

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 Emergecy 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 <u>cannot</u> 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.

Laura Brazil

Litigation & Dispute Resolution

Toronto

416.865.7814

□ laura.brazil@mcmillan.ca



David Fanjoy

Employment & Labour Relations

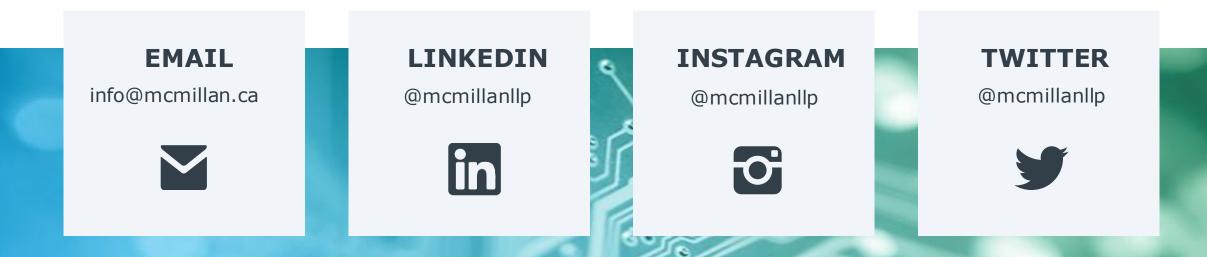
Toronto

416.865.7072





Get in Touch



If you have any questions about McMillan, or how we may help you with your legal needs, please get in touch with us.