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Feature

COVID-19: 18 Months On

Court decisions provide taste of what is yet to come

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Unprecedented" is the word most frequently used to describe the COVID-19 pandemic. Indeed, in the workplace came an unprecedented shift — choices made by thousands of employers on a scale never before seen.

What also remains without precedent is how the law will respond in turn. More than 18 months into the pandemic, we continue to wait for many of these issues to work their way through the courts so that we have some guidance as to its impact on the law.

While much remains unknown, a few decisions have been rendered that give us a small taste of what is yet to come. We highlight three of them below.

Mandatory COVID-19 testing found reasonable

In December 2020, an arbitration award upheld an employer's right to require employees to take a COVID-19 test.

CLAC Local 303 filed a grievance on behalf of members at Caressant Care Nursing and Retirement Home ("Caressant") in Woodstock, Ontario. Their position was that Caressant's bi-weekly COVID-19 testing of all staff was unreasonable. Its policy also stipulated that medical accommodation would be addressed on a case-by-case basis, and that any refusal to participate in testing would result in the employee being held out of service until testing was undertaken.

Caressant's testing policy was rolled out during the month of June 2020. All staff were provided with a comprehensive memo on the new policy and a copy of the policy itself. The union's position was that testing would only be a reasonable invasion of staff privacy if they were symptomatic.

Arbitrator Randall weighed the privacy intrusion of members against the safety benefits and goals of the policy. He found that the policy was reasonable, particularly given the risks of COVID-19 among the elderly population.

Takeaway for Employers

While this decision does not speak to mandatory testing in settings outside of long-term care, it does support the principle that mandatory testing may be considered reasonable when employers are able to accommodate as required, and sufficiently mitigate invasion of privacy, particularly in high-risk settings.

Notice periods in a pandemic/CERB

One argument advanced by employees throughout the pandemic has been that the uncertainty created by COVID-19 should lengthen the reasonable notice period.

In February 2021, *Iriotakis v Peninsula Employment Services Limited*, 2021 ONSC 998 ("Iriotakis") held that, in some cases, the pandemic may well "tilt" the notice period away from what otherwise might have been a shorter one. In this case, the motion judge noted that the pandemic likely had an impact on Mr. Iriotakis' job search, particularly given that his employment was terminated in March 2020 at the start

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of the pandemic. Mr. Iriotakis, who had been employed for just over two years, was awarded a three-month notice period.

Takeaway for Employers

While not ideal, employers should know that *Iriotakis* does not stand for the principle that the termination of employment during the COVID-19 pandemic automatically warrants a longer notice period. In fact, the judge noted that the uncertainty in the job market was a factor to balance with the other factors, but not one to be applied to the exclusion of the other factors. For example, we have already seen certain industries with particularly high demand throughout the pandemic such that it could be argued that an employee can mitigate very quickly.

We note that *Iriotakis* also briefly addressed the issue of whether CERB should be deducted from damages. Here, the motion judge opted not to order such a deduction. However, he noted that such a determination is fact-specific, and appears to suggest that the deduction might be possible if an employer can establish that it would be fair and equitable to do so. Additionally, the decision is entirely silent on two key arguments that employers can put forward on this issue: the fact that the termination of employment led to the eligibility for CERB; and, that thousands of employees that would have applied for EI benefits in the normal course, which would be deductible, were automatically diverted to CERB during the pandemic. In short, *Iriotakis* speaks to CERB on a very narrow basis.

Infectious Disease Emergency Leave and constructive dismissal

In March 2020, the *Ontario Employment Standards Act*, 2000 (the "*ESA*") was amended to include an infectious disease emergency leave ("IDEL") for employees exposed to COVID-19. On May 29, 2020, the Ontario government extended the application of IDEL to apply to all employees laid off due to COVID-19. These amendments relieve against the layoff provisions under the *ESA* such that employees are deemed to be on the IDEL rather than laid off, and without recourse to a constructive dismissal argument under the *ESA*.

The question for many employers has since been what, if any, impact do these regulations have on a laid off employee's ability to claim constructive dismissal at common law? In April 2021, the Ontario Superior Court of Justice addressed this issue in *Coutinho v Ocular Health Centre Ltd.*, 2021 ONSC 2076.

In short, Ms. Coutinho was temporarily laid off from her position on May 29, 2020 and commenced a constructive dismissal action against her employer three days later. Ocular Health argued that there was no constructive dismissal pursuant to the IDEL, and thus, no cause of action.

Justice Broad found that the IDEL did not restrict Ms. Coutinho's common law right to treat the temporary layoff as a constructive dismissal. In his reasons, Justice Broad relied on section 8(1) of the *ESA*, which provides that no civil remedy of an employee is affected by the *ESA*. As the Ontario government did not explicitly address common law rights, they were preserved.

Takeaway for Employers

While this decision is disappointing given the vast number of temporary layoffs that were triggered by the pandemic, there is hope. Ocular Health was argued on narrow grounds and should therefore not be considered as a wide-sweeping authority on this issue. Other defences such as condonation, past practice and the doctrine of frustration remain available and have not yet been tested before the courts in the context of COVID-19. More remains to be seen on this very important issue.

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