Court of Queen's Bench of Alberta

Citation: Benke v Loblaw Companies Limited, 2022 ABQB 461

Date: 20220705
Docket: 2101 02629
Registry: Calgary

Between:

Michael Benke

Plaintiff

- and -

Loblaw Companies Limited

Defendant

Reasons for Judgment
of the
Honourable Mr. Justice Colin CJ Feasby

Introduction

[1] For parts of 2020 and 2021, employers, municipalities, and public health authorities mandated the wearing of face masks in public places of business to mitigate the transmission of the virus that causes COVID-19. During that time, the Plaintiff, Michael Benke, did not want to wear a mask when attending grocery stores as part of his responsibilities working for the Defendant, Loblaw.

[2] Mr. Benke sought an exemption to the requirements to wear a face mask based on an undiagnosed medical condition. Mr. Benke's doctor provided him with a certificate stating that he did not have to wear a mask in the early stages of the COVID-19 pandemic so that he could be exempted from complying with the City of Calgary mask by-law ("Mask Bylaw").

[3] Mr. Benke later sought additional notes from his doctor so that his exemption from compliance with the Mask Bylaw could continue and so that he could be exempted from Loblaw's mask policy ("Mask Policy") which applied to all Loblaw stores nationally. On these occasions, the doctor declined to state that Mr. Benke's request to be exempted from wearing a mask had a medical justification.

[4] Loblaw put Mr. Benke on indefinite unpaid leave because he refused to wear a mask in stores without medical justification and thereby did not comply with the Mask Bylaw and Mask Policy. He claims that this constitutes constructive dismissal and that he is entitled to substantial damages in lieu of notice. I reject this position. Mr. Benke's inability work was the consequence of a voluntary choice that he made. Loblaw had no obligation to accommodate Mr. Benke because there was no medical justification for a mask exemption. Loblaw also had no obligation to pay Mr. Benke for not working. For the reasons that follow, the action is dismissed with costs payable to Loblaw.

Appropriateness for Summary Trial

[5] The Plaintiff set this matter down for a summary trial. The Defendant did not object to the matter proceeding by summary trial, but said, "[i]f the Court is concerned that it is unable to decide between [the] contradictions [between the testimony of the Plaintiff and the Defendant's witnesses] or it would be unjust to do so, it could decide that a full trial is required under Rule 7.9(2) of the *Rules of Court*."

[6] This raises a common problem that afflicts civil litigation in Alberta. The perception amongst the civil litigation bar is that attempting to proceed by way of summary trial, even with the agreement or non-objection of the opposing party, is fraught with risk because the Court may decide after counsel have put in the work to prepare for the summary trial and clients have made corresponding and sometimes significant financial outlays that the matter is not suitable for summary judgment. This is something that I experienced as counsel. There are examples in the caselaw to the contrary where the Court has proceeded with summary trials in the face of conflicting evidence and credibility issues; however, decisions not to proceed with a summary trial are much less likely to result in written reasons. The perception that summary trial is a risky procedure, even when both parties agree, has caused it to be under utilized.

[7] Under utilization of the summary trial process contributes to the problem discussed by Feehan and Wakeling JJA in ***Hannam v Medicine Hat School District No. 76***, 2020 ABCA in the context of summary judgment. Feehan and Wakeling JJA observed that "conventional trials are expensive and plagued by delay": ***Hannam*** at para 46. The length of time that civil matters take to get to trial, they noted, is pushing matters into arbitration. "Until this trend is reversed, Alberta litigants will have a high interest in having access to a workable expedited dispute resolution procedure – summary judgment or summary trial. Or they will continue to take their commercial business elsewhere – private dispute resolution": ***Hannam*** at para 48.

[8] Some people might shrug and say "so what?" Who cares if parties opt for arbitration for private dispute resolution? But it matters a whole lot. If private litigants vote with their feet in large numbers and opt out of using the court system, it will undermine the legitimacy of the courts. Why should anyone trust the courts if those who have resources overwhelmingly opt to resolve their disputes elsewhere?

