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UNMASKING EMPLOYER ACCOMMODATION OBLIGATIONS AND MUTUAL FRUSTRATIONS

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A recent arbitration decision in *Unifor Local 333 v. Moore Packaging Corp. (Termination of Employment Grievance)*, [2021] O.L.A.A. No. 476, presents unique factual circumstances related to mask wearing during the COVID-19 pandemic and serves as an important reminder for employers of their accommodation obligations. The decision arose out of two grievances brought by Unifor Local 333 due to the employer's failure to accommodate the grievor's medical disability in a timely way and for ultimately terminating her employment on the basis of frustration of contract.

Background

The grievor was employed as a machine operator at a manufacturing facility in Barrie, when on September 7, 2020, the employer instituted a mandatory masking policy (the "Policy"). The grievor promptly advised the employer she could not wear a mask because of chronic Post-Traumatic Stress Disorder ("PTSD") that made it impossible for her to wear any kind of face-covering for more than a brief period of time. Unfortunately, the PTSD stemmed from the grievor being sexually assaulted as a young child by a male babysitter who used tape across her mouth to prevent her from screaming out. She testified at the hearing that in the spring of 2020 when shopping at Walmart, she had to wear a mask for 10 minutes, but at that point experienced a full panic attack, vomited and nearly passed out.

In support of her inability to wear masks, the grievor provided a series of medical notes to the employer. The employer inquired further into her restrictions, including how long she was able to tolerate wearing a mask, and if she could wear a face shield instead. Ultimately, the grievor's doctor indicated that, due to her PTSD, she could not wear any type of face covering for more than 5-10 minutes at a time, that a face shield was not a viable alternative, and that she was aware of her increased risk of infection. The grievor's doctor further advised that the grievor received treatment for her PTSD in the past that did not help, and that "no accommodation is available" for her to be able to comply with the Policy. Finally, the doctor indicated that it was unknown whether she would ever fully recover from her PTSD.

Based on the medical evidence, the employer created an accommodation plan (the "Plan") that moved her between general help tasks where it was possible for her to work alone or within her restrictions. Despite the accommodation offered, the grievor became frustrated with the difficulty of being exposed to a number of employees throughout the plant, leading her union to request that she be moved to a new position at a machine where no one would be around her the majority of the time. In turn, the employer became frustrated with the grievor's continuous lack of compliance with her obligation to wear a mask for 5-10 minutes at a time in accordance with the Plan. The employer argued that it could not train her on the requested machine because doing so would require 15-20 minutes of close proximity to a trainer, which was beyond her limitation.

By October 28, 2020, due to the grievor's failure to follow the Plan and her inability to perform the duties of her original position, the employer deemed the employment contract frustrated, or terminated through no fault of either party.

No Frustration and Procedural Failure to Accommodate

At the arbitration, it was found that while recovery for the grievor's PTSD could not be certain, the underlying problem was rather the state of the pandemic, which will likely end at some point, along with masking requirements. Moreover, while the grievor was "less than scrupulous at times in remembering to raise her mask", it was found that there were numerous other employees who equally did not abide by the Policy, but were not subject to any formal discipline.

When the employer became frustrated with the grievor's lack of masking compliance for 5-10 minutes at a time, it had a duty to provide warning to the grievor and her union that termination may be imminent, which it did not do.

Further, the employer did not demonstrate unequivocally that accommodation of the grievor's restrictions on the machine she requested to work at was not a viable option. Witness testimony described how training could have been accomplished within the terms of the Plan.

The arbitrator did recognize the challenge the employer faced balancing its health and safety obligations to all other employees against a genuine medical disability that risked undermining the health and safety of the workplace. However, the arbitrator ruled that the employer should have further engaged in the accommodation process prior to unilaterally pulling the plug on the grievor's employment. Ultimately, the arbitrator ordered that the grievor be reinstated to her position with back pay and required the employer to consider and discuss possible accommodation options with her.

Key Takeaways

This decision contains a number of important lessons for employers as they continue to navigate the COVID-19 pandemic. First, it is a reminder that an employer's *procedural* duty to accommodate is just as important as its *substantive* duty. Fulsome communication is key for an employer to have all the information it requires to determine what kind of accommodation, if any, it can provide based on an employee's disability. Following the information gathering stage, an employer must comprehensively canvass all options for different roles or duties an employee may perform within their medical limitations. If an employer fails on either the *procedural* or *substantive* duties, it can face costly discrimination damages.

Second, frustration of contract is a very fact-specific exercise. It can occur when an employee cannot perform their duties for the foreseeable future, such as in the case of a serious illness that cannot be accommodated. However, an employer must fully canvass all options and obtain required medical and other information prior to declaring frustration; otherwise, it will face costly termination exposures for non-unionized employees or potential reinstatement in the case of unionized employees.

Finally, employers dealing with employees not following health and safety guidelines should treat all such employees equally when it comes to implementing discipline. A failure to discipline fairly and consistently for similar types of violations may end up disfavouring an employer's position at the end of the employment relationship. With legal advice, documented discipline for health and safety violations can help an employer best position itself for termination with cause or potentially frustration of contract.

McMillan's employment team would be pleased to help your organization take measures to avoid costly discrimination and termination exposures.

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