

Brief Your Supervisors: Is Fear of Coronavirus Infection Valid Grounds for a Work Refusal?



Don't be surprised if one of your workers engages in a work refusal out of fear of catching coronavirus from a co-worker, client or member of the public. While it might seem overly dramatic, such a refusal may be justified, especially if the individual to which the worker is exposed has recently traveled to China or another high-risk area. Result: Dismissing the worker's fears out of hand can get you into serious trouble under OHS laws. Here's what you and your supervisors need to know to properly handle coronavirus-related work refusals.

What the OHS Laws Say'And Don't Say

The OHS laws allow workers to refuse work when they have "reasonable" cause to fear serious injury **or illness** to themselves or others. As with all work refusals, the supervisor who receives the refusal must take it seriously and overcome the temptation to engage in knee-jerk rejection and order workers back to work before making a determination about whether their concerns are reasonable and an immediate danger exists.

Unfortunately, that's easier said than done. The OHS statutes and regulations don't go into details or specifics about what makes a refusal reasonable. To find out what reasonable means, you need to look at the actual cases in which a court or arbitrator had to apply the principles to real-life refusals. Although there haven't yet been any reported cases on coronavirus refusals, there have been several cases involving refusals related to other infectious illness outbreaks like H1N1, SARS, hepatitis B (Hep B) and Ebola. Of course, supervisors aren't likely to know about any of these cases. So, it's up to you to debrief them on the cases to ensure they're prepared to deal with coronavirus-related refusals. Here's how to do that.

How to Brief Your Supervisors

First, be sure that supervisors understand that they must do their own investigation of each work refusal and make an appropriate decision based on their findings. Explain that knowing how courts and arbitrators across Canada

have ruled on other infectious illness work refusals will help them make legally sound determinations when dealing with coronavirus refusals by their own workers.

The next point to make is that as long as the proper investigation procedures are followed, infectious illness-based work refusals fail much more often than they succeed. In other words, it's extremely difficult for a worker to prove that risk of infection poses an immediate danger. Thus, the *Insider* found 9 cases where a court or arbitrator had to decide whether an employee's infectious illness work refusal was reasonable. The worker lost all but 2 of these cases.

The 5 Questions to Ask

But the significance of the cases isn't just the outcome but the approach courts and arbitrators used to assess whether the worker's fear of immediate danger was reasonable. The 5 questions the tribunals asked are the ones you want your own supervisors to consider in making their own determination in dealing with a worker's coronavirus-based work refusal.

1. How Is the Infection Transmitted'

One of the key issues in determining the reasonableness of infectious illness refusals is how the illness is transmitted. Thus, for example, during the SARS outbreak, there were a number of refusal cases brought by workers who feared contracting the disease by working near individuals who'd recently arrived from Asian countries where SARS had reached pandemic levels. Employers in 3 cases were able to shoot down the refusals in arbitration by relying on reports from the World Health Organization (WHO) and other medical evidence showing that SARS isn't spread by being in proximity to an infected individual.

Refusal Fails: Two Air Canada ticket agents at Pearson Airport in Toronto refused to work near passengers arriving from Hong Kong unless they could wear surgical masks and gloves, because they were afraid of getting SARS. Citing the WHO report, the federal arbitrator upheld Air Canada's determination that the agents weren't at high risk of contracting SARS and didn't need PPE [*Cole v. Air Canada*].

Refusal Succeeds: Each morning, a prison guard had to escort 3 inmates from their toilet-less isolation cells, waste bucket in hand, to a washroom. The guard was afraid that the inmates would toss the contents of their waste buckets at him and he'd contract Hep B. The federal arbitrator found the refusal valid based on scientific evidence showing that Hep B is transmitted through contact with feces, urine and semen [*Walton v. Treasury Board*].

2. Does the Refusing Worker Work with or near People who Are Infected'

It appears that a person can get coronavirus infection by being in close proximity to infected individuals. Thus, supervisors will have to consider whether this is actually the case with the refusing worker.

Refusal Fails: A federal arbitrator nixed an airport customs agent's refusal to work unless he would wear PPE as his job involved little to no contact with newly arrived passengers from SARS-infected parts of Asia [*Chapman v. Canada (Customs and Revenue Agency)*].

Refusal Fails: Theoretical possibility of treating a patient with Ebola wasn't enough to justify the refusal of 2 Ontario paramedics who couldn't prove they'd have actual exposure.

3. Are the Workplace Infection Hazards "Undue"'

Applying the above cases to coronavirus is tricky because it seems clear that you can contract coronavirus from being in contact with an infected individual. In fact, coronavirus appears to be more contagious than SARS, Hep. B and other previous outbreak illnesses. And that would make being in a workplace or any environment where multiple individuals are located near each other inherently risky. But that's not enough. To justify a work refusal under OHS laws, the workplace condition or operation must pose an *undue* hazard, i.e., one that's different from and greater than what would exist in the community.