[9] A large-scale exodus from the courts also creates a rule of law problem. The law that governs commerce is, in significant part, the product of the courts. This is true whether the reasons produced by judges are part of the common law or interpretations of statutes. Public reasons are a public good. Arbitration, which is typically conducted in private and sometimes shielded by confidentiality agreements, rarely produces public reasons. Without a steady

caseload in the courts, commercial law will cease to develop in tandem with our ever-changing society.

[10] My comments should not be understood as an attack on arbitration. Arbitration has an important role to play resolving private disputes. And it is critically important to recognize that arbitration *needs* the courts to continue to produce the public reasons that form the law which arbitrators use to decide disputes. Courts should not abdicate their role and allow arbitration to entirely occupy the field of commercial law.

[11] So how should the courts go about remaining a relevant and viable option for parties to resolve their disputes? ***Hryniak v Mauldin***, 2014 SCC 7 gives the answer at para 2 where Karakatsanis J demanded a "culture change" in order "to create an environment promoting timely and affordable access to the civil justice system." The Court of Appeal made it clear in ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 that in Alberta ***Hryniak*** should be understood as a general admonition that summary processes should be more available in Alberta, but the Court was also careful to note that ***Hryniak*** did not change the words in the Alberta summary judgment rule. The Ontario summary judgment rule considered in ***Hryniak*** was meaningfully different from the Alberta summary judgment rule because it permitted findings of credibility.

[12] In Alberta, summary trials are an important part of the answer, though not the whole answer, to the question of how courts can provide more timely and affordable civil justice. The main reason that summary judgment is not more widely used in Alberta is that credibility findings are not permitted: ***Weir-Jones*** at paras 35 & 38. A requirement to make credibility findings has been held by the Court of Appeal to also be a factor that weighs against using the summary trial procedure: ***SHN Grundstuecksverwaltungsgesellschaft MBH & Co v Hanne,*** 2014 ABCA 168. The conventional wisdom that credibility is an obstacle to proceeding by way of summary trial is seen in the remarks in ***Lehr v Lehr***, 2021 ABQB 538 para 2 where the trial judge observed that "summary trials are often not an appropriate venue for determinations of credibility." We need to move past this mindset.

[13] Starting with first principles, it must be observed that "[a] summary trial is a trial": ***Weir-Jones*** at para 18 citing ***Windsor v Canadian Pacific Railway Ltd***, 2014 ABCA 108 at para 14. A defining characteristic of a trial is that credibility findings are made. The fact that credibility findings must be made cannot be a reason for refusing to hear a summary trial. Recently, the Court of Appeal in ***Weir-Jones*** suggested that this is the correct position. The Court of Appeal explained at para 212 that:

> [a] summary trial or a determination of an issue may be appropriate if a dispute has features that promote a just resolution without accessing all aspects of the trial protocol – no need for questioning, for example. A dispute may largely turn on the resolution of a credibility issue or simply require the application of a known legal standard to an agreed fact pattern, the outcome of which is not obvious. Sometimes a final disposition is the most important dimension of a dispute. An adjudicator will decide these contests using the balance of probabilities standard.

[14] The Court of Appeal in *obiter dicta* reiterated its view in ***Rudichuk v Genesis Land Development Corp***, 2020 ABCA 42 at para 34 scolding the parties for not using the summary trial procedure. The Court wrote **"**this wrongful dismissal action, which involves a significant credibility contest between a small group of people and some novel legal claims, might have

been more efficiently addressed by way of a summary trial rather than three years of litigation on a motion to strike and a summary judgment application, both of which were ultimately dismissed at considerable expense to the parties and cost to the system."

