Coronavirus: Can Ontario Employees Refuse to Work?

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At the time this article is being written on February 21, 2020, the coronavirus remains a serious global threat. According to the New York Times, approximately 2,236 people have died as a result of the virus and there are more than 76,000 individuals infected.[1] The virus originated from the Hubei province in Mainland China. In response, Chinese government authorities have quarantined tens of millions of residents on a scale once thought unimaginable.[2]

However, this is not merely a regional threat and authorities globally are taking significant precautions. Infections have been recorded in 29 countries outside of China.[3]

According to the Ontario government, there is one confirmed positive case of the coronavirus in the Province and nine cases under investigation.[4] Three cases have been resolved, meaning the patients are no longer infectious based on two consecutive negative tests performed by a Public Health Ontario laboratory.

For residents of Toronto, the coronavirus brings back memories of the Severe Acute Respiratory Syndrome ("**SARS**") outbreak of 2003, which infected approximately 375 residents and resulted in a total of 44 deaths.[5]

The coronavirus raises legitimate concern for both employees and employers in Ontario. Some employees may go so far as to refuse to attend the workplace out of an overabundance of caution. Under section 43 of the *Occupational Health and Safety Act*,[6] a worker who may otherwise be subject to discipline for insubordination is entitled to refuse work in certain circumstances where he or she "has a reason to believe" that performing the work would endanger himself, herself or another worker. The precise wording of the provision, however, provides a strong argument that the risk contemplated is mechanical, not biological. The Act specifically references the right to refuse work based upon "any equipment, machine, device or thing" that may endanger a worker. However, the Act also considers "the physical condition of the workplace" and whether or not it is likely to endanger a worker. There are very few decisions with respect to viruses in the workplace as it pertains to health and safety obligations.

Accordingly, the spread of the coronavirus and the associated risk do pose a legitimate question regarding work refusals, and if and when they arise, they should be considered carefully with counsel based on the objective evidence available at the time.

In order to lawfully refuse work, the employee must report their refusal to a supervisor, who is required to investigate the hazard in the presence of the worker or a health and safety representative, if applicable. Following the supervisor's investigation, if the worker "has reasonable grounds" to believe there is still a danger, he or she may continue to refuse the work and an inspector from the Ministry of Labour must be notified.[7]

The law recognizes that an employee refusing work must have an honest belief that his or her health is in jeopardy. As such, employees are not entitled to be deceitful with their employer under the guise of health and safety concerns in order to avoid work or select preferred assignments.[8] The law also recognizes that a work refusal must be based on a hazard that is reasonably expected to occur. For example, mere days after September 11, 2001, the threat of terrorist activity in Israel was ruled too "hypothetical" for an Air Canada flight crew to refuse to fly to Tel Aviv.[9] We note that this case interpreted the *Canada Labour Code* and not the *Occupational Health and Safety Act.*

If an employee refuses to work out of sincere concern of the coronavirus, the legitimacy and lawfulness of the refusal turns on the reasonableness of this concern. Under such circumstances, an employer is statutorily required to inspect the workplace in order to consider whether the employee's concern is objectively reasonable and if there are mitigating steps that can be taken to diminish or neutralize the threat to health and safety.

In 2010, two (2) pregnant teachers in British Columbia refused to work out of fear of contracting the HIN1 virus. The authorities refused to issue an order against their employer for alleged occupational health and safety violations, which was upheld by a Review Officer. In making her determination, the Review Officer stated:

While I acknowledge the workplace would be categorized as a higher risk environment, these risks were neutralized by the control measures and systems in place. Even if there was specific evidence which confirmed these workers were specifically susceptible, that would not have been sufficient to confirm an undue hazard existed. No different hazard has been identified in this workplace than would exist in the community […] As there is no evidence of undue susceptibility or undue hazard for the workplace in question, no orders would flow from that work refusal. Based on the evidence before me, I am not satisfied there was a work condition or circumstance which required immediate corrective action before work could continue.[10]

Based on the current status of the coronavirus in Ontario, arguably an employer could be compelled to inspect the workplace and consider whether its place of employment is particularly vulnerable to the coronavirus. However, assuming the workplace is no more susceptible than the general population and reasonable precautions are in place, an employee's mere anxiety of contracting the coronavirus is not a legitimate or reasonable justification to refuse to work.

