

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Parmar v. Tribe Management Inc.*,
2022 BCSC 1675

Date: 20220926
Docket: S220954
Registry: Vancouver

Between:

Deepk Parmar

Plaintiff

And

Tribe Management Inc.

Defendant

Before: The Honourable Justice MacNaughton

Reasons for Judgment

Counsel for the plaintiff:

J. G. Howard
S. Chern

Counsel for defendant:

L. Robinson
M. Mackoff

Place and Date of Trial/Hearing:

Vancouver, B.C.
July 12 and 15, 2022

Place and Date of Judgment:

Vancouver, B.C.
September 26, 2022

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The Issue

[1] This case is about 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”).

[2] Although the validity of MVPs providing for unpaid leaves of absence for non-compliance has been the subject of a number of Canadian arbitral decisions, I am advised by counsel that this is the first time the matter will have been determined in the context of a civil claim.

Background

[3] In her notice of civil claim, Deepk Parmar alleges that she was constructively dismissed from her employment with Tribe Management Inc. (“Tribe”) when she was placed on an unpaid leave of absence after refusing to comply with Tribe’s MVP. She contends that Tribe fundamentally breached its contractual obligations, entitling her to treat the employment relationship as having ended. Ms. Parmar filed her claim on January 26, 2022, and Tribe responded on March 9, 2022.

[4] In its response, Tribe pleads that the MVP was a reasonable and lawful response to the uncertainty of the COVID-19 pandemic and was implicitly authorized by the terms of the employment contract. Tribe also argues that it was justified in placing Ms. Parmar on a leave of absence for failing to comply with the MVP. The consequence of her refusal to be vaccinated was foreseeable, and she voluntarily assumed that consequence. If Ms. Parmar sustained any losses, they are as a result of her failure to mitigate by becoming vaccinated. Ms. Parmar could have resumed employment at any time by simply doing what every Canadian was encouraged to do, and what virtually every one of her colleagues at Tribe had already done—being vaccinated against COVID-19.

Suitability for Summary Trial

[5] The matter proceeded by way of a summary trial. Counsel agreed that the matter was suitable for the summary trial process contemplated under R. 9-7 of the *Supreme Court Civil Rules*.

[6] I agree that this matter is suitable for summary trial.

[7] There are few factual disputes on the evidence, and the necessary facts can be determined because that parties have conducted examinations for discovery. Credibility is not an issue. The matter was argued on the primary legal issue of whether an employer may place an employee on an unpaid leave of absence for failing to comply with an MVP. It would not be unjust to decide this matter summarily: *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at paras. 41–43, 1989 CanLII 229 (C.A.).

[8] The decision in this case is highly dependent on the circumstances facing Canada, and the rest of the world, in dealing with the COVID-19 at the time that Tribe implemented its MVP.

[9] If I find that Tribe constructively dismissed Ms. Parmar, the parties disagree on the measure of her damages and whether it is appropriate to account for the income she earned after finding new employment as mitigation of her damages.

The Summary Trial Evidence

[10] Ms. Parmar’s evidence on this summary trial consisted of: her affidavits dated June 20, 2022, and July 8, 2022; an affidavit from Sunca Milic, one of Ms. Parmar’s colleagues, dated July 8, 2022; an affidavit from a legal assistant attaching relevant correspondence; and extracts from the July 27, 2022, examination for discovery of Maureen McMahon, Tribe’s Director of Human Resources.

[11] Tribe’s evidence consisted of: a June 29, 2022, affidavit from Ms. McMahon; a June 28, 2022, affidavit from Joseph Nakhla, Tribe’s Chief Executive Officer; responses to a notice to admit dated July 5, 2022; and extracts from Ms. Parmar’s

July 6, 2022, examination for discovery as attached to the affidavit of a legal assistant.

The Nature of Tribe’s Business

[12] Tribe’s head office is in Vancouver and it operates regional offices throughout British Columbia (“BC”) and has satellite offices in Alberta and Ontario. Tribe provides condominium management services to strata boards and councils. Those services include financial and information management, community/amenity management, and building maintenance. Tribe also provides rental management services to both full rental buildings and individual units. After its acquisition of Gateway Property Management (“Gateway”), Tribe has approximately 220 employees and provides services to strata corporations collectively comprising 40,000 strata units, housing approximately 100,000 residents.

[13] Tribe’s employees include property managers and administrative and accounting staff. Its property managers attend at the premises of the various stratas and rental properties to which Tribe provides its services. Property managers oversee strata council meetings, provide management and oversight of strata employees and external contractors, and deal with emergent situations affecting strata property. Tribe’s property managers interact with strata council members, residents, and owners of units in the strata properties. They also interact with strata employees, many of whom reside in the properties at which they are employed.

Ms. Parmar’s Employment History

[14] Ms. Parmar is an accounting professional with approximately 19 years of experience in property management. She worked with Gateway until it was acquired by Tribe, a former competitor, in the summer of 2021.

[15] Ms. Parmar was initially hired by Gateway as an executive assistant in or about 2003. During her employment with Gateway, she was regularly promoted and, when Tribe acquired Gateway, she occupied a senior management position as Controller, Client Accounting. In that position, she was generally responsible for all

aspects of Gateway's accounting, including accounts payable and receivable. She had signing authority over Gateway's accounts. She managed an accounting staff of approximately 20 people and, as needed, was involved in recruiting, disciplining, and dismissing members of her team.

[16] There is no issue about Ms. Parmar's competence or reliability. She was a valued employee throughout her tenure with Gateway and latterly with Tribe. Tribe did not want her to leave, and there is no suggestion that implementing the MVP was a pretext for ending Ms. Parmar's employment relationship with Tribe. As Ms. McMahan said in her affidavit at paras. 11 and 52:

11. Throughout her employment, Ms. Parmar demonstrated herself to be a reliable and competent employee. I recommended her for a number of promotions and pay increases and I am aware that she progressed from an entry level position as Executive Assistant to a Senior Managerial role as Controller, Client Accounting.

...

52. I did not want to place Ms. Parmar on a leave of absence. In addition to being a valuable and integral employee of Tribe, I considered her my friend. I sincerely hoped that she would become vaccinated and return to work as soon as possible.

[17] In addition, Mr. Nakhla said in his affidavit at para. 9:

I was at all times ready to welcome Ms. Parmar back to the office and to have her resume her duties immediately if she became vaccinated. She was an excellent employee and an integral part of Tribe's business. Tribe took no steps to replace her or to fill the vacancy created by her leave of absence until after she advised of her resignation on January 26, 2022. It was my sincere hope that she would return to work.

Tribe's Acquisition of Gateway

[18] In or about July 2021, Gateway was sold to Tribe. Tribe continued Gateway's operations until the two businesses could be integrated.

