



# What's New in HR Law

## Mandatory Masking Not Discriminatory where Refusal to Mask Based on Personal Preference

June 1, 2021

In a number of recent decisions, provincial human rights tribunals have confirmed that complaints of discrimination related to mandatory masking by-laws or policies will not be entertained unless they are objectively linked to a protected ground. Employers can take comfort in these recent decisions, knowing that human rights protections do not extend to masking objections based solely on personal preference or opinion.

### **COVID-19 Mandatory Masking Requirements**

In response to the COVID-19 pandemic, many governmental bodies and other organizations have implemented mandatory masking requirements to help prevent the spread of COVID-19. Even prior to governmental involvement, many employers and businesses adopted mandatory masking requirements to minimize the risk of COVID-19 transmission.

In response to these mandatory masking requirements, some individuals have raised objections. The reasons for such objections vary and include complaints based on personal preference, purported medical restrictions, alleged infringements on personal freedom, and claimed lack of effectiveness, to name a few.

**This update is for general discussion purposes and does not constitute legal advice or an opinion.**

While some have raised complaints informally, others have gone further and have challenged the legality of mandatory masking requirements through formal legal channels. Among the chosen forums for such complaints, provincial human rights tribunals have taken the opportunity to comment on the extent to which human rights laws extend to challenges against mandatory masking requirements.

## **Provincial Human Rights Tribunals: Personal Preference Not Protected**

### Human Rights Tribunal of Ontario

In *Sharma v. Toronto (City)*, 2020 HRTO 949 (“*Sharma*”), Mr. Sharma filed an application with the Human Rights Tribunal of Ontario (“HRTO”) alleging discrimination as a result of the City of Toronto’s mandatory masking by-law. Specifically, Mr. Sharma claimed that the City discriminated against him with respect to services because of his creed and disability after he was denied service at a number of businesses for refusing to wear a mask.

As it related to the ground of creed, Mr. Sharma claimed that covering his face was counter to his creed. As it related to the ground of disability, Mr. Sharma claimed that his bodily functions were impaired by masks.

The HRTO found that Mr. Sharma’s objection to the mandatory masking by-law, while baldly alleged to be related to creed and disability, was in fact an objection based on his subjective opinion that masking is not “evidence-based” or an effective means of curbing the transmission of COVID-19.

Helpfully, the HRTO found that these objections did not engage human rights protections. In addition, as it related to the ground of disability, while the HRTO suggested that while a medical condition/disability could conceivably be impacted by a mandatory masking requirement, it is incumbent on an applicant to seek accommodation on the basis of their medical condition/disability in order to engage human rights protections.

Ultimately, the HRTO dismissed Mr. Sharma’s discrimination application on a preliminary basis given that he did not have a reasonable prospect of proving discrimination.

### British Columbia Human Rights Tribunal

In two recent decisions, the British Columbia Human Rights Tribunal (“BCHRT”) implicitly concurred with the findings made by the HRTO in *Sharma*.

In *The Customer v. The Store*, 2021 BCHRT 39 (“*Customer*”), the Customer filed a human rights complaint against the Store (the identity of both are subject to a publication ban) which refused her service when she refused to wear a mask. At the time that the individual was refused service, masks were not mandated by government order, but the Store had a policy that required customers to wear one. When a security guard stopped the Customer and asked her to wear a mask, the Customer told the guard that she was exempt from wearing one but refused to explain why, other than to say they “cause breathing difficulties”. The guard insisted that she wear one, and so the Customer left the Store.

The Customer alleged that, in requiring that she wear a mask, the Store discriminated against her based on physical and mental disability. However, she refused to provide any evidence to substantiate her alleged physical and mental disability.

The BCHRT dismissed the Customer's complaint, and in doing so stated that human rights legislation does not protect people who refuse to wear a mask as a matter of personal preference. The BCHRT commented that human rights legislation only protects people from discrimination based on certain personal characteristics, including disability, and that any claim of discrimination arising from a requirement to wear a mask must objectively establish that the complainant has a disability that interferes with their ability to wear the mask.

A similar decision was reached in *The Worker v. The District Managers*, 2021 BCHRT 41. In this case, the Worker was contracted to do work at a facility. Upon arriving, the Worker was told that the facility was subject to a mask requirement, to which the Worker responded that it was his "religious creed" that he should not wear a mask. The Worker was denied entry to the facility, and his contract was thereafter terminated. The Worker then filed a complaint of discrimination with the BCHRT on the basis of creed.

When questioned about his creed-based refusal to wear a mask, the Worker stated that to cover your face with a mask was to arbitrarily dishonor God because "we are all made in the image of God". The BCHRT did not accept this explanation, stating that the Worker did not point to any facts that could support a finding that wearing a mask is prohibited by any particular religion, or that not wearing a mask engenders a personal, subjective connection to the divine or the subject or object of [his] spiritual faith, as required in order to obtain protection under the ground of creed.

In dismissing the Worker's complaint, the BCHRT stated that the Worker's opinion that masks are ineffective is not a belief or practice protected from discrimination under human rights legislation. The Worker's complaint was, in essence, about his disagreement with the reasons for the mask-wearing requirement, which was not subject to human rights protection.

## **Check the Box**

For employers who are subject to governmental masking requirements, or who have implemented their own masking policies, these cases offer welcome support for these protocols, as well as insight into how adjudicators will approach unjustified attempts to rebuff them.

These recent decisions confirm that a refusal to wear a mask based on personal preference will not attract legal protection. Similarly, baldly claiming that a mask refusal is connected to a protected ground without a justifiable basis or evidence to substantiate the claim will likewise be rejected as a legal basis upon which a person may refuse to comply with established masking requirements or policies.

While employers should take comfort knowing that they are within their right to stand behind and enforce mandatory masking requirements in their workplace and business settings, in the event they are presented with a request for accommodation (*i.e.* requests for modification to, or

exemptions from, existing protocols), they should address it in a manner that ensures both their procedural and substantive obligations under applicable human rights legislation are met.

Specifically, when presented with an accommodation request to a masking or other COVID-related protocol, employers should:

1. **Take the request seriously.** Engage in a meaningful dialogue with the individual to understand *why* the request for accommodation is being made, as well as *what* specific form of accommodation is being requested.
2. **Request supporting documentation.** As in the normal course, employers are entitled to request reasonable documentation that is necessary to substantiate the need for accommodation and/or facilitate the accommodation process. In appropriate circumstances, this may include supporting medical documentation. Given the language of various applicable bylaws and regulations, some employers may be reticent to request medical information in conjunction with masking-related accommodation requests. However, in most cases, applicable bylaw and regulatory provisions do not extend so far as to prevent employers from requesting such information where it will be used for reasons relating to assessing or implementing an accommodation request.
3. **Document all steps, discussions, and meetings.** Keeping an accurate record of all steps, actions, and communications in the accommodation process will ensure that employers are in the best position to defend human rights-based claims should the need arise.

## Need more information?

For additional information regarding workplace management amidst the ongoing COVID-19 pandemic, or for assistance navigating employee complaints relating to mandatory workplace policies, contact Danny Parker at 416-408-5518, or your regular lawyer at the firm.



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