

# EMPLAWYERS' UPDATE

Spring 2023

A Quarterly Newsletter on Labour and  
Employment Law Issues

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### ***Croke v. VuPoint Systems Ltd., 2023 ONSC 1234***

The Ontario Superior Court of Justice has determined that an employee's refusal to comply with a mandatory COVID-19 vaccination policy can give rise to the frustration of contract. In this case, a mandatory vaccination policy was implemented by Bell Canada, which operates through VuPoint Systems Ltd. (VuPoint). Two days after the policy was in effect, VuPoint implemented a policy that required employees to submit their proof of vaccination as soon as possible. The policy stated that if employees did not comply, they would be prohibited from working with Bell customers.

When an employee failed to provide his vaccination status, VuPoint did not assign him any work. Prior to his final day of employment, the employee provided the employer with a letter confirming that he would not disclose his vaccination status or consent to Bell's mandatory policy. Due to the employee's refusal to comply with the Covid policy, the employer provided him with two weeks' pay and severance pay on his last day of employment.

The employee sued for wrongful dismissal, and aggravated, punitive and/or moral damages. The Plaintiff claimed that disclosing his vaccination status was a breach of privacy under section 8 of the *Canadian Charter of Rights and Freedoms*.

VuPoint maintained the position that the Plaintiff's employment contract was frustrated. As Bell's policy states, their employees must be fully vaccinated if their position requires interaction with customers. VuPoint argued that they had no alternative jobs for the employee. As a result, the employee's contract was frustrated and his employment terminated.

In his decision, Justice Pollak confirmed that the employee received "clear and unambiguous" warnings. The warnings provided that failure to comply with the Policy could lead to the termination of his employment. As a result, the Court

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concluded that the employer was not liable for wrongful dismissal, aggravated, punitive, or moral damages. The employee's termination was considered reasonable and the case was dismissed.

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### **Leave for Injured Military Reservists**

The Ontario government is introducing new legislation to create job-protected leave for injured military reservists. If passed, the legislation will allow military reservists to return to their civilian jobs after deployment. A job-protected leave will acknowledge their physical and mental trauma, and could provide the reservists with additional time off to recover before returning to work. The new legislation may also amend the Ontario *Employment Standards Act* to expand reservist leave for employees who receive physical or mental treatment, recovery or rehabilitation. This can only be applicable if it is related to a participation in a military operation or specified activity.

The Canadian Armed Forces continues to experience shortages of reservists and troops, with one in 10 of the military's 100,000 positions unfilled. This legislation, if passed, aims to help relieve that shortage.

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### **Working for Workers Act, 2023**

On March 20, 2023, the Ontario government introduced the *Working for Workers Act, 2023*. This act will strengthen protections for temporary foreign workers who have become increasingly vulnerable to employers who withhold or retain a foreign worker's passport or work permit. The highest maximum fines in Canada may be imposed on both businesses and individuals who contravene these new rules.

Fines could range between \$100,000 to \$200,000 per worker. However, the passing of this legislation allows supplementary punishment to per-passport penalties. Those convicted of withholding passports can face a fine of up to \$500,000, up to 12 months imprisonment, or both. Corporations that are found liable would be subject to fines of up to \$1 million. After the Ministry of Labour, Immigration, Training and Skills Development established a new unit to detect potential labour trafficking activity in 2021, they received over 300 tips. This unit was able to help 3,500 workers recover \$400,000 in wages.

The Ontario government has proposed amendments to the *Occupational Health and Safety Act (OHSA)* to increase the

maximum fine for corporations. Offences committed under the *OHSA* will be subject to the fine increase from \$1.5 million to \$2 million. Proposed legislative amendments to the *Employment Protection for Foreign Nationals Act* and the *OHSA* would come into force upon Royal Assent if they are passed.

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## Ontario's Proposed Changes to Mass Lay-offs

The Ontario government is proposing updates to the Ontario *Employment Standards Act (ESA)* in an effort to protect remote workers. The proposed amendments seek to ensure that remote workers receive the same notice of termination, or pay-in-lieu of notice, as in-office employees would receive in mass termination situations. Currently, employers are only required to share the latest employment standards poster which highlights the new employee's rights and responsibilities. The amendments to the *ESA* will require employers to provide new hires, prior to their first shift, with written information regarding remuneration, hours of work, and work location.

Under the *ESA*, mass terminations happen when the employer terminates 50 or more employees at an employer's "establishment" within a four-week period. The pandemic sparked the largest shift to remote work. Within three months from the start of the pandemic, the majority of Canadians were working from home, changing the definition of workplace establishment. As a result, the *ESA* amendments aim to broaden the definition of "establishment" to include employees' remote home offices. The proposed amendments will provide remote workers with the right to receive enhanced notice of termination or pay-in-lieu of notice.

