



Employment and Labour Webinar

COVID case law update

| Tuesday, October 5, 2021

Introduction. Welcome!

Today, we will be covering 6 topics:

- (1) Unpaid Leave and Layoffs;
- (2) "Return to Office" and Remote Work
- (3) Vaccine Mandates
- (4) Workplace COVID Testing
- (5) The Law of Dismissal and COVID-19
- (6) Mandatory Masks and Human Rights



Unpaid Leave and Layoffs

- The “COVID period” under s.50.1 of the *Employment Standards Act* was recently extended to January 1, 2022. During this period, a non-unionized employee is deemed to be on unpaid infectious disease emergency leave if their hours are temporarily reduced or eliminated due to COVID-19.



Unpaid Leave and Layoffs

- There are conflicting Ontario judgments on whether s.50.1 and O Reg 228/20, otherwise called *Infectious Disease Emergency Leave* (IDEL), of the *Employment Standards Act* ousts the common law of constructive dismissal.
- Temporary layoffs can amount to constructive dismissal despite IDEL:
 - *Coutinho v. Ocular Health Centre Ltd.*, 2021 ONSC 3076.
 - *Fogelman v IFG*, 2021 ONSC 4042.
- Temporary Layoffs cannot amount to constructive dismissal, given IDEL.
 - *Taylor v. Hanley Hospitality Inc.*, 2021 ONSC 3135.

“Return to Office” and Remote Work

- Employers are generally permitted to require employees to work on site.
- However, employers have *Human Rights Code* obligations to provide reasonable accommodation to employees (s.24).
- Employers also have obligations under the *Occupational Health and Safety Act* to provide a safe workplace (part III).



Vaccine Mandates

- No law prohibits employers from mandating employee COVID 19 vaccinations.
- However, employers wishing to implement mandatory vaccination policies still face several risks:
 - Constructive dismissal.
 - *Human Rights Code* compliance (i.e., reasonable accommodation).
 - Privacy Legislation compliance.

Mandatory COVID Testing

- *Caressant Care Nursing & Retirement Homes v Christian Labour Association of Canada*
- *EllisDon Construction Ltd. And LIUNA, Local 183 (Rapid Testing Grievance), Re.*
- *Unilever Canada Inc. v United Food and Commercial Workers, Local 175*

The Law of Dismissal and COVID-19

- The issue of reasonable notice for dismissal has arisen frequently in court during the pandemic.
 - *Herreros v Glencore Canada*, 2021 ONSC 5010.
 - The pandemic was not relevant to assessing the availability of similar employment because the employee was dismissed in Oct 2019.
 - *Kraft v Firepower Financial Corp*, 2021 ONSC 4962.
 - The employee deserved “somewhat above average” notice period due to the pandemic.
 - *Abdon v Brandt Industries Canada Ltd*, 2021 SKPC 37.
 - The employee tendered no evidence that the pandemic negatively affected their job search.

| The Law of Dismissal and COVID-19

- *Iriotakis v Peninsula Employment Services Limited*, 2021 ONSC 998.
 - Uncertainties in the job market was a factor in favor of a longer notice period.
- *Yee v. Hudson's Bay Company*, 2021 ONSC 387.
 - Provides general commentary on COVID-19 and notice period calculations.
- See also *Hogan v. 1187938 B.C. Ltd.*, 2021 BCSC 1021.
 - CERB payments were deducted from a reasonable notice damages award.

| The Law of Dismissal and COVID-19

- Likewise, the COVID-19 pandemic has affected courts' assessments of an employee's duty to mitigate:
 - *Kosteckyj v. Paramount Resources Ltd.*, 2021 ABQB 225.
 - The employee's efforts to mitigate were adequate in light of COVID pandemic.
 - *Moore v Instow Enterprises Ltd*, 2021 BCSC 930.
 - Court reduced notice period by 3 months for failure to mitigate.

Mandatory Masks & Human Rights

- *Reed v. Allan Pipe Fab Inc.*, 2021 CarswellOnt 3221 (OLRB)
 - Successful unlawful reprisal claim under *OHSA* made by welding employee who refused to wear mask that impaired their vision via prescription glasses.
- *The Worker v. The District Managers*, 2021 BCHRT 41.
 - Unsuccessful claim by worker alleging mask requirement constituted religious discrimination. Claim was based on opinion, not sincerely held religious belief.


Mandatory Masks & Human Rights

- *Christiansen v. MedRay Imaging*, 2021 BCHRT 107.
 - X-Ray clinic who was unaware of individual's need for accommodation regarding mask policy was not under an obligation to provide it.
- *Rael v. Cartwright Jewelers and another*, 2021 BCHRT 106
 - "Breathing issues", without further specificity, resulting from wearing a face mask does not amount to a protected disability.

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