FTR Now

In Case You Missed It: Key COVID-19 Cases to Date

Date: January 25, 2022

Our recent FTR Now provided an overview of notable "non-pandemic" legal developments from 2021.

In this *FTR Now*, we provide a round-up of key COVID-19 cases, which include decisions on issues such as wrongful dismissal, mandatory vaccination and human rights. These decisions will be of interest to employers and HR professionals as we move forward into 2022.

Mandatory Vaccination Policies and Workplace Testing

Courts Decline to Grant Injunctions

Towards the end of 2021, there were several unsuccessful attempts by employee groups to obtain urgent injunctive relief to stay the enforcement of mandatory COVID-19 vaccination policies. Here are three examples:

- In *Blake v. University Health Network*, the Ontario Superior Court of Justice declined to extend emergency injunctive relief to a group of University Health Network employees who were seeking a stay from a mandatory vaccination policy that required employees to either become fully vaccinated by October 22, 2021 or be dismissed for cause. (See our *Case in Point* of November 2, 2021.)

- In *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission,* the Ontario Superior Court of Justice rejected parallel applications filed by two separate unions (NOWU and ATU, Local 113) to stay the implementation of mandatory vaccination policies that had been imposed by the Toronto Transit Commission and Sinai Health. (See our *FTR Now* of November 20, 2021.)

- In *Wojdan v. Canada (Attorney General)*, a group of government employees sought an injunction staying the operation of the mandatory vaccination policy that was issued by the Treasury Board of Canada on October 6, 2021, pending final determination of their application for judicial review on the merits. The Federal Court dismissed the application, referring favourably to the two Ontario decisions noted above and concluding that "the loss of employment, while a significant and important consequence, is something that can be compensated in monetary damages."

Arbitrations on the Reasonableness of Vaccination Policies

As courts received (and rejected) requests for interim relief, labour arbitrators began to consider the legality of vaccination policies in certain workplaces. As the case law continues to develop rapidly on this issue, employers should stay tuned for updates in the days and months ahead. Some of the key decisions to date are set out below:

- In *UFCW, Canada Local 333 v. Paragon Protection Ltd.*, 2021 CarswellOnt 16048, Arbitrator von Veh upheld a mandatory vaccination policy that applied to a group of security guards who performed work at third party sites and where the collective agreement contained language that explicitly required employees to "agree to receive … vaccination or inoculation" in certain situations. (See our *Case in Point* of November 10, 2021.)

- In *Electrical Safety Authority v. Power Workers' Union,* 2021 CarswellOnt 18219, Arbitrator Stout issued a "bottom

line decision" and distinguished the finding in *Paragon* (which had been released only two days earlier) because there was no collective agreement language that expressly required employees to receive vaccinations required by the employer. In the absence of such language, Arbitrator Stout completed a fact-driven analysis which involved a consideration of the employees' work environment and whether or not employees were required to work in close proximity to others, the lack of evidence of prior COVID-19 breakouts, and the extent to which the employer's operations had been disrupted by the refusal of others to engage with unvaccinated employees. He also noted that the employer's prior policy that required unvaccinated employees to undergo regular testing had been supplanted by a stricter policy that would have placed unvaccinated employees on an unpaid leave of absence. He concluded that, in the particular circumstances before him, the stricter mandatory vaccination policy imposed by the employer was unreasonable. He made a point of acknowledging that the "situation is fluid" and that such policies may be necessary in other workplaces – particularly where "vulnerable populations" are involved. (See our *FTR Now* of November 12, 2021; the full reasons for the decision were released on January 4, 2022.)

- In *Teamsters Local Union 847 v Maple Leaf Sports and Entertainment*, Arbitrator Jesin dismissed a grievance regarding the requirement that employees disclose their vaccination status. He reviewed the case law to date and concluded that "[i]t is clear that the weight of authority supports the imposition of vaccine mandates in the workplace to reduce the spread of Covid 19." Arbitrator Jesin focused on the realities of the employee's work environment, including the fact that employees covered by the policy regularly worked in close proximity to others.

