

Unpaid Leave for Refusal to Adhere to Masking Policy Does Not Constitute Constructive Dismissal

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In an attempt to mitigate the spread of COVID-19 and comply with municipal by-laws, many employers implemented mandatory masking policies. Employees who refused to comply with the mandatory masking policy were often placed on an unpaid leave of absence. *Benke v Loblaw Companies Limited* (Loblaws) is the first decision from the Alberta courts that considers whether placing employees on an unpaid leave of absence for such non-compliance constitutes constructive dismissal.

Background

Employed by Loblaws since 2002, the plaintiff, Mr. Benke, was a Customer Experience Specialist – Produce. As part of his role, Mr. Benke was required to physically attend various Loblaws stores across Alberta and British Columbia.

Towards the end of July 2020, the City of Calgary passed a bylaw whereby, effective August 1, 2020, people in public premises were required to wear a mask (the Municipal Bylaw). Mr. Benke obtained a letter from his family doctor stating that he was exempt from the Municipal Bylaw due to illness. Between July 1, 2020 and August 29, 2020, Mr. Benke continued in his role and attended Loblaws establishments without a mask.

On August 29, 2020, Loblaws implemented a mandatory masking policy (the Loblaws Policy). Employees with an underlying medical condition that prevented them from safely wearing a mask were exempt from the Loblaws Policy. Mr. Benke's doctor refused to provide a new medical note indicating that Mr. Benke had an illness that made him eligible for this exemption.

Loblaws was made aware that Mr. Benke was unable to provide a medical note in support of his request for an exemption and placed him on an indefinite unpaid leave of absence for failing to comply with the Municipal Bylaw and the Loblaws Policy. Mr. Benke claimed that he was constructively dismissed as a result.

The Decision

Cassels

At summary trial, the Court found that Mr. Benke did not have a disability or medical condition that would affect his ability to wear a mask as he provided no evidence of the same. As such, Loblaws was under no obligation to accommodate his refusal to wear a mask. Moreover, the Court concluded that Mr. Benke was placed on an unpaid leave because he had voluntarily chosen not to comply with the Loblaws Policy and was therefore not performing an essential part of his duties. The Court found that by refusing to comply with the Loblaws Policy, Mr. Benke had repudiated his employment contract. This conclusion was bolstered by the fact that Mr. Benke had returned the Loblaws vehicle in his possession and obtained new employment while on unpaid leave.

Takeaway

This decision may provide some solace to employers who implemented masking policies in response to municipal bylaws mandating that masks be worn in public spaces. It also reinforces that, in certain circumstances, an unpaid leave is a reasonable response to an employee's refusal to comply with a workplace policy. Employers should continue to review their COVID-19 policies, including any masking or vaccination policies, to ensure compliance with their obligations under occupational health and safety legislation and any public health recommendations.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.