Refusal Fails: BC OHS Review Officer upholds finding of no danger in case involving refusal of 2 pregnant teachers concerned about catching H1N1 influenza. "While I acknowledge the workplace would be characterized as a higher risk environment, these risks were neutralized by the control measures in place" and the lack of evidence that the workers were specifically susceptible nor that being in the workplace was any riskier than being in the community [Review Reference #: R0112820, Oct. 21, 2010].

4. Are the Worker's Fears Sincere'

Courts and arbitrators will dismiss coronavirus-related work refusals if there's evidence that workers are abusing their refusal rights and their fears of contracting the illness aren't sincere. By the same token, they'll also take into account any physical characteristics that make the individual worker particularly susceptible, e.g., a weakened immune system.

5. Are Adequate Measures Already in Place to Address the Worker's Concerns'

A key factor in any work refusal case is what, if anything, the employer has already done to address the hazard and whether those measures are adequate. Evidence that the employer is stonewalling will almost always tip the case in the worker's favour. Conversely, employers "score points" by being able to show that they took steps to address the worker's concerns.

Refusal Fails: Federal arbitrator strikes refusals of HRDC workers scared of getting SARS from Asian immigrants they might encounter on the job, citing the measures the agency had taken to reassure and protect workers, including providing educational materials about SARS and holding daily briefings on the local and regional health situation [Caverly v. Canada (Human Resources Development)].

Refusal Fails: A railroad crew refused to board a train for a scheduled trip after learning that 28 passengers from the previous trip had contracted a gastrointestinal virus. According to the arbitrator, the company had taken the steps necessary to manage the risk, such as thoroughly scrubbing down the cars, sanitizing the washrooms and keeping the crew informed [Hogue-Burzynski v. VIA Rail Canada].

Refusal Succeeds: Qu bec CSST (as it was called at the time) upheld the refusal of 2 paramedics citing the employer's failure to implement adequate measures and

PPE to protect workers from Ebola.

Take 9 Measures to Minimize Infectious Illness Risks

End your briefing by providing a checklist of measures that address concerns giving rise to a coronavirus- or other infectious illness-based work refusal. Explain that the more of the following measures that are in place at the time of refusal, the harder it will be for the worker to justify the refusal as reasonable:

1. Educated workers about coronavirus and how it's transmitted;
2. Encouraged workers to get vaccinations or provided vaccinations in-house (currently, there is no coronavirus vaccine available);
3. Kept workers updated on illness-related developments in the workplace and community, e.g., by posting regular updates on the company's website;
4. Took basic hygiene measures, such as providing soap, hand sanitizers and paper towels and keeping sinks and surfaces that people touch (such as door knobs) clean;
5. Posted signs, posters and notices reminding workers to wash their hands properly, use cough etiquette, keep social distances, etc.;
6. Adopted work practices that promote social distance, such as using conference calls instead of face-to-face meetings;
7. Screened workers and visitors entering the workplace for signs of transmittable illness;
8. Furnished PPE to workers exposed to infection risks; and
9. Managed cases of infection at work, including telling those suspected of having an illness to go home immediately and monitoring which workers get infected, where they work, etc.

SCORECARD

INFECTIOUS ILLNESS WORK REFUSAL CASES			
CASE	GROUND FOR REFUSING	OUTCOME	EXPLANATION
<i>Caverly v. Canada (HRSD)</i>	HRSD worker fears getting SARS from immigrants	Refusal Invalid	Worker not exposed to infection risk, but HRSD should have done a better job of addressing concerns
<i>Chapman v. Canada (Customs and Revenue Agency)</i>	Customs agent fears getting SARS from new Asian immigrants	Refusal Invalid	Custom agents don't encounter individuals with SARS; even if they did, they can't get it from proximity to infected individuals
<i>Cole v. Air Canada</i>	Air Canada ticket agents fear getting SARS from Asian passengers	Refusal Invalid	Medical evidence shows SARS isn't transmitted by proximity to infected individuals; airline adequately addressed SARS concerns

<i>Hogue-Burzynski v. VIA Rail Canada</i>	Railroad crew members fear getting intestinal virus from sick passengers on previous trip	Refusal Invalid	Railway took steps to minimize risk and workers had to accept that risk as part of their job
<i>Swan River Valley Hospital (Re)</i>	Hospital workers fear getting Hepatitis B	Refusal Invalid	Not reasonable to require hospital to vaccinate all workers, especially when they didn't demand vaccination in collective bargaining
<i>Walton v. Treasury Board</i>	Prison guard fears getting Hepatitis B from inmates	Refusal Valid	Fear of being doused with waste bucket is reasonable given that Hepatitis B is spread via contact with feces, urine and semen
Unreported	Quebec paramedics fear getting Ebola from patients	Refusal Valid	Employer didn't have ample infection control measures in place
Unreported	Ontario paramedics fear getting Ebola from patients	Refusal Invalid	Risk of paramedics actually being exposed only hypothetical