Arbitrations on the Reasonableness of Workplace Testing

When considering the reasonableness of COVID-19 testing in the workplace, to date, labour arbitrators have held that the interests of employers in promoting health and safety and preventing the spread of COVID-19 outweigh the intrusiveness of the testing:

- In *Caressant Care Nursing & Retirement Homes v Christian Labour Association of Canada*, Arbitrator Randall upheld a unilaterally imposed policy requiring all staff employed at a retirement home to be tested for COVID-19 every two weeks and stated, "when one weighs the intrusiveness of the test … against the problem to be addressed – preventing the spread of COVID in the Home, the policy is a reasonable one." (See our *HR HealthCheck* of January 6, 2021.)

- In *Unilever Canada and UFCW, Local 175* (Unreported, 25 April 2021), Arbitrator Bloch upheld a mandatory COVID-19 testing policy at a food processing plant, finding that the employer was permitted to take reasonable steps to reduce the risk of COVID-19 transmission in the workplace, and testing was one such reasonable step.

- In *EllisDon Construction Ltd v Labourers' International Union of North America, Local 183*, Arbitrator Kitchen upheld a rapid COVID-19 antigen screening program at a construction project, stating that "[w]hen one weighs the intrusiveness of the rapid test against the objective of the Policy, preventing the spread of COVID-19, the policy is a reasonable one." (See our *Case in Point* of July 5, 2021.)

Arbitrations Unrelated to Vaccinations

Leaves of Absence

Since the beginning of the COVID-19 pandemic, issues have arisen as to the application and implementation of leaves of absence. See, for example, the following two cases:

- In *Ontario Public Service Employees Union, Local 101 v Windsor Regional Hospital*, Arbitrator Trachuk considered the ability of a health service provider under O. Reg 74/20, Work Redeployment for Certain Health Services Providers (made under the *Reopening Ontario Act*) to deny statutory leaves of absence claimed by employees under the *Employment Standards Act, 2000* (*ESA*). Arbitrator Trachuk concluded that pursuant to s. 3(i)(E) of O. Reg. 74/20, a

health service provider, “may defer or cancel any Infectious Disease Emergency Leave to which the Grievor may be entitled under the *ESA*.”

- In *Ontario Nurses’ Association v Humber River Hospital*, Arbitrator Jesin determined that employees who are required to isolate because of a possible exposure to COVID-19 are not entitled to sick pay, unless their isolation is accompanied by actual illness. He also noted that an employee who is required to isolate and tests positive for COVID-19 during their isolation is entitled to sick pay for the entire period of their isolation (and not from the date of notification of a positive test result, which may be a later date), because the positive test was merely proof of an earlier illness. However, isolating to prevent exposure to illness is not the same as suffering from an illness.

Employee Misconduct

Labour arbitrators have arrived at numerous, fact-dependent conclusions regarding the appropriate level of discipline for employee misconduct specifically related to COVID-19 protocols implemented by employers. For example:

- In *Tenneco Canada Inc. Cambridge, Ontario Facility v United Steelworkers, Local 2894*, the grievor was discharged for violating the employer’s COVID-19 screening protocol. Specifically, the grievor entered the workplace with COVID-19-related symptoms after attesting that he had none. Arbitrator Chauvin concluded that although the grievor’s conduct was very serious, it did not warrant the penalty of discharge. The grievor was reinstated with no backpay.

- In *Johnson Controls Canada LP v Teamsters Local Union 419*, the employment of a grievor, a facilities technician, was terminated for repeatedly, intentionally and improperly attesting to not exhibiting symptoms of an upper respiratory infection, when in fact he had been exhibiting such symptoms. Arbitrator Gedalof weighed the grievor’s long service, seriousness of misconduct and extensive past disciplinary record to conclude the penalty of discharge was appropriate.