[19] Shortly after the sale, Tribe offered new written employment contracts to Gateway's employees, including Ms. Parmar. Ms. Parmar was provided with a draft employment agreement on July 26, 2021, and signed it on July 31, accepting the terms and conditions of employment set out in the letter.

[20] In brief, in exchange for a \$10,000 signing bonus and eligibility for stock options in Tribe (a publicly traded company), Ms. Parmar agreed, to take effect on August 1, 2021, that:

- a) she would continue her existing role as Controller, Client Accounting;
- b) her remuneration was comprised of a base salary of \$100,000 per annum;
- c) she was required to comply with all policies “as amended from time to time by Tribe in its discretion”; and
- d) if she was dismissed by Tribe, in circumstances not constituting just cause, she would be entitled to receive “notice, or at Tribe’s option, payment in lieu of notice, or a combination thereof as follows:
an initial payment of twelve (12) months base salary, plus payment of an additional one (1) months’ base salary for each completed year of employment, to a maximum of twenty-four (24) months, going forward from 01 August, 2021.

The COVID-19 Pandemic

[21] On March 16, 2020, British Columbia declared a provincial state of emergency in respect of the COVID-19 pandemic.

[22] As Gateway’s Vice President of Human Resources, Ms. McMahon was responsible for responding to the pandemic and developing a plan to manage it. She said that the plan had three primary objectives in mind: the sustainability of Gateway as a viable business; the health and safety of Gateway’s employees and clients; and the health and safety of the community generally.

[23] Gateway and Tribe (then a separate entity) were recognized as providing “essential services” in accordance with the document published by Emergency Management BC outlining those industries considered to be essential. They were businesses that “support the safe operations of residences”. As Mr. Nakhla explains in his affidavit, Tribe employees frequently responded to emergent situations in the buildings they managed including fires, floods, malfunction of heating and cooling systems, malfunction of building utilities related to potable water, and hazardous

property damage. As a result of their status as essential services, unlike many BC businesses, Gateway was not required to cease operations.

[24] Like other human resource professionals, Ms. McMahon had no experience in dealing with a pandemic. She says that she did not know how to respond appropriately. She explains that she sought as much information and advice as possible. She closely followed reports issued by BC's Public Health Officer, the Centre for Disease Control, and various other media sources.

[25] Gateway considered implementing a policy to allow or require employees to work from home, but this was not feasible for many of Gateway's employees. Gateway remained dependent on paper files, had poor electronic records, had no equipment to allow employees to work from home, and, in many cases, did not have the necessary software licensing to permit remote work. As a result, remote work was not an option for more than 40 percent of Gateway's employees. Ms. Parmar was able to work remotely for some of the time but never entirely from home.

[26] As a company, Tribe was better prepared to facilitate remote work and implemented a policy that permitted about 90 percent of its employees to work remotely.

[27] Gateway implemented measures that were generally in place until June 2021 including: encouraging employees to work remotely where possible; discouraging employees from congregating when at the office by requiring physical distancing at all times; enforcing strict adherence to the start and end times of employee shifts to minimize interaction within the office; limiting occupancy in shared elevators; and closing its office to the public and restricting access to employees only. Similar measures were implemented at Tribe.

[28] In her first affidavit, Ms. Parmar says that starting in or about March 2020, Gateway introduced a work-from-home policy and that from March until late June or early July 2020, she worked primarily from home and was only required to attend at her office, one to three times a week, to sign cheques. She did so after hours.

[29] Ms. Parmar also says that she worked from home from April until June 2021 on the same basis.

[30] Ms. McMahon says that, to her knowledge, Ms. Parmar attended at the office about half of the time. Ms. McMahon said that it was usual to have employees in the office as early as 6:00 a.m. and often as late as 10:00 p.m. I consider this a minor difference in the two women's evidence. I need not resolve the difference for the purposes of this summary trial application because it is clear on both affidavits that, while Ms. Parmar was able to work from home, she was also required to attend at the office.

[31] There is no dispute that Ms. Parmar was responsible for signing cheques and interacting with colleagues and other staff who, in turn, needed to interact with Ms. Parmar to satisfactorily perform their jobs. Many of Ms. Parmar's duties were curtailed leading up to June 2021 as about half of the accounting team was working remotely, and she was not managing or overseeing her direct reports.

[32] There is also no dispute that Ms. Parmar was not told that there were any issues with her working remotely for most of the time. She was able to fulfill all of her duties.

[33] Ms. McMahon says in her affidavit that, until June 2021, Gateway had been able to withstand many of the challenges posed by the pandemic with the measures that they had implemented. However, she says that the measures created considerable difficulty and that there was a significant decline in productivity and profitability which she attributes, in part, to the lack of social and professional interaction among employees. I accept that Ms. McMahon's statements are difficult to prove objectively; nonetheless, I also accept that remote work would necessarily reduce communication opportunities between colleagues and made supervision of employees more difficult.

[34] By mid-June 2021, just prior to the completion of Tribe's acquisition of Gateway, and about when it was expected that vaccines would become readily

available, Ms. McMahon says that the circumstances of the pandemic changed to an extent that permitted Gateway/Tribe to reopen their offices. On June 18, 2021, she sent an email to all staff, including Ms. Parmar, advising that Tribe was reopening its BC offices effective June 23, 2021. Ms. Parmar returned to the office and worked there between June 23 and November 30, 2021.

[35] There is no dispute that Ms. Parmar carefully observed or exceeded all of the public health requirements while she was in the Tribe office.

[36] Ms. Parmar says that in or about August 2021, she was informed that she would be moved into a newly-created role, that of Controller-Financial Accounting. She would continue to report to the Vice President, Finance Services, Ken Axenty, but would no longer be managing the property accounting team. She would focus on the finances of the overall Tribe business. There is no dispute that Ms. Parmar was expected to fill the new role, but Ms. McMahan says that no job description had yet been created.

[37] On November 18, 2021, Ms. Parmar says that Mr. Axenty told her that the transition into her new role would be accelerated and an announcement was sent to all Tribe employees. Ms. Parmar said that her new role created less risk of COVID-19 transition as her number of direct reports would be reduced to two and she could manage them from home and through video meetings. In her new role, she would no longer be required to attend the office to sign cheques.

[38] I accept that Tribe intended to transition Ms. Parmar into her new role. However, due to the timing of the implementation of the MVP and Ms. Parmar's decision not to be vaccinated, it is apparent that she never fully completed the transition.

Tribe's Implementation of the MVP

[39] Ms. McMahon says that, in late 2020, as vaccines became more readily available, she was aware that a number of employers were implementing policies requiring employees to be vaccinated and to demonstrate proof thereof as a

condition of continued employment. In the summer of 2021, and over more than two months, she was part of a small group of Tribe employees who discussed and considered implementing an MVP for Tribe staff.

