



What's New in HR Law

Court Confirms that Refusal to Obtain COVID-19 Vaccination Amounts to Frustration of Contract

February 28, 2023 | By [Hayley Smith](#)

Bottom Line

An Ontario court has found that an employee's refusal to comply with a mandatory COVID-19 vaccination policy can constitute frustration of contract. This is one of the first cases of the COVID-19 era to confirm that a refusal to become vaccinated can lead to frustration of contract.

Background Facts

The Plaintiff in *Croke v. VuPoint Systems Ltd.*, 2023 ONSC 1234 ("*Croke*"), was employed as a systems technician by VuPoint Systems Ltd ("VuPoint"), a federally regulated employer who provides satellite television and smart home installation services on behalf of Bell Canada and Bell Express Vu (collectively referred to as "Bell"). VuPoint's employees, including the Plaintiff, completed installation work for Bell's customers, regularly interacting with these customers in their homes. VuPoint's work for Bell comprised more than 99% of its annual revenue.

On September 8, 2021, Bell announced a COVID-19 vaccination policy for all its vendors and contractors ("Bell's Policy"). Bell's Policy required all subcontractors or other agents who visit any Bell location or interact in person with Bell customers to be fully vaccinated against COVID-19. Bell's Policy also stipulated that non-compliance would constitute a material breach of Bell's supply agreements.

This article is for the purposes of only general information and does not constitute legal advice or opinion.

On September 10, 2021, VuPoint implemented its own COVID-19 Vaccination Policy (“VuPoint’s Policy”) in order to ensure compliance with Bell’s Policy. VuPoint’s Policy required all employees to send proof of vaccination to VuPoint as soon as possible. VuPoint’s Policy also stated that if employees did not provide proof of vaccination, VuPoint would assume that they were unvaccinated and the employees would be prohibited from performing work with certain customers, including Bell.

The Plaintiff failed to provide his vaccination status to VuPoint. As a result, VuPoint could not assign the Plaintiff to perform work for Bell. Since VuPoint had no other work to provide the Plaintiff and had no control over Bell’s Policy, VuPoint considered the Plaintiff’s employment contract to be frustrated.

On September 28, 2021, VuPoint advised the Plaintiff that his employment would cease on October 12, 2021. During the intervening period, the Plaintiff provided VuPoint with a letter stating that he was neither going to disclose his vaccination status to VuPoint nor consent to any type of COVID-19 vaccine that Bell mandated. On his last day of employment, the Plaintiff was provided with his final two weeks’ pay and severance pay, in accordance with the *Canada Labour Code*.

The Decision

On January 11, 2022, the Plaintiff commenced an action for wrongful dismissal and aggravated, punitive, and moral damages. He subsequently brought a motion for summary judgment with VuPoint’s consent.

In the course of the proceedings, VuPoint maintained its position that the Plaintiff’s employment had been frustrated.

The Court agreed with VuPoint’s position and determined that the Plaintiff’s employment contract was frustrated, for the following reasons:

- The implementation of Bell’s Policy meant that the Plaintiff could not perform any work for VuPoint unless he was vaccinated. By refusing to obtain a COVID-19 vaccine, the Plaintiff lacked a necessary qualification under Bell’s Policy to perform any of his duties.
- The employment relationship had been altered by unforeseen circumstances that were not contemplated by the parties at the start of their relationship – namely, Bell’s implementation of vaccination mandate as a condition for subcontractors to be eligible to perform installation services for Bell. Although Bell’s supply agreements historically required the employees of subcontractors to comply with Bell’s policies, VuPoint and the Plaintiff could not have possibly foreseen a pandemic-related mandatory vaccine policy when they entered into their employment agreement in 2014.
- The change to the employment relationship was not the fault of either the Plaintiff or VuPoint, as it had resulted from Bell’s actions. VuPoint was required, by Bell’s supply agreement, to comply with Bell’s policies.

Considering these factors together, the Court found that Bell’s Policy was a change that radically struck at the root of the Plaintiff’s employment contract with VuPoint.

Check the Box

Croke is one of the first Canadian court decisions to confirm that an employee’s refusal to comply with a COVID-19 vaccination policy amounts to frustration of contract. It follows a recent arbitral award from

British Columbia (*Fraser Health Authority v. Hospital Employees' Union (Tracy London Termination)*, 2022 CanLII 91089 (B.C. L.A.) ("*Fraser*")), which found an employment contract to have been frustrated by an employee's refusal to comply with a provincial COVID-19 vaccination mandate. The findings in *Croke* may have significant implications for employees who continually refuse to adhere to their employers' vaccination policies.

Notably, the employers in both *Croke* and *Fraser* were effectively mandated by externally imposed legal obligations to require their employees to be vaccinated against COVID-19. Neither employer exercised much control or choice over these vaccination requirements. It remains to be seen whether *Croke* and *Fraser* will be followed in situations where an employer has full control over whether to implement or uphold its own COVID-19 vaccination policy.

VuPoint was successfully represented in *Croke* by Filion Wakely Thorup Angeletti LLP lawyers, [Evan Campbell](#) and [Hayley Smith](#).

Need More Information?

For more information or assistance with workplace vaccination policies or questions regarding frustration of contract, contact [Hayley Smith](#) at hsmith@filiation.on.ca or your regular lawyer at the firm.



PROUD MEMBER OF
L&E GLOBAL
Alliance of Employers' Counsel Worldwide



ADVOCATES
for EMPLOYERS
of CANADA

Toronto

Bay Adelaide Centre
333 Bay Street
Suite 2500, PO Box 44
Toronto, Ontario M5H 2R2
tel: 416.408.3221
fax: 416.408.4814
toronto@filiation.on.ca

London

252 Pall Mall Street, Suite 100
London, Ontario N6A 5P6
tel: 519.433.7270
fax: 519.433.4453
london@filiation.on.ca

Hamilton

1 King Street West
Suite 1201, Box 57030
Hamilton, Ontario L8P 4W9
tel: 905.526.8904
fax: 905.577.0805
hamilton@filiation.on.ca

Kitchener-Waterloo

137 Glasgow Street
Suite 210, Office 175
Kitchener, Ontario N2G 4X8
tel: 519.433.7270
fax: 519.433.4453
kitchener-waterloo@filiation.on.ca