[15] Credibility contests sometimes require *viva voce* evidence. The Court of Appeal affirmed in ***776826 Alberta Ltd v Ostrowercha,*** 2015 ABCA 49 at para 8 that *viva voce* evidence may be called in a summary trial. The practical difficulty that arises is that counsel may not plan to call *viva voce* evidence but the judge hearing the summary trial may consider it necessary to decide the matter. Judges are often not aware that they have been assigned a summary trial until late in the week before it is to be heard and may not receive the materials concerning the case until a day or two before it is to be heard. The present case is an instructive example as counsel did not plan to call *viva voce* evidence and I received the evidence and the parties' briefs on the Friday before the Tuesday on which the summary trial was to be heard. Had I concluded after reading the materials that *viva voce* evidence was required (which I did not), it would have been difficult and perhaps impossible to proceed as scheduled. The answer to this problem is not refusing to let matters proceed by summary trial; that would be letting the tail wag the dog. The answer lies in improvements to the process by which the court triages and schedules summary trials.

[16] The Court of Appeal in ***JN v Kozens***, 2004 ABCA 394 at para 40 held that "[t]he test for whether a summary trial is appropriate is twofold: 1) can the court decide disputed questions of fact on affidavits or by any of the other proceedings authorized by the Rules for a summary trial? 2) would it be unjust to decide the issues in such a way?" This test was framed before ***Hryniak*** and before the foundational rules of the current *Rules of Court* were adopted which both emphasize the principle of proportionality. The test in ***Kozens*** must be viewed now through the lens of proportionality.

[17] The Court of Appeal in ***Weir-Jones***, following ***Hryniak***, explained at para 20 that "[s]eeing a trial as the default procedure is ... not realistic." The Court further explained that "[w]e have to strive for a 'fair and just process' recognizing that 'alternative models of adjudication are no less legitimate than the conventional trial': ***Hryniak v Mauldin*** at para 27." Though this was said in the context of a discussion of summary judgment, it is equally applicable to the question of whether a summary trial or a full trial is more appropriate. The default is not a full trial.

[18] The first question in the ***Kozens*** test – *can* the court decide disputed questions of fact? – can often be answered in the affirmative. The real reason why some judges answer in the negative is that they are anchored to past practice and have an instinctive sense that they *should* not decide disputed questions of fact in a summary procedure because a full trial is a more robust process that is more likely to get at the truth. After ***Hryniak*** and ***Weir-Jones***, the burden should be on the party seeking a full trial (or on the court if acting on its own motion) to explain why the disputed questions of fact cannot be decided using the summary trial process. And credibility issues alone, for the reasons previously explained, cannot be the justification.

[19] Proportionality requires the second question in the ***Kozens*** test – would it be unjust to decide the issues in such a way? –to be viewed in a broader context. The Court must look beyond simply what it may consider to be an optimal truth-seeking process to consider what is a fair and reasonable use of the resources of both the Court and the parties in light of the significance of the matters in dispute to the parties. Taking up significant Court time and burdening parties with the

expense of a full trial when only marginal gains may be obtained from a full trial process is not just.

[20] The Court may, as counsel for Loblaw invited me to do, decide on its own motion that a matter is inappropriate for disposition by way of summary trial. The Court of Appeal observed in ***Kozens*** at para 46 that "[g] iven the importance of credibility in this case, it may well have been inappropriate to invoke the summary trial procedure, notwithstanding counsel's election to do so." To what extent, should the parties' agreement or non-objection to the summary trial process affect a judge's discretion to refuse to proceed by way of summary trial? A judge assigned to a case for a matter of days must approach the case with a certain amount of humility and understand that counsel who have been working on a case for months or years are likely to have a far better understanding of the factors that determine what is a proportionate process. Indeed, counsel are well placed to assess the relative importance of the nature of the dispute resolution process and the cost of that process to the parties. While deference to the parties' choice of procedure will often be appropriate, the Court retains the discretion to refuse a summary trial where it is obviously the wrong procedure.

[21] The key piece of disputed evidence in the present case is whether Mr. Benke said to Loblaw's occupational health nurse, Ms. Nelson, that his objection to wearing a mask was "not medical." Ms. Nelson reports that he said it and Mr. Benke denies that he said it. Both Ms. Nelson and Mr. Benke were questioned on the point and the transcripts are before the Court.