[40] Initially, the group resolved to strongly encourage employees to become vaccinated against COVID-19 and asked employees to disclose their vaccination status. By September 1, 2021, they learned that 84 percent of their more than 200 employees were vaccinated. The group regarded the 16 percent who were still unvaccinated (35 employees out of 220) as an unacceptably high number considering the risks of COVID-19 as they were then understood and being presented by Public Health and in the media.

[41] The group considered further measures to deal with the pandemic. They reviewed a number of materials and were aware of the following facts:

- a) Public health orders had been made, or were being implemented, requiring proof of vaccination for persons attending restaurants, bars, and events in BC.
- b) The federal government was implementing an MVP for all of its employees.
- c) An order requiring all persons employed in the health care sector to be vaccinated had been, or was being, implemented in BC.
- d) The provincial government was implementing an MVP for all public service employees.

[42] Ms. McMahon says that she also learned of the following comments made by Prime Minister Trudeau at a press conference on September 6, 2021:

We're [going to] make sure that the people that choose not to get vaccinated don't get to get on a plane or a train; don't get to work in the public service; ... don't get to go to movie theatres or gyms or restaurants ... That's how we keep people safe and that actually is part of the choice Canadians get to make ... and that's why it's so important to continue to stand strong and determined on moving forward in the right way.

[43] When a reporter asked the Prime Minister about the propriety of private businesses implementing MVPs, he responded:

... There are a number of different ways that the Justice Department is looking at ensuring that they do not have to fear being sued for demanding that people be vaccinated. But we will make sure that we're helping them know that they're doing the right thing, and know that we'll have their backs as they do it.

[44] In addition to the publicly available information that Ms. McMahon was reading, hearing, and collecting throughout the pandemic, she was in constant and ongoing contact with human resource professionals across Canada. She came to understand that, at this time, MVPs were being implemented with increasing frequency by employers across Canada.

[45] Based on the information available to her, Ms. McMahon concluded that an MVP was both a reasonable and necessary measure to address the pandemic and the risks associated with COVID-19, as she understood them.

[46] In her affidavit, she describes how difficult this decision was for her personally as, in her human resources experience, she had never considered mandating health care decisions for employees and she recognized that some employees would consider an MVP as an unjustified incursion on their rights.

[47] In his affidavit, Mr. Nakhla explains his own concerns about the MVP. He was aware that employees might regard the MVP as an incursion into their personal lives and choices. It was his decision that if an employee opted to forego vaccination, they would not be dismissed or disciplined but would be placed on an unpaid leave of absence. He recognized that the publicly-available information was changing and the possibility that the MVP might be repealed at some point. Mr. Nakhla says that he had uncertainties when he approved the MVP and that it was one of the most difficult decisions he had to make in his professional career. He concluded that it was necessary and the right approach.

[48] Both Ms. McMahon and Mr. Nakhla provided evidence about the impact of COVID-19 on some Tribe employees. While most employees who were infected

recovered without incident, one senior accounting employee, a relatively young man, was seriously ill. He was in intensive care, and dependent on a ventilator for several weeks. His illness caused significant anxiety in the workplace. While he recovered, he was off work for about four and a half months before gradually returning to work.

[49] Certain employees disclosed that they had compromised immune systems, including one who had recently undergone cancer treatment and expressed reservations about working with unvaccinated colleagues. Another employee's mother died in hospital, and he was unable to see her before she died.

[50] Several of Tribe's clients asked whether it had, or was going to, implement an MVP. Some of those clients advised that they would require employees, who attended at their strata properties to perform their duties, to be vaccinated. Although, arguably, Tribe could have implemented a policy that required only its property management employees to be vaccinated, that did not appear to be workable due to the integration of those employees with administrative employees.

[51] Ms. McMahon says that all of the available information, and Tribe's employees' experiences, led her to decide that an MVP was reasonable and appropriate. She drafted, and Mr. Nakhla approved, an MVP to apply to all Tribe employees.

[52] In his affidavit, Mr. Nakhla said that he approved the policy and was ultimately responsible for its terms and implementation. He continues to believe that the MVP was an appropriate response to the uncertain and ever-changing COVID-19 situation which "was unlike anything I had ever experienced in terms of its effect on our business and more importantly, ... on the health of our staff and their families".

[53] The MVP was distributed to all Tribe employees on October 5, 2021, attached to an email from Ms. McMahon. Her email said:

With the ever-changing landscape of COVID-19 and the steps being taken to ensure an end to the pandemic, many agencies and businesses in both the public and private sectors across the country have implemented or will be implementing a Vaccination Policy. In line with our company's commitment to

the protection of the health and safety of our employees, we are implementing a **Mandatory Vaccination Policy**.

The policy is attached and you will need to review asap. There are deadlines included that must be adhered to.

[Emphasis in original.]

[54] The attached MVP explained the reason for the implementation of the MVP and the basis for it:

The health and safety of our employees, clients and communities is a priority. Tribe ... is committed to taking every precaution reasonable for the protection of the health and safety of our employees from COVID-19. Vaccination has proved to be a key element in not only protection against COVID-19, but also in the reduction of the transmission of the virus. Therefore, Tribe has adopted a mandatory COVID-19 Vaccination Policy.

This policy is based on guidance from the Centres For Disease Control and Prevention (CDC), the provincial Public Health Offices (PHO) and all applicable provincial health orders.

[55] The MVP applied to all employees and required them to become “fully vaccinated” by November 24, 2021.

[56] The MVP provided for medical or religious exemptions and allowed for extra time for those employees who were unable to meet the deadline. It also contemplated that the policy could be modified:

Governmental and public health guidelines and restrictions and industry best practices regarding COVID-19 vaccines are changing as new information becomes available, further research is conducted, and additional vaccines are approved and distributed. Tribe reserves the right to modify this policy at any time at its sole discretion to adapt to changing circumstances and business needs, consistent with its commitment to maintaining a safe and healthy workplace.

[57] With the exception of Ms. Parmar and one other employee, all of Tribe’s more than 200 employees complied.

[58] Ms. McMahon says that concurrent with introducing the MVP, Tribe also implemented a hybrid work model to allow employees to work partly in the office and partly from home. The model was not intended as a COVID-19 mitigation strategy, but as a recruitment and retention tool as employees were increasingly expecting to

be able to work remotely at least some of the time. The model did not allow employees to work entirely from home, but allowed employees to work remotely “half time”—two days one week and three days the next. The model was not an alternative to vaccination, as no one was permitted to work entirely remotely. Employees who opted to work in accordance with the model were required to enter an agreement as to its terms.

Ms. Parmar’s Objection to the MVP

[59] Ms. Parmar made her objection to being vaccinated known to Ms. McMahon and others.

