

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Clark v. City of Prince George*,  
2025 BCSC 812

Date: 20250430  
Docket: S133729  
Registry: Kelowna

Between:

**Rob Wayne Clark**

Plaintiff

And

**City of Prince George**

Defendant

Before: The Honourable Justice Bantourakis

## **Reasons for Judgment**

Counsel for the Plaintiff:

B.C. Harvey

Counsel for the Defendant:

N.C. Toye  
D.J. Preston

Place and Dates of Hearing:

New Westminster, B.C.  
February 26 and 27, 2025

Place and Date of Judgment:

Kelowna, B.C.  
April 30, 2025

**INTRODUCTION**

[1] In late 2021, the City of Prince George (the “City”) implemented a mandatory COVID-19 vaccination policy for its employees. The plaintiff, Mr. Clark, was a City employee at the time. He chose not to be vaccinated against COVID-19. The dispute in this wrongful dismissal claim turns largely on whether or not the City constructively dismissed Mr. Clark when it implemented its vaccination policy and placed him on an unpaid leave of absence for failure to comply with it.

[2] Mr. Clark says that the terms of his employment contract did not include a vaccination requirement and that the City was not authorized to place him on an unpaid leave of absence because he had not been vaccinated. He says that when it placed him on that unpaid leave on January 17, 2022, it made a unilateral change that breached an essential term of the employment contract that he was entitled to treat as a repudiation. Alternatively, Mr. Clark says that the City forced him to resign on February 15, 2022.

[3] In response, the City relies heavily on *Parmar v. Tribe Management Inc.*, 2022 BCSC 1675, in which this Court dismissed a constructive dismissal claim involving a similar vaccination policy and resulting unpaid leave of absence. The City says that it did not repudiate the employment contract, but rather that Mr. Clark effectively made the choice to resign. According to the City, the employment contract included an implied term allowing it to implement health and safety policies that would apply to Mr. Clark, and the vaccination policy falls within that rubric. In light of the extraordinary circumstances it was dealing with at that stage of the pandemic, the City submits that its decision to place Mr. Clark on an unpaid leave of absence under the policy was reasonable, justified, and did not breach any contractual term.

[4] An unpaid leave of absence significantly affects the employment relationship. Deciding whether it amounts to a constructive dismissal is a highly fact-driven task, which in this case turns on whether the City had the implied authority to suspend Mr. Clark for non-compliance with its vaccination policy. The following questions arise: (1) was Mr. Clark’s suspension disciplinary or administrative? (2) did the

employment contract permit the City to unilaterally implement a vaccination policy? (3) was Mr. Clark's unpaid leave of absence as of January 17, 2022 pursuant to the vaccination policy reasonable and justified under the contract? and (4) alternatively, did the City force Mr. Clark to resign on February 15, 2022?

**BACKGROUND**

**Mr. Clark's employment with the City**

[5] The City is a municipality incorporated under the *Local Government Act*, R.S.B.C. 1996, c. 323. Mr. Clark started working for the City in February 2009, occupying accounting-type roles there until his departure in 2022. He holds a diploma in accounting and finance, but is not a chartered professional accountant.

[6] By September 26, 2014, Mr. Clark had accepted the position of Strategic Financial Analyst with the City, a non-unionized position, which is the position he held at the relevant time. In that role, Mr. Clark performed a variety of functions relating to financial planning, budgets, capital expenditures, financial statements, audits, and institutional investment. His office was located in City Hall but his duties did not require him to interact with the public. He supervised one direct report.

[7] Mr. Clark performed all of his duties in the office and did not work remotely during the pandemic, though he would have been eligible to work from home under the City's pandemic-era work-from-home policy. That policy allowed remote work on a part-time basis for certain employees. While Mr. Clark preferred to work in the office, he says he could have worked from home full-time if the City had accommodated him after implementing its vaccination policy. The City has tendered evidence suggesting that full-time remote work was not feasible given technological and other limitations it was facing at the time.

[8] There is no suggestion that Mr. Clark's job performance was lacking or that the City had any desire to terminate his employment leading up to the vaccination policy. Likewise, there is no suggestion that the vaccination policy targeted Mr. Clark specifically. The City says that it is unfortunate that matters culminated as they did,

as Mr. Clark was a valued employee whose job would have remained available to him had he not opted to treat the employment contract as being at an end.