[22] Can the Court decide the disputed question of fact? Yes. Whether Ms. Nelson or Mr. Benke is telling the truth may be determined by looking to other communications that occurred at around the same time. My analysis of those communications is set out below in paras 38-44.

[23] Would it be unjust to decide the disputed issue by way of summary trial? No. This case is worth somewhere between $75,000 and $200,000 if the Plaintiff is successful depending on whether the Plaintiff's or Defendant's estimates are accepted. A full trial with the same four witnesses who provided affidavits would likely be scheduled for three days. Based on my relatively recent experience as counsel, I would not be surprised if the aggregate legal fees of the two sets of counsel for a full trial would be an incremental $50,000 or more above what the parties have spent to date. The cost to the parties of litigating this dispute is not proportional if a full trial is required.

Mr. Benke's Employment History

[24] Mr. Benke began as a part-time employee of Loblaw in April 2002. In August 2003, he became a full-time employee. He initially worked in the produce department of a single store. Over the years he was promoted several times. By 2020, his title was Customer Experience Specialist – Produce.

[25] His responsibilities as Customer Experience Specialist – Produce included overseeing the produce and floral departments of Loblaw's 61 Superstores in Alberta and British Columbia. Mr. Benke acted as a liaison between store departments and broader company management.

[26] As a Customer Experience Specialist – Produce, Mr. Benke was provided with a company car, which was available only to Loblaw employees who were required to drive more than 28,000 km annually for work.

[27] Mr. Benke's role was partly remote work and partly in-store work. Loblaw maintains that Mr. Benke was responsible for spending 50% of his time in stores. Mr. Benke disputes this and says that after 2017 his amount of time in stores was less than 50% and that in 2020 he made few store visits.

[28] Regardless of the precise percentage of time that Mr. Benke spent in stores after 2017, visiting stores was an essential part of his role as Customer Experience Specialist – Produce. The fact that he was provided with a company car on the premise that he was to drive more than 28,000 km annually visiting stores across Alberta and British Columbia shows that even if he spent less than 50% of his time visiting stores, it was still an important part of his role.

[29] Beginning in early 2019, Mr. Benke started to experience health issues. Despite seeing his family doctor and specialists, there was no diagnosis nor was he given any treatment. Loblaw accommodated Mr. Benke by allowing him to be absent from work when he had doctor's appointments.

The Mask Bylaw, Mask Policy, and Mr. Benke's Exemption Requests

[30] In March 2020 when the COVID-19 pandemic came to Canada, Loblaw directed Mr. Benke and similar employees to cease store visits and to work remotely until further notice. Sometime later in 2020, the expectation that Mr. Benke would make store visits resumed.

[31] On July 21, 2020, the City of Calgary passed a bylaw that provided effective August 1, 2020 people in public premises were required to wear a mask to mitigate the spread of COVID-19.[1] The Mask Bylaw contained several exemptions, including an exemption for "persons with an underlying medical condition or disability which inhibits their ability to wear a face covering."

[32] A week later, on July 28, 2020, Mr. Benke's family doctor, Ingemaud Gerber, completed a "Work Absence Certificate" that stated that "[t]his letter is to certify that Michael Benke was assessed in this office and is unable to wear a face mask as per City of Calgary bylaw due to illness." The illness was not identified nor was an explanation provided as to why the illness prevented Mr. Benke from wearing a mask.

[33] Loblaw accepted the medical note and allowed Mr. Benke to continue in his role and work without a mask when he was required to be on site. During the period between August and November 2020, he performed store visits without wearing a mask.

[34] Loblaw adopted a mandatory Mask Policy that applied to all its stores in Canada on August 29, 2020. The Mask Policy applied equally to customers and employees. The mask policy provided for exemptions for:

> (1) Children under the age of two;
>
> (2) Persons with an underlying medical condition which inhibits their ability to wear a mask;
>
> (3) Persons who are unable to place, remove, or use a mask without assistance; and

[1] For much of the time relevant to this case, there was a similar mask by-law in Edmonton and a provincial mask mandate in British Columbia.