[60] Ms. Parmar is not an anti-vaxxer. Instead, she says that she had been reviewing the literature and news about the efficacy and potential risks of the various available vaccines and she observed several family members experience severe health complications following their first and second vaccines.

[61] In particular, after Ms. Parmar’s father received his first vaccine dose, he began experiencing headaches that became severe after his second dose and lasted for months. Ms. Parmar acknowledged at her examination for discovery that her father was vaccinated before November 2021. She says that her father started experiencing brain fog, confusion, seizure-like episodes, shortness of breath, and overall weakness making it difficult to get out of bed. After weeks of oxygen therapy, the intensity of his symptoms has subsided, but he has not resumed his daily routines. When asked at her examination for discovery, Ms. Parmar agreed that her father had a heart condition and underwent bypass surgery in 2019.

[62] Ms. Parmar agreed that he father was never told by a doctor his headaches or other post-vaccination symptoms were related to the vaccine. She believed that there may have been a causal connection.

[63] Ms. Parmar also says that her aunt experienced an endometriosis flare-up after receiving her second vaccine dose and that her symptoms continue and cause

her severe pain. There was no evidence in the record before me connecting endometriosis with COVID-19 vaccines.

[64] Finally, Ms. Parmar refers to a family acquaintance who experienced numbness in her legs and was unable to walk for over a week after receiving her vaccine.

[65] Ms. Parmar says that she is concerned that the vaccines were prepared and distributed hastily and that there is limited data about their long-term efficacy and potential negative health implications for certain individuals. She was hesitant to get vaccinated for fear of negative side effects.

[66] After receiving the MVP on October 5, 2021, Ms. Parmar sent an email to Mr. Axenty and Ms. McMahon, asking if the MVP was going to be a condition of employment. She says she shared her concerns with Ms. McMahon and Mr. Axenty.

[67] The MVP exempted employees who did not wish to be vaccinated on either religious or medical grounds. Ms. Parmar did not seek an exemption on those grounds, and Ms. McMahon says that, to her knowledge, neither Ms. Parmar's faith nor her medical status would have prevented her from being vaccinated. This was not disputed by Ms. Parmar.

[68] For those employees who, for personal reasons, wished to remain unvaccinated, the MVP accommodated those wishes. Instead of being dismissed or disciplined, Tribe's Chief Executive Officer required that they be placed on an unpaid leave of absence.

[69] On October 12, 2021, Ms. Parmar met with Ms. McMahon and Mr. Axenty and told them why she was not prepared to get vaccinated. She explained her family's health history including heart issues on her father's side and autoimmune issues on her mother's side, her mother's negative experiences with doctors and specialists providing inaccurate information, and the negative health impacts that her family experienced as a result of vaccinations. Nonetheless, Ms. Parmar's family members were vaccinated.

[70] Ms. Parmar proposed various alternatives, such as: working exclusively from home, or in a hybrid arrangement, with strictly-controlled in-person office visits to sign cheques; that she would continue to strictly adhere to other safety protocols; and that she was willing to undergo rapid testing on each day she was required to attend at the office.

[71] Ms. Parmar was advised that there would be no exceptions to the MVP.

[72] Ms. Parmar, Ms. McMahon, and Mr. Axenty met again on October 20, 2021, and Ms. Parmar suggested rapid testing as an option. She was told that it was not an option. Ms. McMahon and Mr. Axenty asked Ms. Parmar to give Tribe's management until November 30, 2021, to give her an answer. Ms. Parmar said that she did not think anything would change with respect to her opposition to vaccination. On October 22, 2021, Ms. McMahon asked Ms. Parmar whether she had decided to give management until November 30, 2021, and Ms. Parmar agreed on the understanding that Tribe was looking into rapid testing.

[73] On November 9, 2021, Mr. Axenty sent Ms. Parmar a news article about the safety of vaccines and followed up with her on November 22, 2021. She told him that the article had not changed her mind.

[74] A formal announcement about Ms. Parmar's transition to her position was sent out on November 18, 2021. The announcement provided:

As our Tribe teams continue to come together, we are very pleased to announce the next steps in our amalgamation –

Vincent De Guzman will be taking on the Controller, Client Accounting role, overseeing and integrating the Vancouver and Delta Office accounting groups into one team...A transition plan is being put into place to introduce Vincent to the Delta teams, systems, processes and procedures as he works toward the goal of uniting the 2 groups. Congratulations Vincent...

Deep Parmar will be moving into a Controller, Financial Accounting role, working on the corporate side of our financial affairs, which is an area she is familiar with...For the next while, Deep will be transitioning her current position to Vincent, who will be spending more time in the Delta Office. Congratulations Deep...

[75] On November 25, 2021, Ms. McMahon met with Ms. Parmar and told her that, because she had not complied with the MVP, she would be put on an unpaid leave of absence from December 1, 2021, to February 28, 2022 (the “Leave”).

[76] Ms. Parmar was given a letter dated November 24, 2021, confirming the Leave. The letter confirmed that Tribe would continue to fund Ms. Parmar’s participation in Tribe’s benefit plans with the exception of employee-paid benefits, the options for which would be discussed. The letter said:

The decision to impose a leave of absence arises primarily from our legal responsibility as an employer to provide all employees with a healthy and safe workplace. It is our hope that you will use this time as an opportunity to seek as much information and advice as possible regarding the safety and efficacy of the COVID-19 vaccine.

If at any time during the period, you would like to discuss our position or should your decision on receiving the vaccine change, please contact me immediately. If we have not heard from you by mid-February, 2022, I will be in touch to discuss next steps.

[77] On November 29, 2021, Ms. Parmar emailed Ms. McMahon asking for clarification on how the Leave would be implemented and what would happen at the end of the three months.

[78] On November 30, 2021, Ms. McMahon sent a company-wide email advising staff that Ms. Parmar, and one other employee, had been placed on three-month unpaid leaves related to the MVP.

[79] On the same day, Ms. McMahon emailed Ms. Parmar providing her with information about the employee-paid benefits premiums and asking for a return of her company cell phone and her security pass for the duration of the Leave. Ms. Parmar responded on December 1, 2021, and asked whether she could buy out the cell phone.

[80] On December 9, 2021, Ms. McMahon responded that buying out the company phone appeared to be premature as Ms. Parmar was still an employee. With respect to what would happen at the end of three months, Ms. McMahon wrote, in part:

As far as the next steps that may occur should your position remain unchanged at the end of the 3 month period, I do not know what those might be at this point. The situation with the pandemic, emerging variants, escalating hospital admissions etc. will most likely dictate the province's position on its vaccination strategy...

Ms. McMahon asked that they reconnect in mid-February to review the situation at that time.

[81] Although Ms. Parmar submitted that her Leave was, in effect, indefinite, the MVP provided that it would be reviewed ongoingly, and Ms. McMahon wrote that Ms. Parmar's situation would be reviewed in mid-February.

