Cassels

Employee's Refusal to Vaccinate Amounts to Frustration of Employment Contract

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For many, the COVID-19 pandemic is behind us. However, employers continue to grapple with instituting and enforcing COVID-19 vaccination policies.

Until very recently, there was virtually no case law considering the consequences of an employee's refusal to comply with an employer's vaccination policy. In *Croke* v*. VuPoint Systems Ltd*., 2023 ONSC 1234 (*Croke*), the Ontario Superior Court of Justice released the first judicial decision finding that a non-unionized employee's refusal to get vaccinated, as required by the employer and a third party's vaccination policy, amounted to frustration of the employment contract. While the particular facts of this case are unique, as the employer did not have full control over the implementation of the vaccine policy (among other things), the Court's ruling in *Croke* may have significant implications for employees who refuse to comply with their employer's mandatory vaccination policies.

Background Facts

The Plaintiff in *Croke* was employed by the Defendant, VuPoint Systems Ltd. (VuPoint) as a systems technician. VuPoint provided installation services on behalf of Bell Canada and Bell ExpressVu (Bell). Bell provided more than 99% of VuPoint's annual income. The Plaintiff only performed work for Bell, which involved entering the home of Bell's customers.

On September 8, 2021, Bell informed VuPoint that its installers would be required to receive two doses of an approved COVID-19 vaccine (Bell's Vaccine Policy). As a result, VuPoint adopted a mandatory vaccination policy requiring all installers to be vaccinated against COVID-19 and provide proof of vaccination (VuPoint's Vaccine Policy). VuPoint's Vaccine Policy stated that non-compliant installers would be prohibited from performing work for certain customers (including Bell) and may not be assigned any jobs. It did not address termination of employment.

The Plaintiff refused to get vaccinated or provide proof of vaccination. On September 28, 2021, VuPoint terminated the Plaintiff's employment, along with his group benefits, effective October 12, 2021. In the interim, the Plaintiff sent a letter to VuPoint stating he would not disclose his vaccination status due to privacy laws and claimed that VuPoint was discriminating against him by terminating his employment because he did not get vaccinated.

VuPoint took the position that the Plaintiff's employment was frustrated as of October 12, 2021, his last day of employment. In addition to his two weeks of working notice, VuPoint provided severance pay in accordance with the *Canada Labour Code* (CLC).

Decision

On a motion for summary judgment, the court considered the doctrine of frustration and prior jurisprudence, and noted:

- Frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes "a thing ***radically different*** from that which was undertaken by the contract."
- When frustration of contract is argued, the court is asked to intervene, not to enforce some fictional intention imputed to the parties, but to relieve the parties of their bargain because a ***supervening event*** has occurred without the fault of either party.
- The key to the doctrine of frustration is the idea of a ***radical change in the contractual obligation***, arising from unforeseen circumstances in respect of which no prior agreement has been reached, those circumstances having come about ***without default by either party***.
- What would appear essential is that the party claiming that a contract has been frustrated should establish that ***performance of the contract, as originally agreed, would be impossible***.

The Court concluded that the Plaintiff's employment contract was frustrated for the following reasons:

- Bell's Vaccination Policy meant that the Plaintiff could not perform any work for VuPoint unless he was vaccinated. As a result, the Plaintiff lacked a necessary qualification to perform any of his duties.
- The supervening event was Bell's implementation of its mandatory vaccination condition on all subcontractors in order to be eligible to perform installation services for Bell.
- Bell's Vaccination Policy was an unforeseen circumstance not contemplated by either party when they entered into the employment relationship in 2014. There was no default under the employment agreement by either the Plaintiff or VuPoint because the circumstance which caused the frustration (Bell's Vaccination Policy) was the result of a decision by a third party, Bell, not the Plaintiff or VuPoint.
- The Plaintiff's complete inability to perform the duties of his position for the foreseeable future constituted a radical change that struck at the root of the employment contract, resulting in the frustration of the contract.

In reaching its decision, the Court relied on the recent arbitral decision in *Fraser Health Authority* v*. Hospital Employees' Union (Tracy London Termination),* 2022 CanLII 91089 (B.C. L.A.) (*Fraser*), where the arbitrator

found an employment contract was frustrated by a unionized employee's refusal to comply with a provincial COVID-19 vaccination mandate on individuals employed by a health authority. The arbitrator compared the requirement to have employees be fully vaccinated to cases where employees required certain security clearances in order to work.

Since the Plaintiff in *Croke* was provided with two weeks' working notice and received all amounts owing to him under the CLC, he was not entitled to common law damages for reasonable notice.

Key Takeaways for Employers

The Court's decision in *Croke* confirms, for the first time in a judicial decision, that an employee's refusal to comply with an employer's COVID-19 vaccination policy may amount to frustration of contract. However, there must be a supervening event, unforeseen by the parties and through no fault of their own, which renders performance of the contract impossible. In both *Croke* and the cited arbitral decision in *Fraser*, the employer's vaccination policy stemmed from third party or external mandates that employees be vaccinated against COVID-19, which created the unforeseen, supervening event.

It is also worth noting that, in addition to the third party vaccination mandate, the other material facts in *Croke* are unique. First, while the Plaintiff was employed by VuPoint, he only performed worked for Bell. Second, VuPoint, essentially, only provided services to Bell. As a result, there was no alternative work that the Plaintiff (or other non-compliant employees) could have been assigned.

It remains to be determined whether a court will conclude that an employment agreement has been frustrated where the employer has control over whether to implement or enforce a vaccination policy or where the employer has other work available that does not require vaccination. For now, the *Croke* decision provides some helpful insight (although fact-specific) into the approach the Court is willing to take in mandatory vaccination cases.