(4) Persons who are reasonably accommodated by not wearing a mask under applicable Human Rights legislation.

[35] The Mask Policy provided: "[Employees] are expected to comply with the requirement to wear a mask while at work. [Employees] unable to wear a mask based on any of the above noted exemptions should speak with their manager or human resources regarding their accommodation needs. Medical services will provide support to stores, where required, for accommodation needs based on a medical condition."

[36] Sometime between September and November 2020, Mr. Benke participated in a conference call where the Mask Policy was discussed. Following the conference call, Mr. Benke spoke to Loblaw Senior Human Resource Director, Lopa Parikh, to discuss obtaining an exemption to the Mask Policy. Ms. Parikh provided Mr. Benke with a blank form to request an exemption from the Mask Policy. Ms. Parikh explained to Mr. Benke that he was not required to disclose his medical condition but that his doctor was required to state on the form that he has "a disability that exempts [him] from wearing a mask."

[37] On November 25, 2020, Mr. Benke returned the exemption request form completed by Dr. Gerber. The form had a check mark beside the statement "is unable to wear a face mask" but the words "due to the following medical condition/s or disabilities" were crossed out. Mr. Benke says that the words were crossed out by the doctor because he told her that he was not required to disclose his medical condition.

[38] Shortly after Loblaw received the completed exemption request form from Mr. Benke, Jody Nelson, an occupational health nurse employed by Loblaw followed up with Mr. Benke concerning his exemption form to obtain more information because the words "due to the following medical condition/s or disabilities" were crossed out. Ms. Nelson says that Mr. Benke told her that his request for an exemption from the policy was "not medical." Mr. Benke denies saying this. Ms. Nelson says that she then asked him if he could wear a plastic face shield instead of a mask and he said that he could not.

[39] Should Ms. Nelson's version of her discussion with Mr. Benke be accepted? A little over two weeks after her conversation with Mr. Benke, Ms. Nelson wrote down her account of the conversation in an email to Ms. Parikh. Ms. Nelson's written account is substantially the same as the account provided to the Court in her affidavit and questioning evidence. While her written account of the conversation is not a contemporaneous recording, the fact that it was made a little more than two weeks after the event provides some support to her version of the conversation. Her account also makes sense given the communications from Dr. Gerber in December and January discussed below which show that Mr. Benke knew that his medical condition did not qualify him for an exemption from the Mask Bylaw or the Mask Policy. The fact that, even at this summary trial, Mr. Benke has adduced no evidence of a medical condition or disability that prevents him from wearing a mask strongly suggests that there was no medical basis for his exemption request and that Mr. Benke was candid about this with Ms. Nelson. I accept Ms. Nelson's evidence that Mr. Benke told her that his exemption request was "not medical."

[40] Dr. Gerber authored two documents after completing the form on November 25, 2020. The first is dated December 23, 2020 and the second is dated January 11, 2021. It is not clear whether they are separate medical notes intended for Loblaw or whether the December 23, 2020 note is an internal record from the clinic that was generated as part of the process leading to the

January 11, 2021 letter. Regardless, both were faxed to Mr. Benke's lawyer on January 11, 2021 and provided subsequently to Loblaw.

[41] Dr. Gerber's December 23, 2020 note provides as follows:

> In consultation with Dr. Strother, I responded to the lawyer's request stating that I would be able to properly reply during the first week of January.
>
> There are very limited reasons for people to be exempt from wearing masks in indoor public places at this time. Unfortunately, Mike does not fall into one of these categories and I have to stay in compliance with the Medical Officer of Health orders [emphasis added].
>
> I recognize that I already wrote a note dated July 28, 2020, stating that the patient does not need to wear a mask due to illness, as per patient request. The pandemic and the rules are continually evolving and today I do not have any reason to say that the patient should be exempted from wearing a mask given the current Public Health orders and the clearly stated exemptions.