[82] On December 15, 2021, Ms. Parmar sent Mr. Axenty and Ms. McMahon an email attaching a letter requesting to return to work within one week, or she would allege constructive dismissal. She outlined what she saw as some of the safety mitigation measures that could allow her to continue working, including willingness to undergo regular rapid testing, at her expense, if she needed to attend at the office.

[83] Although not in the materials, it appears that counsel for Ms. Parmar sent Tribe, or its counsel, a letter dated January 4, 2022, and, after it, counsel exchanged emails on January 7, 2022

[84] On January 15, 2022, counsel for Tribe wrote to Ms. Parmar's counsel indicating that so long as she remained unvaccinated, she would continue to be on leave but that Tribe expected that she would return to work immediately once vaccinated or the MVP was repealed or relaxed.

[85] On January 25, 2022, after some discussion with Ms. Parmar's counsel, counsel for Tribe advised that it would be extending Ms. Parmar's Leave indefinitely but expressed Tribe's hope that she would return to work as soon as possible after complying with the MVP.

[86] On January 26, 2022, Ms. Parmar emailed Ms. McMahon advising that she was resigning and considered herself constructively dismissed from her employment. The notice of civil claim was filed that day.

[87] After resigning, Ms. Parmar was successful in obtaining alternate employment effective April 11, 2022, as a senior accounting manager with Devon Properties Ltd., another property management company. She negotiated a higher compensation package than that she received from either Gateway or Tribe.

Analysis

[88] Ms. Parmar's employment contract with Tribe expressly provided that she would comply with all of its policies, as amended from time to time at Tribe's discretion. That provision allowed Tribe to implement and amend workplace policies and obliged Ms. Parmar to comply with them. Tribe's right to implement policies was only subject to the implied qualification that any such policy would be reasonable and lawful.

[89] In this case, Ms. Parmar does not argue that the MVP was unlawful. Instead, she argues that it was unreasonable to the extent that it did not make an exception for employees who were able to work from home either entirely or almost entirely. I accept that the MVP was not legally required but it was permitted by law.

The Law on Constructive Dismissal

[90] An employer's right to implement administrative leaves of absence was canvassed by the Supreme Court of Canada in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10. That case concerned the Executive Director of the Legal Aid Services Commission who had been appointed for a seven-year term. During his term, the relationship between the Executive Director and the Commission deteriorated, and negotiations began to buy out the remainder of his term. He became ill before negotiations were finalized. While the Executive Director was absent from work on medical leave, he was suspended in an attempt to jump-start negotiations which had reached an impasse. The Executive Director claimed he had been constructively dismissed.

[91] The Executive Director's claim was dismissed at trial, and the trial decision upheld on appeal. The Supreme Court of Canada reversed the lower court decisions

and allowed the constructive dismissal claim. In doing so, Justice Wagner, as he then was, writing for the majority, considered whether, and in what circumstances, an imposed leave of absence might constitute a breach of contract and amount to constructive dismissal. He stated:

[86] Courts have developed a number of approaches to determining whether an administrative suspension is authorized by a contract. ... All the courts ... have imposed on the employer a basic requirement of a good faith business justification. The factors they have applied include, but are not limited to, the existence of legitimate business reasons, good faith, the duration of the suspension, and whether the suspension was with pay. All the relevant factors go to the fundamental question whether the employer's decision to suspend was both reasonable and justified in the circumstances. ... [I]t is the employer that bears the burden of establishing that the suspension satisfies these two criteria.

...

[97] I do not find it necessary to articulate a rigid framework for determining whether a particular administrative suspension is wrongful. The approach to be taken and the factors to be considered will depend on the nature and circumstances of the suspension. The overriding question will be whether the suspension was reasonable and justified. That said, it is clear from the above discussion that certain factors, while they may not be necessary, will always be relevant. These factors include the duration of the suspension, whether the suspension is with pay, and good faith on the employer's part, including the demonstration of legitimate business reasons.

[Emphasis added.]

[92] In *Potter* at para. 32, the Court explained that the test for constructive dismissal has two branches. The first applies where there has been a single act by the employer that may breach an essential term of the employment contract: *Potter* at para. 34. The second is where the employer has taken a series of steps that, considered together, made continued employment intolerable and demonstrate that the employer no longer intends to be bound by the terms of the employment contract: *Potter* at para. 33. It is the first form of constructive dismissal that is applicable here.

[93] The first branch involves considering two steps. In the first step, the court must identify an express or implied contract term that has been unilaterally changed. This involves an objective analysis. Once it has been objectively established that a breach has occurred, the court turns to the second step and asks whether, when the

breach occurred, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed: *Potter* at paras. 34–39, citing *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846 at para. 26, 1997 CanLII 387. Each case is intensely fact specific.

[94] As the Supreme Court explained in *Potter*:

[41] The uniqueness of the application of this first branch of the test is evident in cases involving administrative suspensions. In all cases, the primary burden will be on the employee to establish constructive dismissal, but where an administrative suspension is at issue, the burden will necessarily shift to the employer, which must then show that the suspension is justified. If the employer cannot do so, a breach will have been established, and the burden will shift back to the employee at the second step of the analysis.

[Emphasis added.]

[95] Courts have recognized that a suspension without pay breaches the employment contract unless there is an express or implied term of the contract permitting it. Suspensions may be administrative or disciplinary. This case involves an administrative suspension, not a disciplinary one, related to Ms. Parmar’s conduct.

[96] In determining whether a unilateral suspension constitutes a fundamental or substantial change to an employment contract, courts have considered the following factors outlined in *Devlin v. NEMI Northern Energy & Mining Inc.*, 2010 BCSC 1822 at para. 50:

- a. The duration of the suspension;
- b. Whether someone was appointed to replace the suspended employee;
- c. Whether the employee was asked for their keys;
- d. Whether the employee continued to be paid and receive benefits;
- e. Whether there is evidence that the employer intended to terminate the employee at that time; and
- f. Whether the employer suspended the employee in good faith, for example, for *bona fide* business reasons.

[97] There is a concern that the use of the term “suspension” connotes a disciplinary process. In fact, many of the cases involve a suspension during a disciplinary investigation or following a criminal charge. For that reason, I prefer the term “unpaid leave of absence”.

Reasonableness of Tribe’s MVP

[98] Applying the *Devlin* factors to the evidence in this case: Ms. Parmar’s leave was for a period of three months and was subject to review; she was not replaced; she was asked to return some Tribe property; she continued to receive certain employee benefits; and Tribe did not intend to terminate her employment, as she was expected to fulfill a new role and was a valued employee.

[99] The focus is on whether Tribe had *bona fide* business reasons, including safety reasons, for the MVP and for placing Ms. Parmar on an unpaid leave of absence for failing to comply with it. The issue is not whether the MVP was a perfect policy, but whether it was a reasonable approach when implemented, given the uncertainties then presented by the pandemic.

