

Employee Who Refused to Mask Told by Court That Losses Were “Self-Inflicted”



Employers and employees saw the workplace change rapidly since March 2020. After a whirlwind of workforce changes and policies, litigation on the appropriateness of COVID-19 workplace measures is working its way through the courts, and the Alberta Court of Queen’s Bench has recently released a decision on masking. In the recent decision, *Benke v Loblaw Companies Limited*, 2022 ABQB 461, the Court expressly held that the imposition of a mask policy was not a substantial change to the employment relationship amounting to constructive dismissal.

Facts

The employee, a grocery store employee whose role required him to work partly remotely, and partly in-store, sought an exemption to the requirements to wear a face mask based on an undiagnosed medical condition. His physician provided him with notes to exempt him from complying with the City of Calgary’s mask bylaw, and the employer’s mask policy at the grocery store. The notes declined to state that the employee’s request to be exempted from wearing a mask had a medical justification. At trial, the employee introduced no evidence of a medical condition or disability that prevented him from wearing a mask.

The employer’s mask policy applied equally to customers and employees. The mask policy contained exemptions, and outlined a process for employees to seek accommodation for their medical needs.

The employer put the employee on an indefinite unpaid leave because he refused to wear a mask in stores without medical justification and thereby did not comply with the City of Calgary mask bylaw and the employer’s mask policy. The employee claimed that this constituted a constructive dismissal and that he was entitled to substantial damages in lieu of notice.

Decision

The Court rejected the employee’s claim.

While the claim was for constructive dismissal, the Court acknowledged that part of the employee’s claim was that his disability was not accommodated. The Court emphasized that complainants who assert discrimination must establish on a *prima*

facie basis that they have a disability. Since the employee failed to show, even on a *prima facie* basis, that he had a disability, there was no reason for the employer to pursue the matter further. The Court found no discrimination and no duty to accommodate.

With respect to constructive dismissal, the Court restated the established test for constructive dismissal outlined in *Farber v Royal Trust Co.*, [1997] 1 SCR 846 and *Potter v New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10: (1) whether the employer has imposed unilateral substantial changes that constitute a breach of the employment contract; and (2) if a reasonable person in the employee's position would have felt that the breach substantially altered an essential term of the employment contract. The Court held that the employee had failed to meet this test and was therefore not constructively dismissed.

The employee was placed on unpaid leave because he would not perform an essential part of his duties, including store visits, because he was required to wear a mask in accordance with the mask bylaw and the mask policy. While the unpaid leave was a substantial change to the employment relationship, the Court found it was not a breach of the employment relationship. To perform his duties, the Court found that he was required to comply with a legal requirement, a bylaw, and an employer policy but he refused to do so. By refusing to comply with the bylaw and policy, the employee repudiated his own employment contract.

The Court further held that the imposition of a mask policy was not a substantial change and did not breach the employment agreement. The employee's job responsibilities did not change, the only difference was that he has to wear a mask. The mask policy was not substantial and was co-extensive with legal requirements imposed by municipalities at the time and public health authorities. The Court noted that similar mask policies prompted by the COVID-19 pandemic have been found reasonable by Human Rights tribunals (see, for example, *Dickson v Costco Wholesale Canada Ltd*, 2022 AHRC 40).

The Court found that the employee's refusal to abide by the mask bylaw and mask policy was a repudiation of his employment agreement, and the defendant acted reasonably in putting the employee on unpaid leave. The Court held that the employee was not constructively dismissed from his role, and the losses that he suffered from being put on unpaid leave were self-inflicted.

Take Away

While employers have always been and continue to be required to accommodate an employee's disability, employers can take comfort in knowing that properly drafted and implemented mask policies will not necessarily repudiate the employment relationship.

By Dana V. Kiefer on July 20, 2022
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