

Alberta Decision Holds Workplace Mask Requirement Does Not Amount to Constructive Dismissal

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By Seth Holland

In a recent decision, [*Benke v Loblaw Companies Ltd.*, 2022 ABQB 461](#) (“**Benke**”), the Alberta Court of Queen’s Bench (the “**Court**”) dismissed a constructive dismissal claim brought by an employee who was placed on unpaid leave for refusing to comply with their employer’s mandatory masking policy. The decision bolsters the legality of employer mandatory masking policies that were implemented in response to the pandemic and government masking requirements, and provides some assurance to employers that properly drafted policies do not amount to constructive dismissal.

The Facts

Benke involved an employee of Loblaw Companies Limited (“**Loblaw**”), Mr. Benke, whose responsibilities involved overseeing the produce and floral departments of Loblaw’s 61 stores in Alberta and British Columbia. After the onset of the pandemic, Mr. Benke’s role required him to continue to perform work in Loblaw’s stores. In August 2020, in response to government masking by-laws Loblaw implemented a mandatory workplace masking policy that provided for limited exceptions.

Prior to the workplace masking policy being instituted, Mr. Benke provided Loblaw with a medical certificate issued by his doctor that purportedly exempted him from complying with local mask by-laws. The certificate did not identify the reason for the medical exemption. Loblaw accepted the employee’s initial exemption certificate and allowed him to work without a mask.

In August 2020 when Loblaw adopted the workplace masking policy, it required individuals seeking mask exemptions from the policy, including for medical reasons, to complete a request form and provide supporting medical documentation. Mr. Benke was unable to obtain support from a doctor stating that there was a medical condition preventing mask use. This was largely because Mr. Benke’s alleged condition did not fall within the narrow categories that Alberta Health Services had recognized as exemptions from the mask requirement. As a result, Loblaw placed the employee on an indefinite unpaid leave.

In response, Mr. Benke brought a civil action against Loblaw claiming he had been subject to discrimination, and that the unpaid leave amounted to constructive dismissal and sought substantial damages.

The Court’s Decision

At trial, the Court dismissed Mr. Benke’s claims.

The Court held that Mr. Benke was not constructively dismissed as a result of the masking policy or being placed on unpaid leave. Rather, the Court held that Mr. Benke’s refusal to abide by the masking policy was a repudiation of the employment contract as he was unwilling to perform an essential part of his duties. The Court held that Loblaw’s decision to place Mr. Benke on unpaid leave was reasonable and did not amount to constructive dismissal. The Court ultimately found that Mr. Benke’s repudiation of the employment

contract amounted to a resignation from his role.

The Court also addressed specifically whether the mandatory masking policy amounted to a unilateral change to a substantive term or condition of Mr. Benke's employment, which is a fundamental element that an employee must establish to claim they have been constructively dismissed. The Court held that the mandatory masking policy was not a substantial change to the employment contract since the employee's duties remained the same. The Court held that the requirement to wear a mask did not fundamentally change the nature of the position, particularly given the requirement was co-extensive with local masking by-laws impacting Loblaw's stores in Alberta and British Columbia.

Finally, the Court held that Loblaw did not discriminate against Mr. Benke since he could not present any evidence demonstrating a disability or medical condition preventing the wearing of a mask. Given there was no medical condition at issue, Mr. Benke's circumstances did not trigger his rights under the *Alberta Human Rights Act* ("Act"), or a duty to accommodate under the Act.

Key Takeaways for Employers

The *Benke* decision provides added support for employers to assert that a mandatory masking policy implemented in response to government masking requirements will not amount to constructive dismissal, provided those policies account for human rights and other exemption requirements required by law.

Benke also indicates that employees that are non-compliant with legitimate masking requirements, and who cannot demonstrate legally valid reasons for non-compliance (such as medical restrictions), in certain circumstances may be placed on an unpaid leave of absence or even deemed to have repudiated and resigned from their employment.

All cases however must be evaluated on their specific facts, as well as the underlying policy and employment agreement at issue. Further, employers must ensure in all cases that their masking requirements have complied with applicable human rights legislation by providing for exemptions for medical reasons, and any other legally recognized exemptions under COVID-19 legislation and guidelines.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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