[42] Dr. Gerber's January 11, 2021 letter indicated that Mr. Benke had "ongoing medical concerns" and stated that AHS stipulated "very specific reasons for people to be exempted from wearing a mask." Dr. Gerber then said that she was "not in a position to make a final decision whether the patient should be forced to wear a mask or not…." She concluded by saying that "it is in the best interest of the patient not to be in public at this time and that if at all possible, continue to do his work from home."

[43] Dr. Gerber's January 11, 2021 letter reads as if she is trying to be respectful of her patient by validating his as yet undiagnosed medical condition while, at the same time, not transgressing any professional standards by misrepresenting to Loblaw that Mr. Benke qualified for a medical exemption from legal and employer policy requirements to wear a mask in public. To be clear, Dr. Gerber does not say in her January 11, 2021 letter that Mr. Benke has a medical condition that prevents mask use or that he qualifies for a medical exemption to the Mask Policy or the Mask Bylaw.

[44] Ms. Parikh's evidence is that the Mask Policy was rescinded in Alberta on March 1, 2022 and in British Columbia on March 11, 2022 "as a result of provincial mask mandates ceasing to apply."

Duty to Accommodate

[45] The present case is a constructive case, not a dismissal claim. Nevertheless, Mr. Benke's claim is, in part, that he was constructively dismissed because Loblaw failed to accommodate his disability (medical condition) by providing him with alternative modes of working. Mr. Benke's counsel submits that he could have been assigned different responsibilities, allowed to work part-time, or permitted to work remotely as he had for several months in 2020.

[46] Where a facially-neutral policy has the effect of discriminating against employees with a disability an employer has a duty to accommodate: ***Stewart v Elk Valley Coal Corporation***, 2015 ABCA 225 para 97. Absent discrimination, there is no duty to accommodate. The Ontario Court of Appeal in ***Filice v Complex Services Inc***, 2018 ONCA 625 considered whether a casino worker who had lost his gaming license was entitled to an alternative work arrangement with the

casino that did not require him to hold a gaming licence. Nordheimer JA observed at para 50 "the respondent was unable to point to any authority that stands for the proposition that an employer has an obligation to relocate an employee to another position, in these circumstances."

[47] Complainants asserting discrimination on the basis of a disability must establish on a *prima facie* basis that they have a disability. Justice Abella, writing for the Court, in ***Moore v British Columbia (Education)***, 2012 SCC 61 at para 33 explained that "complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes."

[48] Mr. Benke did not show to Loblaw nor did he prove to the Court at this summary trial that he has a disability or medical condition that affects his ability to wear a mask. I conclude that Mr. Benke did not have a disability that required accommodation because his doctor could not and did not say that he had a valid medical reason to be exempted from the requirements of the Mask Bylaw or the Mask Policy.

[49] Since Mr. Benke did not show even on a *prima facie* basis that he had a disability, there was no reason for Loblaw to pursue the matter further or seek confirmation through an independent medical examination. I find that there was no discrimination and, accordingly, Loblaw had no duty to accommodate Mr. Benke. In the absence of a duty to accommodate, the hypothetical alternative work scenarios posited for Mr. Benke are irrelevant.

Was Mr. Benke Constructively Dismissed?

[50] After advising Ms. Nelson that his reasons for seeking an exemption to the Mask Policy were "not medical", Mr. Benke was placed on unpaid leave on December 3, 2020. He asserts that by placing him on unpaid leave, Loblaw constructively dismissed him.

[51] The Supreme Court of Canada set out the standard for constructive dismissal in two cases: ***Farber v Royal Trust Co.***, [1997] 1 SCR 846 at para 26 and ***Potter v New Brunswick (Legal Aid Services Commission)***, 2015 SCC 10 at paras 32-39. The Court must determine: (1) whether the employer has imposed unilateral substantial changes that constitute a breach of the employment contract; and (2) if a reasonable person in the employee's position would have felt that the breach substantially altered an essential term of the employment contract. The onus is on the employee to establish the first part of the test and the second part of the test is to be assessed objectively: ***Irvine v Jim Gauthier Chevrolet Oldsmobile Cadillac Ltd***, 2013 MBCA 93 at para 46.