**The vaccination policy**

[9] Like other B.C. employers, from March 2020 onward, the City implemented a number of measures in compliance with public health orders and recommendations following the declaration of a provincial state of emergency in respect of the COVID-19 pandemic. These measures included mask mandates, physical distancing, room and vehicle capacity limits, enhanced cleaning protocols, physical barriers, encouraging employees to stay home if they were sick, and the work from home policy I mentioned a moment ago, among others. Mr. Clark complied with those measures as required.

[10] By the fall of 2021, COVID-19 vaccines were readily available in British Columbia. All public health guidance recommended vaccination as safe and as the most effective method to protect against contracting and transmitting COVID-19, and to reduce the risk of serious illness. The Federal and British Columbia governments, several B.C. municipalities and other large employers in the province were requiring COVID-19 vaccination for their employees as a condition of work.

[11] At the same time, and as I explain later, there was an alarming situation of heightened COVID-19 risk in the Northern Health Region, which encompasses the Prince George area, as compared to some other parts of the province.

[12] The City’s Workplace Wellness Policy authorizes the City Manager to establish workplace health and safety procedures and programs on its behalf. On November 2, 2021, Walter Babitz, the City Manager, emailed all City employees telling them that the City would be implementing a mandatory vaccination policy which required all employees to be vaccinated by December 20, 2021.

[13] About a week later, on November 10, 2021, the vaccination policy was set out in an “administrative procedure” document issued pursuant to the City’s Workplace Wellness policy. Under the heading “Purpose”, it said:

The City of Prince George is committed to the health and safety of its employees and protecting its workers and by extension, the public they serve, from the risks associated with the COVID-19 pandemic. The COVID-19 vaccines approved by Health Canada are proven to be safe and effective and being vaccinated for COVID-19 is the best protection against contracting and transmitting COVID-19 and experiencing severe illness. In order to mitigate the risk in our workplace, the City requires all employees to be fully vaccinated against the COVID-19 virus.

[14] The vaccination policy applied to all City employees including those who were able to work remotely, and to all contractors, volunteers and service providers working alongside City employees or in City-owned or controlled facilities. It required proof of vaccination by December 20, 2021 barring an exemption under the *Human Rights Code*, S.B.C. 1996, c. 210. A subsequent revision extended the December 20, 2021 deadline to January 14, 2022.

[15] Compliance with the vaccination policy was a condition of employment. Those who did not comply would not be eligible to attend work after the deadline and would instead be placed on leave without pay for a minimum period of 30 days. The policy encouraged employees to access the various resources and supports available with respect to the safety and efficacy of the COVID-19 vaccine. Employees who became vaccinated while on leave would be returned to work, while those who remained unvaccinated would be subject to employment consequences up to and including termination of employment. The policy was to be reviewed on a regular basis and was subject to amendment as circumstances changed in light of accepted best practices, public health orders and legislation.

#### **Implementation of the vaccination policy and Mr. Clark's departure**

[16] Mr. Clark was not comfortable receiving the COVID-19 vaccine and decided not to be vaccinated. On December 8, 2021, he received a letter from Sandra Caffrey, the City's Manager of Labour Relations & Disability Management, noting that he had not yet submitted proof of vaccination and that he would be placed on leave without pay if he did not do so by the deadline. The leave without pay would be for a minimum of 30 days and benefits would be maintained during that time. The letter also indicated that employees who did not comply or otherwise did not

cooperate with the employer in administering the vaccination policy would face disciplinary consequences up to and including termination of employment.

[17] On December 18, 2021, Mr. Clark wrote to Ms. Caffrey and advised that he would not be complying with the vaccination policy. He said he was willing to work from home instead, or to do periodic testing, or to do a combination of both. During a subsequent telephone conversation, Ms. Caffrey told Mr. Clark that no exceptions were being allowed to the vaccination policy outside of approved human rights accommodations.

[18] Mr. Clark worked until Friday January 14, 2022 and then was placed on unpaid leave. His benefits continued.

[19] While Mr. Clark was on unpaid leave, his then-lawyer wrote a without prejudice letter to the City on his behalf. Ms. Caffrey responded to that letter on February 15, 2022, the gist of which was, again, that Mr. Clark was subject to the vaccination policy, that he would be returned to work if he submitted proof of vaccination, and that his benefits continued during the period of leave without pay. Ms. Caffrey said that Mr. Clark was still employed by the City and the purpose of the leave was to give him time to consider whether he would comply with the policy. She also said that he had a choice, either to resign or comply and return to work.

[20] Then, on February 17, 2022, Mr. Clark's lawyer wrote to the City saying that Mr. Clark took the position that he had been constructively dismissed. He was electing to end the employment contract based on what he considered to be the City's repudiation of its essential terms in implementing the vaccination policy and placing him on unpaid leave.