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## Ontario Minimum Wage Increase

The Ontario government is increasing the minimum wage on October 1<sup>st</sup>, 2023 to \$16.55 an hour. The Minister of Labour, Immigration, Training and Skills Development, Monte McNaughton, acknowledges that this 6.8 percent increase will aid low-income workers with the increased cost of living.

Workers who average 40 hours per week will have an increase of approximately \$2,200 annually. Students under 18, with less than 28 hours a week will be paid \$15.60 instead of \$14.50 and homeworkers will be paid \$18.20 instead of \$17.05. The new rate will set a precedent in Canada, as Ontario is the first and only one to raise wages this high.



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## Ontario Expanding Cancer Coverage for Firefighters

The Ontario government has announced that it will be introducing regulatory amendments to expand cancer coverage for firefighters. The amendments to the Ontario Regulation 253/07 made under the *Workplace Safety and Insurance Act, 1997*, will expand the list of presumptive illnesses to include certain cancers. The amendments will provide firefighters with access to compensation to support the recovery of thyroid and pancreatic cancers.

The Workplace Safety and Insurance Board has recently identified both thyroid and pancreatic cancers as firefighting work-related causes. According to statistics, firefighters are four times more likely to die of cancer than the general population in Canada. In Ontario, with occupational cancer as the primary cause, firefighters contribute up to 60 deaths per year.

Although standard practices require firefighting crews to take precautions with protective gear and breathing apparatuses, firefighters increase their risk of cancer each time

they are exposed to significant burning toxins. The increased risk is often due to household items being made from hydrocarbon or polymer-type materials that become carcinogenic once burned. The toxicity of carcinogens comes from recent furnishings like plastics, resins, foams and coatings.

Recovery coverage will be retroactive to January 1, 1960. The coverage will be applicable to both active and retired firefighters. Those eligible will include full-time, volunteer, and part-time firefighters, firefighters employed by First Nations band councils, and fire investigators.

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### ***Elementary Teachers' Federation of Ontario v. York Region District School Board, 2022 ONCA 476 (40360)***

In the recent decision *Elementary Teachers Federation of Ontario v. York Region District School Board, 2022 ONCA 476*, the Court of Appeal for Ontario found that a school's principal breached two teachers' rights to privacy when he read and documented the teachers' personal emails to each other, which had been left open on a school laptop.

This case acknowledged teachers' rights against unreasonable search and seizure according to Section 8 of the *Canadian Charter of Rights and Freedoms*.

In this case, two teachers had been recording their communications about another teacher and their work environment on a private log. In an attempt to discipline them through the school board, the principal took pictures of the conversations that were left accessible. Under the *Education Act*, a principal has the power to "maintain proper order and discipline in the school".

At the discipline grievance, the arbitrator had no clear evidence on whether the principal's actions were intentional. Though the grievors were entitled to a reasonable expectation of privacy, their rights were diminished as they were responsible for leaving the log unsecured on a school computer. As a result, the arbitrator determined that their rights were not violated.

At the appeal, the Court of Appeal disagreed with the arbitrator's decision and held that the principal violated the *Charter* right to be free from an unreasonable search.

The Court held that the arbitrator erred in considering the subject matter of the correspondence and the *grievor's* diminished expectation of privacy. Because the logs were stored and secured in the cloud, with reasonable security and privacy measures taken, the Court concluded that the principal's search was unreasonable.

The Court noted that the principal's concern must be related to students, for it to be reasonable:

*"In my view, concerns arising out of employment relationships in the workplace are unlikely to justify a similarly broad and flexible search and seizure authority. Branding workplace relationships "toxic" does not alter this."*

The principal was expected to respect the *grievors'* rights to privacy the moment he knew that he had accessed a private log. With no direct purpose in reading it, taking screenshots and submitting the private logs to the Board, the Court of Appeal declared a violation of the section 8 *Charter* right.

Employers should beware that just because an employee is using the employer's hardware does not mean that the employer has the right to interfere with, or get access to, an employee's private communications.

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### **Cleaner Washrooms on Construction Sites**

The Ontario government is proposing changes to the *Working for Workers Acts, 2021 and 2022*. The changes will require women's-only washrooms on construction sites and make the skilled trades more accessible for everyone.

The women's-only washrooms aims to promote a more private, clean and safe environment on construction sites. The implementation of this policy would require construction sites to have at least one women's only washroom. When this rule is applied, the Ministry of Labour, Immigration, Training and Skills Development will also amend the *Construction Projects Regulation* to ensure that women obtain properly fitted equipment such as uniforms, boots and safety harnesses.

The goal of the legislative changes to the *Act* is to remove workplace barriers and promote equality in underrepresented sectors. The Ministry of Labour's research shows that only 1 in 10 women work in the skilled trades.

Women's-only washrooms will be required to be private. The washrooms are required to be completely enclosed, have adequate lighting and have hand sanitizer available if running water is not reasonably possible. The number of toilets will also be expected to double on more job sites. If approved, the proposed regulatory amendments would come into force on July 1, 2023.