[100] In this case, Ms. Parmar submits that Tribe’s implementation of the MVP should be assessed under the test outlined in *Reininger v. Unique Personnel Canada Inc.* (2002), 21 C.C.E.L. (3d) 278, 2002 CarswellOnt 2355 (Ont. S.C.J.), and cited in *Potter* at para. 91. The test in *Reininger* was developed in a case involving an employee put on leave after being charged with a criminal offence. It did not involve all employees potentially posing a health risk to all other employees.

[101] The assessment of the reasonableness of Tribe’s MVP must be considered based on the state of knowledge about COVID-19 at the time it was implemented. Approaches to managing the pandemic have evolved as more information became available and as the effectiveness of vaccines became known.

[102] The MVP must also be considered in light of Tribe’s obligation to protect the health and safety of its employees, its clients, and, by extension, the residents in the buildings to which it provided property management services.

What was Known about COVID-19 in November 2021?

[103] On March 18, 2020, BC declared a provincial state of emergency. A series of public health orders followed. The orders were unprecedented and were announced during regular public briefings by the Minister of Health, Adrian Dix, and the Provincial Health Officer, Dr. Bonnie Henry.

[104] They included requirements that:

- a) all persons over the age of 12 wear a face covering while in most public settings including: malls, shopping centres, coffee shops, retail and grocery stores, liquor and drug stores, airports, city halls, libraries, community and recreation centres, restaurants, pubs and bars, on public transportation, in a taxi or ride-sharing vehicle, courthouses, and areas of office buildings where services to the public are provided. This requirement remained in effect until March 12, 2022, and Canadian airlines still require face coverings while travelling;
- b) as of September 13, 2021, all persons provide proof of vaccination as a precondition to attending or participating in, most public events and in restaurants, pubs and bars. This requirement remained in effect until April 8, 2022;
- c) all employees employed in the Federal Public Service, irrespective of their position or the nature of their employment and whether they could work from home, be vaccinated against COVID-19 by October 12, 2021. The consequence for non-compliance was leave without pay;
- d) as a condition of continued employment, all BC employees in the health care sector, irrespective of their position or the nature of their employment and whether they could work from home, be vaccinated against COVID-19 by October 26, 2021;

- e) all employees employed in the BC Public Service, including those who were working remotely and those with “telework arrangements”, provide proof of vaccination against COVID-19 effective November 8, 2021. The consequence for non-compliance was leave without pay for three months and employees were not entitled to use their vacation or banked time to delay the effective date.

[105] In addition to various government vaccine mandates, employers in the private sector were strongly encouraged to adopt and implement policies that aligned with government directives.

[106] On September 6, 2021, when announcing the Federal Government’s MVP for civil service employees, Prime Minister Trudeau encouraged private sector employers to follow suit. Above, I set out his comments in response to a question about private sector employees.

Judicial Notice

[107] Courts are entitled to take judicial notice of facts that are so notorious as not to require proof.

[108] In the context of COVID-19, this Court and other courts have taken judicial notice that COVID-19 is a potentially deadly virus that is easily transmissible. Symptoms of the virus may vary from person to person according to age, health, and other comorbidity factors. The virus can mutate. Asymptomatic carriers of the virus can infect others. There is no known immunity to contracting the virus and no verifiable evidence of natural immunity to contracting it, or a known mutation, a second or more time: *Steiner v. Mazzotta*, 2022 BCSC 827 at para. 5, citing *Dyquiangco Jr. v. Tipay*, 2022 ONSC 1441 at para. 22.

[109] In addition, courts have taken judicial notice of the fact that vaccines work. While they do not prevent infection, reinfection, or transmission, they reduce the severity of symptoms and bad outcomes: see, *e.g.*, *A.T. v. C.H.*, 2022 BCPC 121 at paras. 38–39, 41; *A.C. v. L.L.*, 2021 ONSC 6530 at para. 28; *Saint-Phard v. Saint-*

Phard, 2021 ONSC 6910 at paras. 5, 7; *O.M.S. v. E.J.S.*, 2021 SKQB 243 at paras. 112–114.

[110] I accept that it is appropriate in this case to take judicial notice of those facts.

Application of the KVP Test to MVPs

[111] In addition to the public service, many private sector employers implemented MVPs. One such MVP was considered in *B.C. Hydro and Power Authority v. International Brotherhood of Electrical Workers, Local 258*, 2022 CanLII 25764 (B.C.L.A.) (Arbitrator: Gabriel Somjen, K.C.) [*BC Hydro*].

[112] There, Arbitrator G. Somjen, K.C., considered an MVP introduced by BC Hydro and made applicable to all of its 6,600 employees.

[113] Like Tribe, BC Hydro was designated an essential service. The MVP in question was very similar to Tribe’s MVP in that it set a mandatory deadline for all employees to be vaccinated. Employees who did not comply were put on leave from their employment without pay. BC Hydro did not provide a testing alternative to its MVP.

[114] As the BC Hydro MVP was unilaterally imposed by the employer in a unionized environment, the MVP was subject to what has been generally recognized as the “KVP test”, referring to a decision of Arbitrator Robinson’s decision in *Re Lumber & Sawmill Workers’ Union, Local 2537, and KVP Co.* (1965), 16 L.A.C. 73 (O.N.L.A.) (Arbitrator: J.B. Robinson).

[115] The *KVP* test requires that any rule or policy unilaterally imposed by an employer, and not subsequently agreed to by the union, must be consistent with the collective agreement and reasonable. The policy must also be clear and unequivocal and brought to the attention of the employees before it is acted upon. The consequences for non-compliance must be set out, and the policy should be consistently enforced.

[116] The *KVP* test has been repeatedly endorsed by the courts: see, e.g., *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 at paras. 25–26 and the cases cited therein. The *KVP* test identified certain factors to be considered in assessing a workplace policy.

[117] In *BC Hydro*, the union did not challenge the MVP on the basis that it was inconsistent with the collective agreement. Instead, the arbitration proceeded solely on the basis of the reasonableness of the MVP, including the portion related to discipline for non-compliance: para. 21.

[118] The arbitrator said that Rapid Access Tests were unreliable in that negative tests may be inaccurate and cannot be considered as equivalent to mandatory vaccination: para. 62.

[119] The arbitrator concluded that BC Hydro was justified in taking a precautionary approach to the virus and upheld the MVP. He wrote that “[t]he interests that led to the Policy outweigh the significant intrusion on the interests of the ... employees.”: para. 69.

[120] In *Maple Leaf Foods Inc., Brantford Facility v. United Food and Commercial Workers Canada, Local 175*, 2022 CanLII 28285 (O.N.L.A.) (Arbitrator: Peter Chauvin), the arbitrator considered an MVP announced by the employer on December 6, 2021, and implemented on January 28, 2022: paras. 25, 31.