[21] On February 25, 2022, the City responded, noting among other things its position that there had been no breach of the employment contract. Instead, Mr. Clark was refusing to comply with a reasonable rule and so was ineligible to work. If Mr. Clark received his COVID-19 vaccine, the City would begin the process of returning him to work.

[22] The City continued to treat Mr. Clark as an employee on unpaid leave even after he alleged constructive dismissal. His benefits were maintained and he continued to receive periodic memos from the City until April 2022. The City only moved forward with processing Mr. Clark's departure after he filed the Notice of Civil Claim in this action.

[23] In all, 31 of the City's approximately 770 employees decided to remain unvaccinated when the vaccination policy was implemented. Of those, four eventually received their vaccines and returned to work, three were approved for human rights accommodations, one resigned, and the remaining 23 were placed on unpaid leave, including Mr. Clark. Of those, all except Mr. Clark remained on unpaid leave until the vaccination policy was suspended, at which point they were offered a return to work.

**ANALYSIS**

[24] This matter came on for hearing by way of summary trial pursuant to Rule 9-7 of the *Supreme Court Civil Rules*. The parties submit that I am able to find the necessary facts on the record they have put before me and that doing so would be just and proportionate in the circumstances. I agree. Among other things, the essential facts are largely agreed, there are no significant credibility issues, the amount claimed is low both generally and when compared to the costs of a conventional trial, and a decision on the application will completely resolve the parties' dispute: *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30-31.

[25] As I noted at the outset, the dispute here turns on whether or not the City constructively dismissed Mr. Clark. The parties agree that must be decided on the principles set out in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10. A constructive dismissal occurs when an employer evinces an intention to no longer be bound by the employment contract. The employee then has the choice of either accepting the changes or treating the conduct as a repudiation of the contract and suing for wrongful dismissal: *Potter* at para. 30.

[26] Constructive dismissal may result from either a single unilateral act that breaches an essential term of the employment contract, or a series of acts that taken together show that the employer no longer intends to be bound by the contract: *Potter* at para. 43. Only the former is in issue here.

[27] To qualify under this first branch, the employer must first have done something unilaterally that breaches the employment contract and, second, the breach must be such that a reasonable person in the position of the employee would have felt that the essential terms of the employment contract were being substantially changed: *Potter* at para. 34, 37-39.

[28] Where the alleged breach involves an administrative suspension, the burden is on the employer at the first step of the analysis to show that the suspension was reasonable and justified given its nature and circumstances: *Potter* at paras. 41, 97. If the suspension was reasonable and justified, there will be no breach of the employment contract and accordingly no constructive dismissal. If, however, the suspension was not reasonable and justified, there has been a breach and the burden shifts back to the employee at the second stage of the analysis to show that a reasonable person in their position would have felt the essential terms of their contract were being changed: *Potter* at paras. 39, 41.

[29] I begin by considering whether Mr. Clark's suspension without pay was administrative or disciplinary in nature.

**Was Mr. Clark's unpaid leave of absence administrative or disciplinary in nature?**

[30] Mr. Clark says that the unpaid leave of absence was disciplinary in nature. He says that when it implemented the vaccination policy, the City warned him he would be penalized unless and until he complied. Relying on a dictionary definition of the word "discipline" and Ms. Caffrey's letter of December 8, 2021, among other things, Mr. Clark says that the purpose of the unpaid leave of absence was to compel him to comply with vaccination and discipline him if he failed to do so.

[31] Mr. Clark’s position in this regard is not borne out by the evidence. I find that the purpose of the initial 30-day unpaid leave of absence, which was subsequently extended for all employees who remained unvaccinated, was to allow employees an opportunity to educate themselves, reconsider and receive the vaccine if that is what they concluded they should do.

[32] This is consistent with the vaccination policy’s encouragement for employees to explore available resources and supports regarding the safety and efficacy of COVID-19 vaccines and the City Manager’s evidence on this application, which I accept. Ms. Caffrey also made comments to this effect in her letter of February 15, 2022, when she said that the purpose of the leave was to give Mr. Clark time to consider whether he would comply with the policy.

[33] I also accept the City Manager’s evidence that although the vaccination policy flagged that employees who did not comply with the policy would face “employment consequences” up to and including termination, the vaccination policy did not impose disciplinary consequences for employees who decided against vaccination. I accept that evidence because it is most consistent with the wording of the policy itself, and the evidence of what actually occurred.