Employers should note that engaging the Ministry of Labour for a formal inspection should not be done reflexively if an employee remains unsatisfied following the employer's inspection of the workplace. The *Occupational Health and Safety Act* permits an employer to agree to safety precautions that address an employee's concerns. Therefore, with respect to the coronavirus, an employer could agree to permit the employee to work remotely or wear personal protective equipment, such as a mask or gloves. If the employee is satisfied with these protective measures and the employer is satisfied that said measures will not unduly interfere with operations, the employer's obligations under the *Occupational Health and Safety Act* are satisfied. In the event such an accommodation is agreed to, employers are advised to document the compromise and expressly note that it does not represent a permanent change to the terms and conditions of the employee's employment. Rather, it is a temporary measure based on the threat of the coronavirus, which will be re-evaluated based on objective evidence and reasonability, taking into account both the status of the virus in the community and business operations.

Permitting the use of protective equipment, among other precautions, should be carefully considered for employees who occupy roles that reasonably elevate their risk of contracting the coronavirus, perhaps based upon the number of people they encounter who are at elevated risk of infection themselves.

In 2005, two Air Canada ticket agents refused to work due to concerns about contracting SARS. Although based on the evidence before the Appeal Officer, insufficient danger existed to justify the refusal to work, under the *Canada Labour Code* and its health and safety regulations, Air Canada was still required to work with the workplace health and safety committee to address the employees' concerns.

Interestingly, the Appeal Officer addressed the contention by Air Canada that ticket agents routinely handle passenger tickets which have "respiratory fluids, saliva and other bodily fluids." Air Canada claimed this was, therefore, a normal danger connected with the work of the employees. The Appeal Officer noted that while risks may exist within a "normal" course of employment, "a danger normal to the work includes a risk that is an essential characteristic of the work but logically excludes a risk which depends on the method used to perform the job or activity."[11] The Appeal Officer cited a Federal Court decision which stated: "[W]ould one say that it is a normal condition of employment for a security guard to transport money from a banking institution if changes were made so that this had to be done without a firearm, without a partner and in an unarmoured car?"[12]

In summary, an employer is lawfully required to assess how to adequately protect its employees from the coronavirus, much like other hazards. Some employees, as a function of their employment, may be subjected to a greater level of risk for contracting an illness due to their engagement with the public. However, merely because a role is inherently dangerous does not eliminate or relax an employer's obligations. Employers must still assess hazards in the workplace and implement precautions that reasonably mitigate risk to employees, including employees whose roles are inherently dangerous. As such, employers are well advised to

remain up to date on how public health authorities recommend combatting the spread of the coronavirus.

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[1] Vivian Wang et al, “Coronavirus Live Updates: Fears of Global Spread as Cases Accelerate in Iran and South Korea”, *The New York Times* (last updated 21 February 2020), online: <https://www.nytimes.com/2020/02/21/world/asia/china-coronavirus.html>.

[2] Amy Qin, Steven Lee Myers & Elaine Yu, “China Tightens Wuhan Lockdown in ‘Wartime’ Battle With Coronavirus”, *The New York Times* (6 February 2020), online: <https://www.nytimes.com/2020/02/06/world/asia/coronavirus-china-wuhan-quarantine.html>.

[3] Lucy Rodgers et al, “Coronavirus: A visual guide to the outbreak”, BBC News (21 February 2020), online: <https://www.bbc.com/news/world-51235105>.

[4] The 2019 Novel Coronavirus (COVID-19), Government of Ontario (last updated 21 February 2020) online: <https://www.ontario.ca/page/2019-novel-coronavirus>.

[5] Ian Austen, “SARS Was Deadly in Canada. Is the Country Ready for Coronavirus?”, *The New York Times* (31 January 2020), online: <https://www.nytimes.com/2020/01/31/world/canada/sars-toronto-coronavirus.html>.

[6] *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, s 43.

[7] Guide to Occupational Health and Safety Act, “Part V: Right to refuse or to stop work where health and safety in danger, Government of Ontario (2019), online: <https://www.ontario.ca/document/guide-occupational-health-and-safety-act/part-v-right-refuse-or-stop-work-where-health-and-safety-danger>.

[8] *Hamilton (City) v Canadian Union of Public Employees, Local 5167*, 2016 CanLII 9065 (ON LA).

[9] *Abood v. Air Canada*, [2003] C.L.C.A.O.D. No. 2 at para 43.

[10] Review Reference #: R0112820, October 21, 2010 at 16.

[11] *Cole v. Air Canada*, [2006] C.L.C.A.O.D. No. 4.

[12] *Verville v. Canada (Service correctionnel)*, 2004 FC 767 at para 55.