[121] The arbitrator applied the *KVP* test. The primary focus was on the reasonableness of the MVP. The arbitrator noted that:

- a) provincial legislation required the employer “to take every precaution reasonable in the circumstances for the protection of a worker”;
- b) the MVP applied to all employees, contractors, and visitors who enter the workplace and was not being applied selectively;

- c) the MVP appropriately balanced the company's primary and substantial interests of protecting the health and safety of its employees along with its continued viability as a commercial enterprise; and
- d) the policy contemplated exemptions on legitimate medical or religious grounds.

[122] As it related to an employee's right to refuse vaccination on the basis of "bodily integrity", the arbitrator stated:

[43] ... [T]he Union argues that an employee should not ... be forced to subject himself to a vaccination injection, and should not be subject to being placed on an unpaid leave of absence if he will not take the injection. The counter argument to this is usually that it is a false argument to submit that the employee is being forced to take an injection. Rather, it is commonly argued that the employee is not being forced to take an injection, but rather is being required to make a decision: (a) to be vaccinated, or; (b) to not be vaccinated, and to accept the consequences that flow from that decision. If the employee chooses to be vaccinated, the employee can continue to work. However, if the employee chooses to not be vaccinated, to protect the health and safety of the other employees, the employee cannot continue to work. Some Arbitrators have commented that this is not a reasonable choice, because it places the employee in the very difficult conundrum of having to either compromise his personal beliefs, or lose his income.

...

[45] Many other Arbitrators have also concluded that the requirement of the employer to protect the health and safety of all of its employees outweighs the privacy, bodily integrity and financial interests of the employees who do not want to be vaccinated, notwithstanding the difficult situation that those employees find themselves in.

[123] In other arbitration cases, arbitrators have approved MVPs but have found terms unreasonable to the extent that:

- a) provisions allow for discipline, up to and including discharge, of employees who decide to remain unvaccinated: see, *e.g.*, *Electrical Safety Authority v. Power Workers' Union*, 2022 CanLII 343 (O.N.L.A.) (Arbitrator: John Stout);
- b) they apply to unvaccinated employees who work exclusively from home, where there is no reasonable expectation of them returning to the workplace, or they apply to employees who work exclusively outside: see, *e.g.*, *Power*

Workers' Union v. Elexicon Energy Inc., 2022 CanLII 7228 (O.N.L.A.)
(Arbitrator: C. Michael Mitchell).

[124] Each case is decided on its own particular facts and the state of knowledge at the time the policy was implemented.

[125] The discussion in the arbitral cases is helpful but not binding.

[126] In a recent decision, *Benke v. Loblaw Companies Limited*, 2022 ABQB 461, the court considered a somewhat analogous case involving a mandatory masking policy. Mr. Benke was placed on an unpaid leave of absence when he refused, without medical justification, to wear a mask as required by his employer. He took the position that he had been constructively dismissed. The court found that he had resigned: *Benke* at para. 66.

[127] The facts in *Benke* bear some similarities to this case. Mr. Benke was a long-term employee. At the start of the pandemic, he was required to work remotely and did not attend the work premises. Later in 2020, he was required to partially resume in-person work.

[128] On August 29, 2021, the employer, Loblaw, implemented a mandatory masking policy applicable to all customers and employees. Mr. Benke sought an exemption from the policy on unspecified medical grounds. His exemption request was refused and he was placed on an unpaid leave of absence. Mr. Benke argued that the mandatory masking policy was discriminatory. The court held:

[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.

[129] The trial judge did not find that Loblaw discriminated against Mr. Benke as he had not established that he had a disability or medical condition affecting his ability to wear a mask and requiring accommodation: *Benke* at para. 48

[130] On the issue of whether Mr. Benke was otherwise constructively dismissed, the court stated:

[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.

[131] In Ms. Parmar's notice of civil claim, she does not allege that the implementation of the MVP amounted to a breach of her employment contract with Tribe. Rather, the breach was the consequence that flowed from not following it: the imposition of an unpaid leave.

[132] In implementing the MVP, Tribe was required to balance Ms. Parmar's personal beliefs as against its interest in ensuring that it protected the health and safety of all other employees in its workplace. Allowing for exemptions would result in selective application of the MVP. As is evident from Ms. Milic's affidavit, she was reluctant to be vaccinated but elected to make a different choice than Ms. Parmar. Individual views of the appropriateness of Tribe's MVP do not undermine the reasonableness of the policy, and an employee's personal belief must give way to the health and safety concerns that form the basis for the MVP.

[133] I accept that Ms. Parmar was faced with a difficult choice. She apparently held strong beliefs about the safety of the vaccine, and it is not my role to question those beliefs. However, in the extraordinary circumstances of the pandemic in the winter of 2021 and January 2022, implementing an MVP was a reasonable policy choice for employers, including Tribe.

[134] Tribe's MVP was a reasonable and lawful response to the uncertainty created by the COVID-19 pandemic based on the information that was then available to it.

[135] The policy, as drafted, allowed for both medical and religious exemptions, neither of which were then, or are now, asserted by Ms. Parmar. Although

Ms. Parmar was critical of Tribe for not conducting a formal risk assessment with respect to its employees and clients and not retaining experts to advise them, there was a lot of information generally available that indicated that vaccines were the best available chance to prevent infections, they were safe, and they were mandated as a requirement for participation in many other aspects of citizens' lives. Tribe set up a committee to consider its options, and Ms. McMahon, as a member of that committee, was actively involved in gathering and reviewing the available information.

[136] It is not surprising that, until the introduction of the MVP, Tribe's employment policies did not require its employees to be vaccinated. COVID-19 presented an unprecedented worldwide challenge to governments, health authorities, and providers. It also presented a unique and unanticipated challenge to employers and employees.

[137] The MVP reflected the prevailing approach at the time. It struck an appropriate balance between Tribe's business interests, the rights of its employees to a safe work environment, its clients' interests, and the interests of the residents in the properties it serviced. It also satisfied its responsibility as a corporate citizen. At the same time, it ensured that individuals like Ms. Parmar could maintain a principled stance against vaccination without losing their employment by, instead, being put on a leave of absence.

[138] Tribe's MVP reflected its statutory obligation under s. 21 of the *Workers Compensation Act*, R.S.B.C. 2019, c. 1:

General duties of employers

21 (1) Every employer must

(a) ensure the health and safety of

(i) all workers working for that employer, and

(ii) any other workers present at a workplace at which that employer's work is being carried out, and

(b) comply with the OHS provisions, the regulations and any applicable orders.

(2) Without limiting subsection (1), an employer must

(a) remedy any workplace conditions that are hazardous to the health or safety of the employer's workers,

...