- In *Hydro One and Power Workers’ Union* (Unreported, 25 November 2021) the grievor was suspended and subsequently his employment was terminated for refusing to wear a mask in the workplace contrary to the employer’s policy. The grievor alleged wearing a mask that covered his face was contrary to his Catholic religious beliefs. Arbitrator Stout concluded that the grievor’s refusal to wear an approved face covering was not a *bona fide* refusal on the basis of religious belief (i.e. the grievor’s “beliefs and convictions are personal and have no nexus or basis in either his creed or religion”) and therefore the employer had just cause to discipline him. Arbitrator Stout’s award provided the grievor with 30 days to comply with the employer’s policy, after which time, his employment would be terminated.

Wrongful Dismissal Issues

Extension of Notice Period due to Pandemic

Courts have extended notice periods in cases where the pandemic has negatively impacted the employee’s job sector, and this impact was known at the time of termination. We discussed many of these cases in our *Raising the Bar* of September 29, 2021. Here is a recap, with updated information:

- In *Lamontagne v. J.L. Richards & Associates Limited*,the Ontario Superior Court took judicial notice that the threat of a pandemic had created economic uncertainty as of February 19, 2020 (the termination date) and considered the degree of uncertainty in awarding 10 months’ notice. The employer’s appeal of this decision was later dismissed by the Divisional Court.

- In *Kraft v. Firepower Financial Corp*., the employee’s employment was terminated at a point in March 2020 when

pandemic-related economic uncertainties were known to his employer. The employee was awarded 10 months' notice, which the Ontario Superior Court indicated was one month more than would have been awarded during non-pandemic times.

- In *Iriotakis v. Peninsula Employment Services Limited*, the employment of an employee with 28 months' service was terminated on March 25, 2020. The Ontario Superior Court awarded three months' notice, noting that uncertainties in the job market served to slightly increase the applicable notice period.

Where the pandemic's economic impact could not reasonably have been known at the time of termination, courts have generally declined to extend the notice period, even if pandemic-related economic uncertainties arose during the reasonable notice period. See, for example:

- *Yee v Hudson's Bay Company*
- *Flack v. Whiteoak Ford Lincoln Sales Limited*
- *Ewach v. Whiteoak Ford Lincoln Sales Limited*

Deductions of CERB from Damages

Courts have arrived at various fact-dependent conclusions in deciding whether to deduct Canada Emergency Response Benefit (CERB) payments from wrongful dismissal damages. For example:

- In *Iriotakis v. Peninsula Employment Services Limited,* the Ontario Superior Court declined to deduct CERB from damages. It considered the fact that the employee's pre-termination earnings (which included commissions) greatly exceeded his entitlement to damages, such that it would be inequitable to deduct CERB payments.

- In *Hogan v 1187938 B.C. Ltd.,* the Supreme Court of British Columbia deducted the CERB payments from the wrongful dismissal damages. The Court reasoned that if CERB payments were not deducted (and did not have to be repaid), the employee would be in a better position than he would have been if there had been no breach of his employment contract.

To date, we are not aware of an appellate court decision which weighs in on this issue. It also remains unknown at this time whether the federal government will require recipients of CERB to repay payments from damages awards for wrongful dismissal going forward.

IDEL and Constructive Dismissal

The Infectious Disease Emergency Leave regulation (IDEL Regulation), made under the *ESA*, deems certain actions of an employer made in response to COVID-19—a temporary reduction or elimination of an employee's hours of work, or a temporary reduction in an employee's wages—not to be a constructive dismissal if they occur during the COVID-19 period.

The issue of whether the IDEL Regulation prevents an employee from claiming constructive dismissal at common law is now being litigated and courts have arrived at conflicting conclusions on this question:

- In *Coutinho v. Ocular Health Centre Ltd.*, the Ontario Superior Court concluded that the IDEL Regulation does not take away the employee's right of action at common law for constructive dismissal. The Court reasoned that s. 7 of the IDEL Regulation is constrained by s. 8(1) of the *ESA* which provides that the *ESA* does not supersede civil remedies otherwise available at common law.

- In *Taylor v. Hanley Hospitality Inc.,* the Ontario Superior Court disagreed with the analysis in *Coutinho.* It found that it was clear that the IDEL Regulation was enacted to neutralize the effect of the government's decision to shutter

businesses across the province in light of the pandemic. Therefore, the IDEL Regulation was intended to displace the common law respecting layoff and constructive dismissal: where the IDEL Regulation applies, a layoff is no longer a layoff at common law.

