

BC Supreme Court: Placing Employee on Unpaid Leave for Failure to Comply with Mandatory Vaccination Policy was not Constructive Dismissal

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In *Parmar v Tribe Management Inc.*, 2022 BCSC 1675, the Supreme Court of British Columbia dismissed a claim by an employee who claimed that her employer's decision to place her on an unpaid leave of absence for non-compliance with an employer's mandatory vaccination policy constituted constructive dismissal. *Parmar* is a welcome decision for non-unionized Canadian employers who introduced mandatory vaccination policies in response to the COVID-19 pandemic.

The Facts

In the Fall of 2021, Tribe Management Inc. (Tribe) implemented a mandatory vaccination policy (the Policy), requiring all employees to become "fully vaccinated" by November 24, 2021. The Policy provided for medical or religious exemptions and allowed for extra time for those employees who were unable to meet the deadline. It also contemplated that the Policy could be modified, "at any time at its sole discretion to adapt to changing circumstances and business needs."¹

Ms. Parmar was one of two employees who objected to being vaccinated. At trial, Ms. Parmar noted that she was hesitant to get vaccinated for fear of negative side effects, she had reviewed the literature and news about the efficacy and potential risks of the various vaccines, and she had observed several family members experience severe health complications following their first and second vaccines.

Ms. Parmar proposed alternatives to becoming vaccinated, but Tribe advised her that there would be no exceptions to the Policy. On November 25, 2021, Tribe advised Ms. Parmar that she would be placed on an unpaid leave of absence from December 1, 2021, to February 28, 2022, as she had not complied with the Policy.

On January 26, 2022, Ms. Parmar resigned her employment and alleged she had been constructively dismissed. Notably, Ms. Parmar did not allege that the implementation of the Policy itself amounted to a breach of her employment agreement with Tribe; rather, she took the position that the decision to place her on unpaid leave following her failure to comply with the Policy was the breach of contract that amounted to constructive dismissal.

The Decision

The matter proceeded by way of summary trial. The Supreme Court of British Columbia dismissed Ms. Parmar's claim, finding that she was not constructively dismissed when Tribe placed her on an unpaid leave of absence for failing to comply with Tribe's Policy. In particular, the Court held that Tribe's Policy was reasonable given all of the known circumstances at the time. Further, Tribe's decision to place Ms. Parmar on the unpaid leave of absence was also reasonable, and any losses that she incurred were as a result of her personal choice not to follow Tribe's reasonable Policy.²

The Analysis

To establish constructive dismissal on the basis of a single act by the employer (in this case, the imposition of an unpaid leave), a plaintiff must show that the act in question was a change to a term of their employment agreement and, further, that a reasonable person in their position would conclude that this change was a substantial alteration of an essential condition of employment. The Court in this case found that the employment agreement signed by Ms. Parmar gave Tribe the right to impose and amend policies as it saw fit, as long as such policies were reasonable. Therefore, the Court considered both the reasonableness of the Policy and the reasonableness of Tribe's decision to place Ms. Parmar on unpaid suspension due her failure to comply with the Policy.

The Court reviewed the information that was available to employers when Tribe implemented the Policy and the state of various public health requirements in Canada at the time. It also reviewed the nature of Tribe's operations and Ms. Parmar's role and ultimately found that Tribe's Policy was reasonable when considering: (i) Tribe's obligation to protect the health and safety of its employees and its clients, and by extension the public; and (ii) the state of knowledge about COVID-19 at the time it was implemented. Accordingly, Tribe had *bona fide* business reasons, including safety reasons, for the Policy.³

The Court also held that Tribe's decision to place Ms. Parmar on unpaid leave in response to her failure to comply with the Policy was reasonable because: (a) the leave was only for three months and was subject to review; (b) Tribe maintained Ms. Parmar's benefits during her leave; (c) Tribe consistently communicated to Ms. Parmar that she could return to work if she complied with the Policy; (d) Tribe was monitoring the public health situation to determine if it could amend or suspend the Policy; and (e) Tribe did not hire to replace Ms. Parmar while she was on leave.

Ultimately, Ms. Parmar's refusal to comply with the Policy was a repudiation of her employment agreement, one which Tribe did not accept. Tribe acted reasonably in putting her on an unpaid leave. The Court held that Ms. Parmar was not constructively dismissed from her employment; she resigned.

The Court also commented on employer's policies that impact an employee's bodily integrity. In particular, the Court held that in the context of the extraordinary health challenges posed by the global COVID-19 pandemic, such policies are reasonable. Moreover, the Court found that such policies do not force an employee to be vaccinated. Instead, "what they do force is a choice between getting vaccinated, and continuing to earn an income, or remaining unvaccinated, and losing their income."⁴ Ms. Parmar made a choice based on speculative information about potential risks.

Takeaways

This decision is instructive for employers who have implemented mandatory vaccination policies in response to the COVID-19 pandemic. *Parmar* demonstrates that the Court's assessment of an employer's mandatory vaccination policy will be fact-specific and is a continued evolution of the case law that has emerged in the non-unionized context. Employers should note that the reasonableness of a policy will depend on a number of factors, including the language in the Policy and whether there are exemptions permitted.

¹ *Parmar v Tribe Management Inc.*, 2022 BCSC 1675 at para 56.

² 2022 BCSC 1675 at para 152.

³ 2022 BCSC 1675 at para 99.

⁴ 2022 BCSC 1675 at para 154.