[34] The vaccination policy makes a distinction between “employment consequences” attendant upon the decision not to be vaccinated, and “disciplinary consequences” that could be expected by those who submitted fraudulent vaccination certificates or fraudulent human rights accommodation requests. I agree with the City that this difference in language is important and demonstrates different intentions.

[35] Mr. Clark points out that Ms. Caffrey’s letter of December 8, 2021 refers to “disciplinary consequences up to and including termination of employment”. Viewed in light of the evidence as a whole, however, this phrase does not support the view that Mr. Clark’s unpaid leave was disciplinary or that he understood that he would be or was being disciplined.

[36] I have already mentioned that the vaccination policy itself distinguished between employment consequences and disciplinary consequences. Further, the evidence shows, and I find as a fact, that no employees of the City, including Mr. Clark, were disciplined for deciding not to get vaccinated. The only employment consequences any unvaccinated exempt employee experienced was a temporary unpaid leave of absence, which was extended for those who remained unvaccinated, and the corresponding loss of income.

[37] I find as a fact that Mr. Clark's unpaid leave of absence was administrative in nature. As I mentioned at the outset, this Court has previously considered whether placing a non-unionized employee on unpaid administrative leave under a mandatory COVID-19 vaccination policy amounted to constructive dismissal. I therefore move on to a discussion of that case, which both parties addressed at length, before further addressing the specifics of Mr. Clark's situation.

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

[38] In *Parmar*, MacNaughton J., as she then was, found that an employee who, like Mr. Clark, was suspended without pay pursuant to a mandatory COVID-19 vaccination policy, was not constructively dismissed. The primary reason was that the vaccination policy and Ms. Parmar's consequent unpaid leave of absence were reasonable and justified on the facts. That is, there had been no breach of the employment contract at the first stage of the *Potter* analysis: *Parmar* at paras. 134-155, 157.

[39] Unlike Mr. Clark, Ms. Parmar's employment contract included an express term that she would comply with the policies of her employer ("Tribe") as amended from time to time at Tribe's discretion: *Parmar* at paras. 20(c), 88-89. There was no dispute between the parties that the employer could implement policies as it saw fit; instead, the issue was whether Ms. Parmar's unpaid leave pursuant to the policy was reasonable: *Parmar* at paras. 89, 131.

[40] The reasonableness assessment was conducted based on the state of knowledge about COVID-19 at the time the policy was implemented and in light of

Tribe's obligation to protect the health and safety of its employees and clients: *Parmar* at paras. 101-102.

[41] The Court's main focus was on whether there were *bona fide* business reasons for the policy and for placing Ms. Parmar on an unpaid leave of absence for failing to comply with it: *Parmar* at paras. 98-99. It considered a variety of factors, including the employer's obligation to protect the health and safety of its employees and its clients, what was known about COVID-19 at the time, facts regarding COVID-19 that the Court took judicial notice of, how COVID-19 vaccination or other somewhat analogous policies had been treated in other contexts, and the particular features of Tribe's vaccination policy, business, and statutory obligations.

[42] Ultimately, the Court concluded that Tribe's vaccination policy "reflected the prevailing approach" at an unprecedented and dangerous time and struck an appropriate balance between the rights of its employees and clients to a safe environment, while ensuring that employees who did not wish to become vaccinated could maintain a principled stance against vaccination without losing their employment, by instead being placed on a leave of absence: *Parmar* at paras. 137-155. The vaccination policy and the unpaid leave that flowed from it were reasonable and Ms. Parmar had not been constructively dismissed.

[43] There are many similarities between Ms. Parmar's case and Mr. Clark's. Ms. Parmar, like Mr. Clark, was employed in an accounting function and there were no issues at all with the quality of her job performance. Tribe implemented its mandatory vaccination policy in October and November 2021, around the same time that the City implemented the vaccination policy that is in issue here. Ms. Parmar, like Mr. Clark, did not wish to become vaccinated for reasons unrelated to human rights grounds. Similarly, Ms. Parmar was placed on leave without pay, though her benefits continued.

[44] Additionally, Ms. Parmar, like Mr. Clark, proposed that she work from home as an alternative to the vaccination policy and, also like Mr. Clark, was told that there would be no exceptions to the policy. Ms. Parmar was also told that if she became

vaccinated she would be returned to work. Finally, like Mr. Clark, Ms. Parmar told her employer that she considered herself to have been constructively dismissed when she was placed on unpaid leave pursuant to the COVID-19 vaccination policy that was at issue there.

