

# BRIEFING NOTE

## **Unpaid leave for non-compliance with mandatory vaccine policy not constructive dismissal**

In the recent case of *Parmar v. Tribe Management Inc.*, 2022 BCSC 1675 (“Parmar”), the BC Supreme Court considered for the first time whether an employer is entitled to place an employee on an unpaid leave of absence for failing to comply with a mandatory vaccination policy (“MVP”).

The Court dismissed the plaintiff’s claim for constructive dismissal, finding that the MVP was reasonable in the circumstances. This is an important case for employers across the province, who can feel more confident about having implemented reasonable MVPs during the COVID-19 pandemic.

### Background

The plaintiff Deepak Parmar (“D”) was an experienced accounting professional who had worked with property management company Gateway from 2003 to 2021. In 2021, the defendant Tribe Management Inc. (“TM”) acquired Gateway, and D signed a new contract with TM to continue her role as Controller of Client Accounting. The new contract required D to comply with all policies “as amended from time to time by Tribe in its discretion”.

Gateway, and subsequently TM, were recognized as providing essential services and stayed in operation during the COVID-19 pandemic. Working from home was not feasible for most of the employees, and D worked remotely for some of the time, but never entirely from home.

**Guild Yule** LLP

BARRISTERS AND SOLICITORS

2100 – 1075 Georgia Street

Vancouver, BC V6E 3C9

[www.guildyule.com](http://www.guildyule.com)

P 604 688 1221

F 604 688 1315

E [feedback@guildyule.com](mailto:feedback@guildyule.com)

In June 2021, TM reopened its office. D returned to the office and worked there for several months, until November of 2021. In the fall of 2021, TM began considering a vaccine mandate for its employees based in part on the federal and provincial governments' MVP for its employees, and the federal governments' encouragement of private sector employers to implement their own MVPs.

TM's human resources team concluded that an MVP was reasonable and necessary means to address the pandemic. As part of the MVP, employees who refused to be vaccinated would not be dismissed or disciplined, but put on an unpaid leave of absence.

TM's MVP provided for medical or religious exemptions and allowed for extra time for those employees who were unable to meet the imposed deadline of November 24, 2021. The MVP could be further modified pending changing circumstances.

D objected to the MVP. D's reasoning was hesitancy over potential risks of various available vaccines and her personal observations of several family members who experienced health issues after taking the vaccine, which led her to believe there was a causal connection between the vaccine and these health complications, despite the absence of any medical professional stating there was such a connection.

As alternatives to being vaccinated, D proposed to TM to work exclusively from home and undergo rapid testing each day she was in the office. TM advised there would be no exceptions to the MVP.

On November 25, 2021, TM told D she would be placed on an unpaid leave of absence from December 1, 2021 to February 28, 2022 because she had not complied with the MVP. TM continued to fund D's participation in TM's benefit plans with the exception of employee-paid benefits.

On January 26, 2022, TM advised D's legal counsel her leave was extended indefinitely or until she complied with the MVP.

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F 604 688 1315

E [feedback@guildyule.com](mailto:feedback@guildyule.com)

D resigned and argued that she had been constructively dismissed. D was successful in obtaining alternate employment in April 2022 and negotiated a higher compensation package in her new role.

### Analysis and Decision

The Court dismissed the plaintiff's claim for constructive dismissal. In doing so, it made the following findings:

1. The assessment of reasonableness of TM's MVP must be considered based on the state of knowledge about COVID-19 at the time the MVP was implemented.
2. The implementation of the MVP was reasonable in the extraordinary circumstances of the pandemic in the winter of 2021 and in January 2022. At the time, proof of vaccination was required for public events, restaurants, pubs and bars. Federal employees were mandated to be vaccinated, as were BC healthcare workers, and private sector employers were encouraged to adopt MVPs.
3. The MVP itself was reasonable. It did not terminate or discipline employees who refused to be vaccinated, and it allowed for exemptions on medical and religious grounds. The consequence for refusing to comply was an unpaid leave. TM did not take steps to replace D while she was on leave, and at all times indicated its intention to continue the employment relationship.
4. The MVP appropriately balanced TM's business interests, its employees' rights to a safe work environment, its clients' interests, and its responsibility as a corporate citizen.
5. A reasonable employee in D's position would not have felt that an unpaid leave as a consequence of failing to comply with the MVP was a substantial alteration of an essential term of the employment contract, the test for constructive dismissal.
6. D's refusal to comply with the MVP was a repudiation of her contract of employment. TM did not accept that repudiation and instead put D on an unpaid leave, and it acted reasonably in doing so.

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Following earlier decisions regarding the COVID-19 pandemic, the Court took judicial notice of facts regarding the severity and transmissibility of COVID-19, and the demonstrated effectiveness of vaccines in reducing the severity of symptoms and bad outcomes.

### For Employers

This decision is an important win for employers who have implemented COVID-19 MVPs and faced criticism and potential lawsuits as a result. The landscape of the pandemic has shifted and continues to shift, and MVPs for COVID-19 may currently no longer be reasonable. However, the principles of this decision should be considered when implementing any kind of MVP. As a starting point, employers should ensure that their employees sign contracts indicating their agreement to comply with all company policies. An MVP should be proportionate to the threat of illness and employers must prioritize their employees' right to a safe and healthy work environment. Exemptions should be available for medical and religious grounds, and an unpaid leave of absence is the preferable consequence for non-compliance, versus discipline or termination.

Please contact us if you would like more information or if you need legal assistance.



[Eve C. Magnussen](#)

Direct Line: 604-844-5548

Email: [emagnussen@guildyule.com](mailto:emagnussen@guildyule.com)

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Vancouver, BC V6E 3C9

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F 604 688 1315

E [feedback@guildyule.com](mailto:feedback@guildyule.com)