[52] Counsel for Mr. Benke contends that the suspension of an employee without pay constitutes a unilateral change in the employment relationship and a breach of the employment contract, unless the employer has the right, whether explicitly or implicitly, to do so. Even when it is within the employer's discretion to impose such a sanction, such discretion must be exercised reasonably, and the employer bears the burden of showing that the suspension is justified.

[53] Counsel for Mr. Benke relies upon ***Cabiakman v Industrial Alliance Life Insurance Co***, 2004 SCC 55 and ***Filice***. ***Cabiakman*** is a case about an employee who was suspended without

pay by his employer after it became known that he was facing criminal charges for activities that took place outside the workplace. ***Filice*** concerns the suspension of an employee without pay for alleged misconduct in the course of the employee's work duties. The present case is notably different from ***Cabiakman*** and ***Filice*** because Mr. Benke's suspension was a result of him being unwilling to perform his duties.

[54] ***Filice*** concerned an employee at a casino accused of stealing from his employer. Nordheimer JA observed at para 40 "at least at the very early stage of the investigation, it is difficult to see how the appellant could reasonably have concluded that a suspension without pay was warranted. The OPP investigation was ongoing. It was not then clear whether criminal charges would be laid. The appellant did not have any other information to suggest that a suspension without pay was justified. Indeed, the appellant knew that there were flaws generally in their lost and found procedures that went beyond the respondent's activities." A suspension without pay was not warranted in the earlier stages of the investigation because it was not clear that the employee was at fault.

[55] Nordheimer JA continued saying at para 40 that "there might have been a point later in time when the suspension of the respondent without pay could have been justified...." What happened later in ***Filice*** was that, because of the incident, the employee lost his gaming licence so that he could no longer legally work. Had the employer in ***Filice*** waited until the employee lost his gaming license and became unable to work to suspend the employee without pay, the Court may well have found a suspension without pay to have been justified as Nordheimer JA intimated.

[56] Mr. Benke was put on unpaid leave because he would not perform an essential part of his duties as a Customer Experience Specialist – Produce. Specifically, he would not visit stores because he was required to wear a mask in accordance with the Mask Bylaw and Mask Policy. Mr. Benke's situation is analogous to the casino worker in ***Filice*** without a gaming license or a doctor who is suspended for refusing to wash her hands prior to surgery contrary to a hospital policy. To perform his duties, Mr. Benke was required to comply with both a legal requirement, a municipal bylaw, and an employer policy but he refused to do so.

[57] By refusing to comply with the Mask Bylaw and the Mask Policy, Mr. Benke repudiated his employment contract. Justice Gillese explained in ***Roden v Toronto Humane Society***, 2005 CanLII 33578 (ONCA) para 46 in the context of employees who refused to comply with an employer policy that "[r]epudiation … takes place when an employee refuses to perform an essential part of his or her job duties in the future. In such a situation, the employer is entitled to accept the repudiation and treat the employment relationship as terminated because the parties no longer agree on the fundamental terms of the contract."

[58] Rather than accepting a repudiation, an "innocent party" may choose to let a contract continue: G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed (Carswell: Toronto, 2011) at 599-600. That is exactly what happened in the present case. Instead of accepting Mr. Benke's refusal to abide by the Mask Policy and Mask Bylaw as a repudiation of his employment agreement and terminating his employment, Loblaw placed Mr. Benke on unpaid leave which indicates an intention to continue the employment relationship. Ms. Parikh's evidence is that at various points Loblaw advised Mr. Benke that it still viewed him as an employee and that it was willing to work with him to facilitate a return to work. Counsel for Loblaw advised the Court in

his written submissions that "Benke remains in the Loblaw system [as an employee] as of June 2022."

