Case In Point

Ontario Court Denies Injunctive Relief Pending Action Challenging Employer's Vaccination Policy

Date: November 2, 2021

On October 29, 2021, Justice Dunphy of the Ontario Superior Court of Justice declined to extend emergency injunctive relief to a group of University Health Network (UHN) employees, seeking reprieve from UHN's Mandatory COVID-19 Vaccination Policy (Policy) which required employees to either become fully vaccinated against COVID-19 by October 22, 2021, or be terminated from their employment for cause.

History of Proceedings

On October 21, 2021, counsel for six UHN employees (Applicants), each of whom were not fully vaccinated and therefore facing the possibility of termination, served an urgent motion, to be heard by the Ontario Superior Court of Justice, for an interim injunction seeking to prevent their termination from employment as a result of the Policy.

An emergency hearing was scheduled for the next day—October 22, 2021. At this hearing, UHN took the position that injunctive relief was not available to the Applicants, due (in part) to the unionized status of some of these applicants. More specifically, UHN argued, the Court lacked jurisdiction over the subject matter of this action, as both the legislature and the courts have granted to labour arbitrators exclusive jurisdiction over matters that arise expressly or inferentially out of a Collective Agreement. A unionized employee's employment status, argued the UHN, falls squarely within the ambit of this scheme.

Further, the UHN argued that the Court had no jurisdiction to award injunctive relief in relation to non-unionized employees, because Ontario law allows private sector employers to terminate the employment of non-unionized employees at any time, subject only to the provision of notice or compensation in lieu. Therefore, UHN argued, the non-unionized employees would never be granted an order that their employment continue and an injunction was therefore inappropriate.

Given the short notice and the lack of materials before him, Justice Dunphy ordered that an interim inunction be granted to "preserve the status quo" in the face of this jurisdictional question. UHN was ordered not to terminate the employment of a set of enumerated employees involved with this lawsuit, pending the outcome of a jurisdiction motion to be heard on October 28, 2021.

The October 28, 2021 Hearing

On October 28, 2021 Justice Dunphy heard from the plaintiffs, the UHN and from a number of unions who had been invited by his Honour to intervene.

UHN took the position, once again, that the Court had no jurisdiction to grant an injunction with respect to the unionized employees. The intervening union supported UHN's position, asserting that it was within the sole purview of the union to decide where and how to seek the relief that the plaintiffs were seeking, and that the unionized employees had no standing to interfere in that process.

With respect to the non-unionized employees, UHN's position was that the courts and legislature have both recognized that employers in the private sector have an unfettered right to terminate the employment of employees, with or without a reason. The Court is simply unable to force an employer to maintain the employment of employees whom an employer wishes to terminate.

The October 29, 2021 Decision

Justice Dunphy released his final decision on October 29, 2021 (Blake v. University Health Network).

His decision was focused on three key issues. First, whether the unionized plaintiffs had standing to seek the relief sought in the proposed expanded statement of claim. Second, whether the Court had the jurisdiction to grant the interim relief or permanent relief sought by these unionized employees. And third, whether an interim injunction could be continued with respect to non-unionized employees.

Justice Dunphy ultimately found wholly in favour of UHN and dismissed the injunction proceedings in their entirety.

First, Justice Dunphy confirmed that the unionized employees did not have standing to seek injunctive relief. He concluded that the essential character of the dispute was one which lies squarely within the ambit of the collective agreements to which the unionized members were party. Unions, Justice Dunphy concluded, were free to pursue this issue on behalf of their members and labour arbitrators were capable of resolving them.

Justice Dunphy also noted that the fact that the unions had not availed themselves of their own ability to seek injunctive relief did not affect the analysis, writing at paragraph 13:

The plaintiffs take issue with the manner in which the unions have pursued the resolution of those grievances but not with their right to do so. The essential character of a dispute is not altered by strategic choices made as to the remedy being pursued.

Second, the Court held that it had no residual authority in this case to continue the existing interim injunction to restrain UHN from implementing its Policy, regardless of its finding that there was a remedy available to these Applicants through labour relations procedures.

Although Justice Dunphy acknowledged that there are rare circumstances where a union may bring a civil claim for injunctive relief on behalf of its members, such judicial discretion must be exercised sparingly and could not be used as a “Trojan horse” applied to “undermine the exclusive jurisdiction of the arbitration process or the union.” On this point, Justice Dunphy wrote at paragraph 20:

I am nevertheless not satisfied that this would be an appropriate case to open the narrow window of residual jurisdiction the Supreme Court has conceded remains. None of the unions who have intervened on this hearing asked me to maintain the interim injunction in place for a period of time to permit them to bring their own applications. All of them have the undoubted standing to do so. The decision of the collective bargaining agents to pursue or not pursue a particular remedy is one that is entitled considerable deference in our civil court given the fundamental nature of the labour relations principles involved.

After dismissing the injunction as it pertained to unionized employees, he turned his attention to non-unionized employees. Here too, Justice Dunphy ultimately concluded that he could not make an order restraining UHN from exercising its fundamental right to terminate an employee’s employment.

Justice Dunphy noted that it is a general rule in employment law in Ontario that private sector employment may be terminated at will. The only form of recourse available to a terminated employee is through an order of compensation payable to the employee. “Given that fundamental principle” Justice Dunphy noted at paragraph 28, “it is hard to see how any plaintiff who is not in a union can allege irreparable harm arising from threatened termination of employment. If the termination of their employment is not justified, they are not entitled to their job back – they are entitled to money. Money, by definition is not only an adequate remedy it is the only remedy.”

This case provides important insight and guidance into the court's continued reluctance to interfere in the employment relationship, particularly as it pertains to unionized workers, but with respect to non-unionized workers as well. More narrowly, it is expected that Justice Dunphy's well-reasoned analysis will influence the manner in which Canadian courts deal with similar issues as we navigate the challenging waters surrounding vaccination and Canadian workers.

The UHN was represented by Hicks Morley's Bonnie Roberts Jones, Sean Sells and Danika Winkel. The Intervenor, Ontario Hospital Association, was represented by Hicks Morley's Frank Cesario.

Should you require further information about this decision and how it may impact your workplace, please contact your regular Hicks Morley lawyer.