

[CASE ALERT: Benke v Loblaw Companies Limited \(2022 ABQB 461\)](#)



Benke v Loblaw Companies Limited 2022 ABQB 461

On July 5, 2022, the Alberta Court of Queen's Bench released the first Alberta employment law decision addressing a constructive dismissal claim in the context of an unpaid leave of absence for failure to follow an employer's COVID policy: *Benke v Loblaw Companies Limited*.

The employer in this case instituted a masking policy for all its employees, customers, and contractors. The employee had a senior role which required him to visit many of the employer's stores. Many of those stores were also subject to municipal masking bylaws. The employee requested a medical exemption to the masking policy. The employer investigated, and it became clear despite an initial doctor's note suggesting a medical basis for the claim, that his exemption request was not based on any medical condition preventing him from wearing a mask. After he refused to wear a mask for in store visits, the employer placed the employee on an unpaid leave of absence.

The employee argued that he was constructively dismissed from his employment. The Court applied the well known test in *Potter* to conclude that the employer's introduction of the mask policy was not a substantial change to nor a breach of the employment agreement. Further, the Court found that the unpaid leave of absence was not a breach of the employment contract since employees are only paid for work actually performed. In this case, because the employee was not working because of a voluntary choice that he made not to comply with the policy, it was reasonable for the employer to not pay him.

In conclusion, the Court found that the employee repudiated his employment agreement by refusing to follow the policy and the employer acted appropriately by putting him on an unpaid leave of absence. The employee was not constructively dismissed and any losses suffered by the employee were self inflicted.

This decision is a welcome sight for employers who have instituted similar policies, whether it be masking or vaccination. While the decision turns on its facts, the hope is that further decisions follow suit and provide protection to employers who have

undertaken good faith vaccination policies and applied them fairly with due consideration of claims for human rights based accommodations.

While the main interest in the decision for employers is the discussion about the unpaid leave of absence, this decision also addressed the seldom used summary trial process in the Alberta Rules of Court.

While historically, most cases were addressed using the traditional full trial process, that process is expensive and time consuming. In recent years the Court has increasingly been encouraging use of summary processes where those still permit the case to be fairly adjudicated. The Court urged participants to consider the use of summary trials to avoid delay and obtain faster resolution of issues. The Court also confirmed that credibility issues can often be resolved through the summary trial process. While summary trials in employment law cases have been very rare in the past, with this decision, we can expect that in the future employers will much more routinely see plaintiff's counsel push to use summary trials instead of full trials, even when credibility is in issue.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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