[59] Returning to the question of constructive dismissal, I must address the two questions stated in ***Potter***. Did Loblaw unilaterally impose a substantial change that constitutes a breach of the employment agreement? And, if so, would a reasonable person in the employee's position have felt that the breach substantially altered an essential term of the employment contract?

[60] Loblaw's imposition of the Mask Policy was not a substantial change and did not breach the employment agreement. Mr. Benke's job responsibilities did not change; the only thing that was different was that he had to wear a mask by reason of the Mask Bylaw and Mask Policy. The Mask Policy, though imposed by Loblaw, was not a substantial change and it was co-extensive with legal requirements imposed by municipalities (*ie*. the Mask Bylaw) and public health authorities. Similar mask policies prompted by the COVID-19 pandemic have been found to be reasonable by other decision-makers: see, for example, ***Dickson v Costco Wholesale Canada Ltd***, 2022 AHRC 40 at para 29.

[61] The unpaid leave was a substantial change to Mr. Benke's employment relationship, but it was not a breach of the employment agreement. The essence of the employment bargain is that the employee will work and the employer will pay. Given that Mr. Benke was not working by reason of a voluntary choice that he made, a choice not to comply with the Mask Policy and Mask Bylaw, it was reasonable for Loblaw to not pay him. Though it is not necessary, I conclude that a reasonable employee in Mr. Benke's shoes would not have felt in the circumstances that an unpaid leave as a consequence of failing to abide by the Mask Policy and Mask Bylaw was a substantial alteration of an essential term of the employment contract.

[62] Counsel for Loblaw says that, in the alternative, Mr. Benke resigned from his position. Counsel for Loblaw submits that Mr. Benke's resignation may be inferred from his actions, including his return of the company vehicle in March 2021, making a human rights complaint, and commencing this action. Again, this submission is contrary to Loblaw's position, discussed in the previous para, that Mr. Benke remains an employee in the Loblaw system.

[63] An unsuccessful constructive dismissal claim is often treated by courts as a repudiation or resignation by the employee. Sometimes it is said to be a resignation by operation of law. Wagner J, as he then was, writing for the majority in ***Potter*** observed at para 111, "[t]his view certainly finds support in the traditional principles of the law applicable to constructive dismissal, and I have no doubt that the employee will be found to have resigned in the majority of failed constructive dismissal cases. However, I will leave open the question whether there are factual circumstances in which an employee whose constructive dismissal action is unsuccessful might nevertheless argue that he or she did not resign."

[64] Mr. Benke did not seek reinstatement in this action. In the meantime, he has also obtained full-time employment with a different employer. Despite Loblaw continuing to show Mr. Benke in their records as being on unpaid leave, there can be no doubt that he has resigned even if he did not explicitly communicate that to Loblaw.

Conclusion

[65] Mr. Benke's refusal to abide by the Mask Bylaw and Mask Policy was a repudiation of his employment agreement. Loblaw, however, did not accept the repudiation and put him on unpaid leave.

[66] Loblaw acted reasonably in putting Mr. Benke on unpaid leave. Mr. Benke was not constructively dismissed from his role at Loblaw; to the contrary, he resigned. Any losses that he suffered from being put on unpaid leave were self-inflicted and not the responsibility of Loblaw.

[67] Mr. Benke's action is dismissed with costs payable to Loblaw. If the parties are unable to agree on costs within 30 days of these reasons, they may make submissions on costs by way of a letter of two pages or less accompanied by a proposed Bill of Costs and any supporting materials that may be appropriate.

Heard on the 28th day of June, 2022.
Dated at the City of Calgary, Alberta this 5th day of July, 2022.

Colin CJ Feasby
J.C.Q.B.A.

Appearances:

Charles Osuji & Lucy Mewanu-Mensah, Osuji & Smith Lawyers
for the Plaintiff

Thomas W.R. Ross, Q.C. and Marco Baldasaro, McLennan Ross LLP
for the Defendant