(c) establish occupational health and safety policies and programs in accordance with the regulations,

[139] The policy respected Ms. Parmar's right to choose to remain unvaccinated by putting her on a three-month leave of absence. She understood, pursuant to the terms of the MVP, that a leave would be the consequence of her decision to remain unvaccinated.

[140] Tribe was consistent in its position that Ms. Parmar could return to her employment upon becoming vaccinated. It did not fill her position and was prepared to extend her leave of absence until its MVP changed as more information became available, or if her vaccination status changed. It was her choice to remain unvaccinated. She opted to resign, and, in the circumstances of this case, that was a voluntary decision.

[141] Under the Tribe MVP, it was clear that it intended to review the policy as information was gathered and more was learned about COVID-19. If the pandemic subsided, Ms. Parmar would have been able to return to productive work with Tribe. No other discipline was contemplated by the MVP.

[142] The MVP was not Gateway's or Tribe's first response to COVID-19. Initially, Gateway put in place a series of safety measures to reduce the risk of transmission of COVID-19 in its workplace. They were set out in Ms. McMahon's affidavit at para. 24. Tribe's approach was set out in Mr. Nakhla's affidavit at para. 4(c) and the policies attached as exhibits B, C, and E.

[143] The fact that safe vaccines were becoming more readily available in Canada in the late summer and fall of 2021 changed the landscape yet again.

[144] Ms. Parmar is entitled to hold her beliefs about the COVID-19 vaccination. However, her entitlement to hold her beliefs and to protect her bodily integrity does

not entitle her to impact other Tribe employees or, potentially, the thousands of residents in buildings to which Tribe provides property management services.

[145] The strength of her beliefs does not entitle her to take the position that an exception to the MVP should be made for her. This is particularly so in light of her senior management position and the fact that she was the only Tribe employee who refused to comply with the MVP.

[146] On the evidence, the Tribe MVP was carefully considered. It accounted for the interests of Tribe employees, their clients and their client's employees, residents, and owners. It was reasonable.

[147] The MVP was not arbitrarily or selectively applied. The terms of the MVP, and the consequences of non-compliance, were known to Ms. Parmar. It was applied consistently to her and to the only other employee who failed to become vaccinated by the required date.

[148] While Ms. Parmar's leave was unpaid and for an unspecified duration, she had the ability to end the leave and return to work for remuneration. In this regard, she was unlike the Executive Director in *Potter*.

[149] I understand that resuming her employment would have required Ms. Parmar to be vaccinated against COVID-19; she chose not to do so, and Tribe's MVP respected that right. She was not dismissed or otherwise disciplined for non-compliance with the MVP. She was permitted to exercise her personal autonomy and follow her view. While she was not paid, she did not have any employment responsibilities during her leave.

[150] Most recently in *Lewis v. Alberta Health Services*, 2022 ABQB 479, a double lung transplant candidate sought exemption from an MVP on the basis of her conscience. While she had the right to choose what went into her body and her beliefs about the vaccine were honestly held, those rights did not supersede the policies, applicable to all lung transplant recipients, requiring them to be vaccinated. Although the case was argued on constitutional principles, what Ms. Lewis was

giving up was the right to live, and it is, I think, consistent with the general view that MVPs are a reasonable infringement on personal freedoms.

[151] On the evidence of both Ms. McMahon and Mr. Nakhla, the decision to implement an MVP was not taken lightly and deciding to do so was personally very difficult for them. In turn, Ms. Parmar also faced a difficult decision not to be vaccinated. That decision on her part led to a loss of her income and some of her benefits. The Leave did not, however, terminate her employment contract. It was clear that Tribe wanted the employment relationship to continue as they had plans for Ms. Parmar's role in management. It was Ms. Parmar who resigned, taking the position that she had been constructively dismissed.

[152] Ms. Parmar's refusal to comply with the MVP was a repudiation of her contract of employment. Tribe did not accept that repudiation. Instead, it acted reasonably in putting her on an unpaid leave. She was not constructively dismissed from her position; she resigned. Any losses that she suffered from being put on unpaid leave were as a result of her personal choice not to follow Tribe's reasonable MVP.

[153] I accept that the imposition of an MVP is qualitatively different from the mandatory mask policy in *Benke*. However, because I have taken judicial notice of the fact that vaccines are safe and effective for use in people and with respect to controlling the spread of COVID-19, it was solely Ms. Parmar's choice not to comply with the MVP. The safety of vaccines is "so notorious as not to be the subject of dispute among reasonable people": *R. v. Williams*, [1998] 1 S.C.R. 1128 at 1156, 1998 CanLII 782; see also *O.M.S.* at paras. 113–114, citing *B.C.J.B. v. E.-R.R.R.*, 2020 ONCJ 438 at para. 188. Various publications by Health Canada and by the BC Ministry of Health and the Provincial Health Officer cannot reasonably be disputed to be inaccurate.

[154] Finally, I accept that it is extraordinary for an employer to enact a workplace policy that impacts an employee's bodily integrity, but in the context of the extraordinary health challenges posed by the global COVID-19 pandemic, such

policies are reasonable. They do not force an employee to be vaccinated. What they do force is a choice between getting vaccinated, and continuing to earn an income, or remaining unvaccinated, and losing their income. Ms. Parmar made her choice based on what appears to have been speculative information about potential risks.

[155] I note that in *Maddock v. British Columbia*, 2022 BCSC 1065, Chief Justice Hinkson reached a similar conclusion with respect to the requirement for proof of vaccination to restaurants. At para. 78, Hinkson C.J. wrote that such policies “[do] not compel or prohibit subjection to any form of medical treatment”: para. 78. Rather, individuals remain free to make choices within the bounds of the policy. The MVP did not, in the words of *Maddock*, “[leave Ms. Parmar] with no reasonable choice but to accept, or effectively accept, non-consensual treatment”: paras. 78–79.

Ms. Parmar retained the choice to remain on unpaid leave.

[156] A reasonable employee in Ms. Parmar’s shoes would not have felt in all the circumstances 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. This is confirmed by the fact that all but one of her fellow employees complied with the MVP and that most adult Canadians have since been vaccinated—many as a condition of continued employment.

Conclusion

[157] In the face of Tribe’s reasonable MVP, Ms. Parmar made that choice. She was not constructively dismissed. Her constructive dismissal claim is dismissed.

[158] As a result, it is not necessary for me to deal with the alternative issues raised in this summary trial application.

Costs

[159] The parties did not speak to costs. I expect that in light of Tribe’s success in this summary trial, the parties will be able to agree on a costs order. If they are not, or if there are other factors that might affect the costs order and of which I am not

currently aware, the parties may contact Supreme Court Scheduling and seek to appear to speak to costs.

“MacNaughton J.”