

UNPAID LEAVE FOR FAILURE TO VACCINATE NOT A TERMINATION OF EMPLOYMENT

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In the first civil case since mandatory vaccination policies have become widely implemented by employers throughout Canada, a British Columbia Court has ruled on the validity of mandatory vaccination policies and an employer's right to place non-compliant employees on an unpaid leave of absence.

This decision is significant in that the Court concluded that placing the Plaintiff on an unpaid leave of absence in the circumstances of this case did not amount to a constructive dismissal and any damages she suffered was as a result of her personal choice to remain unvaccinated. In previous decisions, the Courts have held that an unpaid leave of absence amounted to a constructive dismissal and entitled employees to compensation.

The Facts

In *Parmar v. Tribe Management Inc.*, 2022 BCSC 1675, the Defendant implemented a mandatory vaccination policy (the "**Policy**") in response to concerns surrounding the spread of COVID-19 in the workplace. The Policy required that all employees be "fully vaccinated", unless an employee was exempt on medical or religious grounds. The Policy also provided that any employee who (for personal reasons) chose to remain unvaccinated, would be placed on an unpaid leave of absence until such time as the employee complied with the Policy. Unvaccinated employees were not dismissed or otherwise disciplined for choosing to remain unvaccinated.

The Plaintiff was an employee of the Defendant prior to the implementation of the Policy. Despite implementation of the Policy, the Plaintiff refused to get vaccinated, but did not pursue an exemption on either medical or religious grounds. The Defendant advised the Plaintiff that, as a result of her failure get vaccinated, she would be placed on an unpaid leave of absence for a period of three months. The leave was later extended to become an indefinite leave of absence.

Two weeks into her unpaid leave, the Plaintiff sent a letter to Defendant requesting that the Defendant allow her to return to the workplace (without vaccination). She advised that if the Defendant did not return her to work within one week, she would take the position that the unpaid leave was a constructive dismissal and a termination of her employment.

The Defendant refused to return the employee to work and advised that, as long as she remained unvaccinated, she would continue to be on leave. The Plaintiff resigned from her employment and took the position that the Defendant's actions amounted to a constructive dismissal.

The issue in the case was whether an employer was entitled to place an employee on an unpaid leave of absence for failing to comply with a mandatory vaccination policy, or whether the implementation of an unpaid leave of absence amounted to a constructive dismissal.

Decision

In assessing whether a constructive dismissal occurred, the Judge considered the reasonableness of the Policy, whether the Defendant had *bona fide* business reasons (including safety reasons) for implementing the Policy, and whether placing the Plaintiff on an unpaid leave of absence when she failed to comply with the Policy was reasonable in all of the circumstances.

After reviewing the law on constructive dismissal, the Court concluded that the Policy was reasonable, and that the Plaintiff's refusal to comply with it amounted to a repudiation of her employment contract. The Defendant did not accept the repudiation and acted reasonably in placing her on an unpaid leave of absence. In particular, the Court stated that:

[152] Ms. Parmar's refusal to comply with the MVP was a repudiation of her contract of employment. Tribe did not accept that repudiation. Instead, it acted reasonably in putting her on an unpaid leave . She was not constructively dismissed from her position; she resigned. Any losses that she suffered from being put on unpaid leave were as a result of her personal choice not to follow Tribe's reasonable MVP.

...

[154] Finally, I accept that it is extraordinary for an employer to enact a workplace policy that impacts an employee's bodily integrity, but in the context of the extraordinary health challenges posed by the global COVID-19 pandemic, such policies are reasonable. They do not force an employee to be vaccinated. What they do force is a choice between getting vaccinated, and continuing to earn an income, or remaining unvaccinated, and losing their income. Ms. Parmar made her choice based on what appears to have been speculative information about potential risks.

...

[156] A reasonable employee in Ms. Parmar's shoes would not have felt in all the circumstances

than an unpaid leave as a consequence of failing to comply with the MVP was a substantial alteration of an essential term of the employment contract. This is confirmed by the fact that all but one of her fellow employees complied with the MVP and that most adult Canadians have since been vaccinated — many as a condition of continued employment.

Conclusion

This is the first civil case on the issue of whether a mandatory vaccination policy is reasonable, and whether placing non-compliant employees on an unpaid leave of absence amounts to a constructive dismissal.

This is a welcome decision for many employers who opted to implement mandatory vaccination policies during the pandemic and supports an employer's right to place employees on an unpaid leave of absence for failure to comply with such policies.

by [Dianne Rideout](#) and [Michelle McKinnon](#)

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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