discrimination against disadvantaged groups. According to section 50 of the ESA, if your employer regularly employs 50 people or more, you are entitled to an unpaid leave of absence not exceeding 10 days in a calendar year for personal illness, injury or medical emergency (known as personal emergency leave). If your nursing home fits in the 50 employees or more category, the question then is whether infertility qualifies as an illness, injury or medical emergency. Although the analysis may differ from province to province (or territory), I expect that it would not differ greatly, perhaps with the exception of Quebec.

Although I am unaware of any court decisions dealing with this question, the Ontario Ministry of Labour's Guide to the Employment Standards Act provides some guidance. It states that "All illnesses, injuries and medical emergencies of the employee … will qualify an employee for personal emergency leave." Generally, employees are entitled to take personal emergency leave for preplanned (elective) surgery. Although such surgery is scheduled ahead of time (and therefore not a medical "emergency"), surgeries performed because of an illness or injury will entitle an employee to personal emergency leave.

In my opinion, an employer of 50 or more employees would be faced with an uphill battle if it tried to prevent an employee from utilising the personal emergency leave for the purpose of attending medical appointments to deal with infertility issues.

However, I understand that fertility treatments may require that an employee be absent from work for more than 10 days in a calendar year and that many employees work for employers that employ fewer than 50 employees.

An employee who is not entitled to personal emergency leave under the ESA should look to his or her employment contract, which will often stipulate how much personal time or "sick days" an employee is entitled to take off from work each year. If there is no written employment contract, the employee should investigate whether the employer has a policy dealing with time off work for personal reasons. In the event that no such policy exists and the parties did not enter into an employment contract (or if the employment contract is silent on this issue), the employee should speak with the employer about the employer's policy and seek to obtain the employer's consent to his or her taking time off to attend medical appointments and to recover from any procedures. If an employer refuses to allow an employee any or sufficient personal time or "sick days", the employee may have to resort to using his or her vacation time. Likewise, an employee who is entitled to personal emergency leave under the ESA but requires more than 10 days off work may have to resort to using vacation time for the additional days off.

The above analysis is just the starting point. Perhaps the essential consideration is whether the Code requires employers to allow employees undergoing fertility treatments sufficient time off work to attend medical appointments, recuperate from procedures and/or simply avoid stressful situations which may impact the success of the treatments.

Under the Code, in the context of employment, everyone has the right to be free from discrimination because of disability or perceived disability. The Supreme Court of Canada and other appellate courts throughout the country have affirmed that this means that persons with disabilities must be accommodated by employers to the point of undue hardship. The most important question becomes whether infertility is a disability within the meaning of the Code. On this point, there are court decisions which affirm that infertility is a disability. As such, an employer has a positive duty to accommodate an employee dealing with infertility to the point of undue hardship (although what that means practically will vary with each situation and depend on several factors).

Accommodating an employee does not necessarily entail providing a leave of absence; rather, depending on the situation, it may mean a temporary reassignment to a less stressful role or fewer hours or more administrative assistance. What is clear, however, is that it would be contrary to the Code for an employer to be disrespectful, marginalize or penalize an employee undergoing fertility treatments as this would amount to discriminatory behaviour contrary to the Code. Similarly, an employer that has a policy regarding time off work for "sick leave" or personal time must apply that policy equally to all employees whether the employee requires chiropractic care for a disabling back injury or fertility treatments.

In short, if you are undergoing fertility treatments, you likely do have rights that you can assert if your employer is not cooperative or worse still, giving you negative feedback for the sole reason that you require some time off work for undergoing medically necessary procedures. As there are numerous factors that will affect your rights, you should be sure to consult a qualified employment or labour lawyer before taking any steps. ■

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