[45] Subsequently, in *Van Hee v. Glenmore Inn Holdings Ltd.*, 2023 ABCJ 244, the Alberta Court of Justice considered and applied *Parmar* in another employment case involving a mandatory vaccination policy, that time involving a restaurant worker. In that case, the employment contract also included a term that the employer could make or add policies as required: *Van Hee* at para. 10.

[46] Mr. Clark says that *Parmar* is distinguishable on several bases, including that, unlike him, Ms. Parmar did not contest that her employer's vaccination policy was a lawful term of her contract, only the reasonableness of the policy. He stresses that Ms. Parmar's employment contract expressly provided that she was required to comply with all policies as amended from time to time by the employer, whereas his did not. I will address whether the employment contract permitted the City to unilaterally implement a vaccination policy, before moving on to consider whether it had the implied authority to suspend Mr. Clark for non-compliance with that policy in the particular circumstances of this case.

**Did the employment contract permit the City to unilaterally implement a vaccination policy?**

[47] Express terms of Mr. Clark's employment contract are set out in a letter dated September 26, 2014 describing his duties, pay and job description. Mr. Clark emphasizes that it did not include any express term requiring him to be vaccinated in order to work, nor any express term permitting the City to unilaterally introduce a vaccination requirement. This is unsurprising considering the COVID-19 pandemic presented a completely unexpected and unprecedented challenge: *Parmar* at para. 136.

[48] Mr. Clark also says that no such terms should be implied, having regard to the factors in *Village Gate Resorts Ltd. v. Moore*, [1997] B.C.J. No. 2478 (C.A.). He

notes, among other things, that compliance with the vaccination policy was said to be a condition of employment and non-compliance resulted in unpaid leave, submitting that this shows the City was changing the terms of his employment contract unilaterally and to his detriment.

[49] The City frames the issue differently. It says that it was an implied term of Mr. Clark's employment contract that the City was permitted to implement workplace health and safety policies that Mr. Clark would be required to comply with, and that the City could place Mr. Clark on unpaid leave or administrative suspension without pay where he was ineligible to work under a health and safety policy. The City says that the vaccination policy falls within that category and that it was not changing the terms of Mr. Clark's employment contract, but rather operating under its existing implied terms.

[50] As the City points out, it has a legal obligation pursuant to the *Workers Compensation Act*, R.S.B.C. 2019, c. 1, s. 21 and the *Occupational Health and Safety Regulation*, B.C. Reg. 296/97 to provide a safe and healthy workplace for its employees and to take steps to mitigate against workplace health and safety risks. As a municipality, it also has obligations to the populations it serves and provides important services to its broader community, including services that would ultimately be classified as "essential" during the pandemic.

[51] I agree with the City that it would be illogical, not to mention unworkable in light of its obligations, to find the City in breach of individual employment contracts for implementing and enforcing City workplace health and safety policies without individual employees expressly agreeing to those policies. Having regard to the criteria set out in *Village Gate*, an implied term permitting the City to implement workplace health and safety policies during the course of Mr. Clark's employment, which policies he would be required to abide by, is reasonable and equitable, is necessary to give business efficacy to the contract, is obvious, is capable of clear expression and does not contradict any express term of Mr. Clark's contract.

[52] To that end, both on examination for discovery and in the course of submissions, Mr. Clark effectively acknowledged that the City was entitled to introduce workplace policies, including health and safety policies, during his employment. This is consistent with my finding that the parties must have intended a contractual term permitting the employer to unilaterally implement workplace health and safety policies to which Mr. Clark would be subject.

[53] However, Mr. Clark says that even if the City could introduce workplace policies, it could only do so if those policies did not fundamentally change the terms of his employment contract, which is what he says the vaccination policy did. He says the issue should not be framed with reference to whether his employment contract included a term permitting the employer to implement workplace health and safety policies generally, but rather with reference to whether it included a term permitting the implementation of a mandatory vaccination policy specifically.

[54] In support of his position, Mr. Clark relies on caselaw providing that an employer does not have the right to unilaterally implement policies that have contractual force. Rather, if an employer seeks to rely on a policy as being contractually binding upon an employee, all of the usual elements of a contract must be established: *Rahemtulla v. Vanfed Credit Union*, 1984 CanLII 689 (BC SC), [1984] B.C.J. 2790, 51 B.C.L.R. 200 (S.C.) at paras. 22 – 24.

