

NO CONSTRUCTIVE DISMISSAL FOR VACCINATION REFUSAL

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A recent Alberta decision affirms that an employer's reasonable vaccination policy will be upheld.

Background

In *Van Hee v Glenmore Inn Holdings Ltd.*, 2023 ABCJ 244 a server employee alleged she was constructively dismissed after her hotel employer instituted a mandatory COVID-19 vaccination policy (the "**Policy**"). The Policy was introduced in mid-September 2021 during the fourth wave of COVID-19 in Alberta, which was a serious public health emergency.

The employer had communicated that failure to be vaccinated would result in employees being placed on an unpaid leave of absence. The Policy allowed for accommodation based on protected human rights grounds, but the employee's physician denied her a medical exemption, thus there was no duty to accommodate. When the employee failed to become vaccinated, she was placed on an unpaid leave of absence. A few weeks after her leave of absence, her lawyer sent the employer a draft Civil Claim alleging constructive dismissal and discrimination, which the employer took as her resigning.

The Decision

The Court determined that the unpaid leave of absence was not a constructive dismissal; it was not a unilateral change that substantially altered the essential terms of the employment contract. The Court determined the leave of absence was reasonable and justified, based on the following factors:

1. Duration of the leave: even though there was no end date, the leave of absence was to continue until either the employee met the vaccination requirements or public health guidelines changed. In the pandemic context, the Court found this duration reasonable.
2. Pay for the leave: while the leave was without pay, the employer offered to the employee to continue receiving her benefits, and it was reasonable for the leave to be unpaid.^[1]
3. Leave in good faith for legitimate business reasons: the employer was required to take reasonable steps to protect the health and safety of its employees and the public,^[2] even if it was not subject to an explicit government or health authority vaccination mandate. This was particularly true given the business of the hotel was dependent on providing face-to-face services. The Policy applied uniformly to guests and

employees to ensure everyone's safety, in relation to which the Court specifically noted "To apply the Policy in any other manner would have risked an outbreak and a temporary closing of the business". Further, the unpaid leave was not disciplinary, and the employee could have returned to work when she got vaccinated or the public health guidelines changed.

Further, the Court found the employee resigned when her lawyer sent the employer a draft Civil Claim, as such "conduct was inconsistent with the continuation of an employment relationship between the parties".

Takeaways

This decision is a positive one for employers because it reminds employees that:

- while they are free to take a principled stance on not becoming vaccinated, that does not entitle them to continue working to jeopardize other employees' health and safety and an employer's business; and
- the practice of sending a draft court claim while employed is serious enough that it could mean the employee will be found to have resigned, and thus not have any termination entitlements.

This decision also provides further support to employers that had to act swiftly during crucial times in the pandemic, recognizing the health and safety and operational difficulties they faced. While a leave of absence is not a decision many employers take lightly—which should also be undertaken with legal advice—it can often be a reasonable measure in times of uncertainty. Employers should still be mindful that any constructive dismissal case, including related to mandatory vaccination and leaves of absence, will turn on its specific facts and context.

[1] Similarly, in another Alberta decision, [Benke v Loblaw Companies Limited](#), 2022 ABQB 461 the Court found the employer had no obligation to pay the employee while on a leave of absence for voluntarily choosing to not wear a mask to comply with a mandatory mask policy during the COVID-19 pandemic.

[2] The Court supported an earlier British Columbia decision that also upheld an unpaid leave of absence for an employee's refusal to comply with a mandatory vaccination policy, which was reasonably instituted in response to the uncertainty of the COVID-19 pandemic to balance the employer's business interests with employee and client health and safety. See our [bulletin on Parmar v Tribe Management Inc.](#), 2022 BCSC 1675.

by [Ioana Pantis](#) and [Gordana Ivanovic](#)

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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