

Refusal of Unsafe Work: Lessons Learned From SARS



As British Columbia moves from Phase 2 into Phase 3 of its Restart Plan, employees will increasingly be asked to return to work and resume work as before – subject of course to the requirements and recommendations of the government, public health authorities and WorkSafeBC.

An employee has the right under the workers' compensation scheme in BC to refuse unsafe work. If the employee has a reasonable basis to believe that performing work will put him or her or someone else at risk, he or she can refuse to perform the work and appropriate steps will then be taken to determine if it is unsafe and otherwise address the situation.

A new face to an old problem ...

It has repeatedly been said that the challenges created by COVID-19 are unprecedented in many respects and that is indeed so.

In determining whether an employee's refusal to work is justified, however, it is useful to look not only to present circumstances but also to our experience with severe acute respiratory syndrome (SARS) in the early 2000s.

The right to refuse work was the focus of a number of health and safety decisions made in the context of the SARS outbreak.

In one case, a customs officer who worked at Pearson International Airport refused to report to work, citing the risk of exposure to travellers arriving at the airport and potentially infected with SARS. On appeal of a finding by a health safety officer (HSO) that there was no risk to the employee, the adjudicator held that the perceived risk to the employee was speculative or hypothetical and not grounded in fact.

In another case, two ticketing agents working at Pearson Airport refused to work for fear of contracting SARS from passengers with whom they came into contact at the airport. On appeal of a decision of the HSO, the adjudicator noted that Air Canada had addressed the risk of exposure of its employees to SARS in its policy. The policy was based on information from the World Health Organization (WHO), Health Canada, the Centre for Disease Control and other public health authorities. In particular, the adjudicator highlighted the WHO's definition of "close contact" which involved consistent contact as in the situation of a healthcare worker caring for a SARS patient in a hospital or a family member caring for a SARS patient at home.

In a third case, two employees who worked at a Human Resources Development Canada resource centre near Pearson Airport refused to work a particular shift, citing a concern about contracting SARS and insisting that they be provided with masks and gloves. The HSO referred to Health Canada guidelines stating that personal protective equipment was not necessary to protect government employees who had limited contact with the public. The HSO determined the risk was negligible that the clients with whom the employees had contact in the course of their duties would be infected with SARS. On appeal, the adjudicator held it was insufficient for the employees to rely only on evidence that some of their clients were arriving from Asian countries where SARS was prevalent.

Takeaways for employers

The common thread running through the decisions made in connection with the SARS outbreak is that: (a) the employee must have a reasonable basis for refusing to perform work on safety grounds; and (b) the employer is not measured against a standard of perfection and must simply take reasonable steps to provide a safe workplace and manage foreseeable risks.

In the context of COVID-19, the prudent and compliant employer will take the necessary steps to adhere to the applicable health and safety rules and guidelines established by the BC Ministry of Health, Provincial Health Officer and WorkSafeBC and minimize the risk of infection or transmission of the virus, including by developing and implementing a COVID-19 Safety Plan.

Consider any refusal to work by an employee to be an opportunity to inquire and investigate as required and avoid potential harm. Address the matter with expedition and alacrity, understand the employee's concern or concerns and respond in a context-sensitive and responsible manner. Follow the steps recommended by WorkSafeBC, including by involving a prevention officer from WorkSafeBC if or when necessary.

By James D. Kondopulos and Janna Crown (articled student), Roper Greyell LLP – Employment and Labour Lawyers

This article is for general information purposes only and does not constitute legal advice.

James D. Kondopulos is a founding member and partner (practising through a law corporation) of Vancouver-based employment and labour law boutique, Roper Greyell LLP. He was named by Lexpert as one of Canada's leading lawyers under 40 and is ranked as a leading employment lawyer in the Canadian Legal Lexpert Directory. He is also recognized as a leader in the area of employment and labour law in both Who's Who Legal and Best Lawyers International, Canada.

Janna Crown is an articled student at Roper Greyell and assisted in writing this article.