[55] The cases Mr. Clark relies on largely involve situations where the employers relied on termination clauses set out in employee policy manuals to limit an employee's notice entitlements at the time of termination, effectively altering termination entitlements that otherwise existed under contract: see e.g. *Rahemtulla; Reotech Construction Ltd. v. Snider*, 2022 BCSC 317; *Starcevich v. Woodward's Ltd.*, [1991] B.C.J. No. 2182. They do not discuss the application of such principles to the implementation of workplace health and safety policies. Mr. Clark also relies on *Wiebe v. Central Transport Refrigeration (Man.) Ltd.*, [1994] M.J. No. 279 (MB CA). In that case, the employee was summarily dismissed for having consumed alcohol during working hours, contrary to company policy.

[56] I do not agree with Mr. Clark's framing of the question. I have found that it was an implied term of Mr. Clark's employment contract that the City was permitted to implement workplace health and safety policies during the course of Mr. Clark's employment and that those workplace health and safety policies would apply to him. On the evidence before me, I find that a vaccination policy falls within that category.

[57] Like *Parmar*, there existed a contractual term (in that case express, in this case implied) permitting the implementation of certain workplace policies generally that would apply to the employee in question and with which the employee would be required to comply: *Parmar* at paras. 20(c), 88.

[58] Suspension without pay breaches the employment contract unless there is an express or implied contractual term permitting it: *Parmar* at para. 95. The question therefore becomes whether the City had the implied authority to suspend Mr. Clark for the administrative reasons it gave (*Potter* at para. 72), that is for non-compliance with the workplace health and safety policy that is in issue (i.e. the vaccination policy). That, in turn, depends on whether the administrative suspension pursuant to the policy was reasonable and justified, keeping in mind that, among other relevant factors, "legitimate business reasons constitute a requirement for a finding that an administrative suspension based on an implied authority to suspend is not wrongful": *Potter* at paras. 97-98; see also *Parmar* at paras. 96, 99.

**Was Mr. Clark's leave without pay as of January 17, 2022 pursuant to the vaccination policy reasonable and justified under the contract?**

[59] There is no rigid framework for determining whether a particular administrative suspension was wrongful: "[t]he 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": *Potter* at paras. 41, 97. However, factors such as 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, will always be relevant. As noted above, legitimate business reasons are a requirement: *Potter* at

paras. 97-98; see also e.g. *Devlin v. NEMI Northern Energy & Mining Inc.*, 2010 BCSC 1822 at para. 50.

[60] Mr. Clark's leave of absence in this case was for a minimum period of 30 days. The City then extended his leave of absence beyond that, maintaining his status as an employee on leave until he made clear he did not intend to return. Other City employees who were placed on unpaid leave for failure to comply with the vaccination policy and who remained unvaccinated continued on unpaid leave until the policy was rescinded about a year later, at which point they were offered to return to work. Though he was not paid during the period he was ineligible to work under the policy, Mr. Clark continued to receive benefits. His position remained available to him and was not filled until after he had filed this claim.

[61] The evidence satisfies me that Mr. Clark was a valued employee and that the City did not want to terminate his employment. It is likely that he too would have been offered a return to work along with the others, had he not elected to bring the employment contract to an end before that.

[62] As in *Parmar*, the analysis turns to a significant extent on whether the City had legitimate business reasons, including safety reasons, for placing Mr. Clark on an unpaid leave of absence for non-compliance with the vaccination policy: *Parmar* at para. 99.

[63] I find that the City had legitimate business reasons for imposing the consequence of an unpaid leave of absence for non-compliance with the vaccination policy and that it acted in good faith. The evidence that the vaccination policy was implemented in order to respond to the unprecedented challenges and risks posed by the COVID-19 pandemic and the attendant safety concerns within the City's workplaces and its broader community is compelling. It was reasonable for the City to apply the vaccination policy to all employees in order to meet the objectives of that policy and placing employees who did not comply with it on unpaid leave was, in turn, a reasonable measure considering the policy's rationale and objectives.

[64] Some years past the initial onset of the pandemic, one might find oneself glossing over the extremity of the risk to public health and social order it first posed, not to mention the tragedies it brought with it. For the purposes of this case, however, it is important to remember that during the relevant period individuals and institutions routinely faced difficult decisions in the face of significant risks and highly uncertain outcomes. Here, Mr. Clark evidently faced a decision that was very difficult for him. His employer, likewise, was faced with having to balance a complex set of considerations in circumstances of great precarity.

[65] The analysis must be conducted in light of what was known about COVID-19 at the time the vaccination policy was implemented: *Parmar* at para. 101. Notably, the policy in issue in *Parmar* was implemented during the same period as the one that is in issue here. I will not repeat the various facts relating to COVID-19 that the Court took judicial notice of in *Parmar*, or its description of what was known about COVID-19 at the relevant time, but I adopt them: *Parmar* at paras. 103-110, 135.