The Ontario Court of Appeal will weigh in on this issue, as it is scheduled to hear an appeal from the decision in *Taylor v. Hanley Hospitality* this coming April.

Human Rights

COVID-19 Policies and Adverse Impact

The Human Rights Tribunal of Ontario (HRTO) has considered the adverse impact that policies intended to prevent the spread of COVID-19 may have on individuals in various scenarios:

- In *JL v. Empower Simcoe*, the HRTO acknowledged that though the respondent–an organization that provides housing support for children and adults–was doing its best to keep its residents and staff safe when it introduced COVID-19-related visitation restrictions, these restrictions negatively impacted the applicant. In failing to prove it could not accommodate the applicant without incurring undue hardship, the respondent was found to have discriminated against the applicant. Monetary compensation and development of an accommodation policy in accordance with the decision were ordered. The respondent has sought judicial review of this decision.

- In *Jacobs v. MyHealth Centre*, an individual filed an application alleging the respondent health clinic discriminated against him when the clinic refused him service due to his potential exposure to COVID-19. The central issue to be determined in this case was whether a medical clinic following Ministry of Health guidance had acted in a discriminatory manner. The HRTO found that the differential treatment the applicant experienced was not related to his disability or his perceived disability; rather, it was a result of an assessment of the risk posed by an individual who may be carrying a highly infectious and sometimes fatal disease. The HRTO dismissed the application as having no reasonable prospect of success.

Masking Requirements

When considering the issue of masking requirements, human rights tribunals have dismissed numerous applications due to the applicants' failures to provide sufficient information on their alleged *Code* protected ground:

- In *Sharma v. Toronto (City)*, the HRTO dismissed an application brought by an individual who took issue with a City of Toronto by-law requiring businesses and other establishments open to the public to adopt a mask policy such that only those wearing a mask or face covering will be permitted entry. The applicant alleged that the City discriminated against him because of his creed and disability. A summary hearing was held and the parties made submissions about whether the application should be dismissed because the applicant had not alleged specific acts of discrimination by the City, as opposed to conduct by the various businesses purporting to apply the by-law. The application was dismissed for this reason. Among other things, the HRTO noted that creed was not engaged and that the applicant did not sufficiently particularize his disabilities in the application.

- In *The Customer v. The Store*, an individual brought a complaint to the British Columbia Human Rights Tribunal alleging the respondent grocery store discriminated against her based on physical and mental disability when she was stopped outside the store for not wearing a mask. The Tribunal found that the customer's explanation ("it is very difficult to breathe with masks, and it causes anxiety") was not, on its own, enough to trigger the protection of the *Code.* It decided not to proceed with the complaint.

- In *The Worker v. The District Managers*, a worker brought a complaint to the British Columbia Human Rights Tribunal

alleging discrimination based on religion when he was refused entry to the workplace and subsequently had his contract terminated for his refusal to wear a mask. The worker did not set out facts that could establish his objection to mask wearing was grounded in a sincerely held religious belief. Rather, it was based on his opinion that wearing a mask does not stop transmission of COVID-19. The Tribunal did not proceed with the complaint, concluding his beliefs were not "experientially religious in nature."

- In *Pelletier v 1226309 Alberta Ltd. o/a Community Natural Foods*, the Human Rights Tribunal of Alberta upheld a decision of the Director of the Commission in which it dismissed a complaint brought by a customer who alleged that the respondent store discriminated against him on the grounds of physical disability and religious belief by requiring face masks for entry. Among other things, the Tribunal noted that while the Calgary face mask by-law provided for exemptions, it does not prohibit businesses from establishing their own policies. The exemption in the by-law provides a defence to a charge the person has violated the by-law. It provides no positive right to enter a business without a mask.

For more information regarding these cases, or for assistance with any legal matters related to COVID-19, please contact your regular Hicks Morley lawyer.