[66] Here, in addition to the risks posed by COVID-19 generally, the City was confronted with an alarming situation specific to its region. COVID-19 case rates were higher and vaccination rates lower in the Prince George and the broader Northern Health region than elsewhere in the province. The public health system was experiencing severe impacts and was unable to attend to the needs of all critically ill patients. Consistent with heightened risk level in the region, in the Fall of 2021, the Chief Medical Officer for Northern Health made orders under the *Public Health Act*, S.B.C. 2008, c. 28, beyond those already in place province-wide.

[67] The City had the statutory and other obligations I discussed earlier, and delivered important services to the community, including services that were designated as “essential”. I have considered Mr. Clark’s evidence that sick rates within the ranks of City employees were not concerning. However, bearing in mind the situation within the broader community and the functions the City served, I have concluded it should be accorded minimal weight in the analysis.

[68] At the same time, the Provincial Health Officer was recommending that large employers who had not done so consider implementing vaccination policies. Both the Federal and Provincial Governments, some municipalities as well a number of other large employers, were adopting mandatory vaccination policies for their employees. Proof of vaccination was also required in order to engage in a number of public activities, such as attending restaurants, concerts or sporting events. All of the relevant public health advice at the time was recommending COVID-19 vaccination as safe and the most effective way of protecting against getting and spreading COVID-19, as well as the best way to reduce the risk of serious illness.

[69] I accept the City Manager's evidence that these were among the many things he was aware of and considered when evaluating whether to implement a mandatory vaccination policy for the City, that the situation he was confronted with was like nothing he had ever dealt with, and that the safety of the City workplace and the greater community were core considerations. The vaccination policy was not the City's first response to the pandemic, but it is one it opted for, for a period of time, when it was the "prevailing approach", vaccines were known to be safe, effective and readily available, and the situation was extraordinary: *Parmar* at paras. 137, 142, 153-154.

[70] I do not agree with Mr. Clark that *Parmar* is distinguishable because Ms. Parmar could not have carried out all of her duties remotely, whereas he could, or because Ms. Parmar was not forced to choose between her employment and receiving the vaccine, whereas he was.

[71] On the remote work issue, leaving aside the premise that Mr. Clark could have worked entirely from home and still effectively fulfilled his duties, which is questionable on the evidence, the analysis in *Parmar* did not turn on whether the plaintiff could have done her job remotely or not. Like here, when Ms. Parmar proposed remote work as an alternative to Tribe's vaccination policy, the employer informed her that there would be no exceptions to the vaccination policy: *Parmar* at paras. 70-71. The Court conducted its analysis of Tribe's policy on the basis that it

made no exception for employees who were able to work from home either entirely or almost entirely: *Parmar* at para. 89. The Court concluded that the policy and resulting leave without pay were nevertheless reasonable and justified.

[72] I note here that the City Manager's evidence addresses the City's rationale in not allowing exceptions to the vaccination policy other than on human rights bases, namely that allowing other exceptions would compromise and undermine the policy's effectiveness as a means of reducing the risk of infection, transmission and serious illness. The City in fact wanted the vaccination policy to be consistently applied to all employees, considering the number of its employees who work in public facing roles and who interact with colleagues and members of the public as part of their regular duties and responsibilities. On the evidence, I find this was reasonable and supports the conclusion that the City had legitimate business reasons, including safety reasons, for placing Mr. Clark on a leave of absence for non-compliance with the vaccination policy: *Parmar* at para. 99.

[73] The City was not required to implement a perfect policy, only one that was reasonable and justified: *Parmar* at para. 99. As in *Parmar*, the fact that the Policy did not allow an exception for remote work does not make it unreasonable considering the circumstances at the time and the City's mandate and operations. To that end, I do not accept Mr. Clark's submission that the City was required to allow him to work from home as an exception to the vaccination policy, because of a workplace safety order issued by Dr. Henry in January 2022 providing that employers had to "allow workers to work from their private residence, if possible" given a variety of factors. That workplace safety order does not address remote work as an alternative to vaccination and, in any event, the vaccination policy applied equally to those who might work remotely. That is, even if Mr. Clark had been working remotely, the City's vaccination policy would still have applied.

[74] As for whether Mr. Clark was forced to choose between his employment and receiving the vaccine, I find as a fact that he was not. I accept the City Manager's evidence that under the policy, all City employees retained the right to choose

whether to be vaccinated or not. This included Mr. Clark. As in *Parmar*, the City “was consistent in its position that [Mr. Clark] could return to [his] employment upon becoming vaccinated”: *Parmar* at para. 140. The City informed Mr. Clark that it still considered him an employee even after he first asserted there had been a constructive dismissal and, as noted previously, extended his leave and did not fill his position until he filed this claim.

[75] The policy’s reference to employment consequences “up to and including termination” does not alter the analysis. In coming to this conclusion, I have considered the variable and highly uncertain nature of the situation to which the City was responding, and the policy’s express recognition that it was subject to review and change depending on how circumstances evolved: *Parmar* at para. 141. Again, the only employment consequence any unvaccinated exempt employee experienced was a temporary unpaid leave of absence, which was extended for those who remained unvaccinated, and the corresponding loss of income.

[76] As in *Parmar*, the vaccination policy “respected [Mr. Clark’s] right to choose to remain unvaccinated” by putting him on a 30-day leave of absence, which was subsequently extended: *Parmar* at para. 139. He continued receiving benefits during the leave period and, considering he was ineligible to work under the terms of the policy and the highly unusual circumstances prevailing at the time, it is reasonable that the leave was unpaid. The vaccination policy did not force Mr. Clark to become vaccinated, but rather forced a choice between getting vaccinated and continuing to earn income, or remaining unvaccinated and losing income: *Parmar* at paras. 139, 154; *Maddock v. British Columbia*, 2022 BCSC 1065 at para. 78. Mr. Clark made his choice.

[77] The City acted in good faith and for legitimate business reasons in placing Mr. Clark on an unpaid leave of absence for non-compliance with the vaccination policy. On the evidence as a whole, and much like *Parmar*, I find that the vaccination policy was carefully considered, accounted for the City’s interests, those of its employees and the population it serves, and its terms were known to Mr. Clark. The policy was

consistently applied and Mr. Clark retained the ability to bring his leave of absence to an end and return to work if he so chose: *Parmar* at paras. 146-149. While the policy was certainly exceptional, it reflected the then “prevailing approach” in the face of extraordinary and unprecedented circumstances and did not compel non-consensual medical treatment: *Parmar* at paras. 151-155. The unpaid leave of absence was a reasonable measure in the face of the City’s legitimate interest in the vaccination policy and Mr. Clark’s ineligibility to work due to his non-compliance with that policy.

[78] In light of all this, I find that the vaccination policy and Mr. Clark’s resulting unpaid leave of absence were reasonable and justified. The City did not breach the employment contract. That being so, it is not necessary to go on to consider whether a reasonable employee in Mr. Clark’s shoes would have felt there was a substantial alteration of an essential term of the employment contract at the second stage of the *Potter* analysis. However, if it had been necessary, Mr. Clark’s claim would have failed on this basis also, for the reasons set out in paragraph 156 of *Parmar*.

**In the alternative, was Mr. Clark forced to resign?**

[79] Though Mr. Clark’s primary arguments centered on his having been constructively dismissed on January 17, 2022, when he was placed on leave without pay, he also advanced an alternative argument on his summary trial application. Specifically, he argued in the alternative that he had been forced to resign when Ms. Caffrey said in her letter of February 15, 2022 that he had a choice to either be vaccinated or resign.

[80] The City objects to this submission noting that the pleadings do not contain any allegation of wrongful dismissal by way of forced resignation, nor any material facts in support of such an allegation. Instead, Mr. Clark only pled that he was constructively dismissed by the implementation of the vaccination policy and consequent leave without pay. The City says that Mr. Clark should not be permitted to advance a new and unpled theory of liability at trial.

[81] I am not prepared to make much of that sentence in Ms. Caffey's letter. She was writing in response to a without prejudice communication that the Court, of course, is not privy to. Without knowing exactly what she was responding to, important context for understanding the impugned statement is lacking.

[82] More importantly, and in any event, in his letter telling the City that he was electing to accept the City's actions as a repudiation of the employment contract, Mr. Clark said that the City's alleged repudiation consisted of: (a) implementing the vaccination policy and (b) placing him on an unpaid leave of absence. He was represented by counsel when he did that. These were the bases upon which he elected to bring the employment contract to an end, not the now-alleged forced resignation.

[83] That being so, regardless of the pleadings issue, Mr. Clark's alternative argument fails on the facts. Further, it bears repeating that the City maintained the employment of Mr. Clark and the other employees who chose not to be vaccinated.

**CONCLUSION**

[84] When, as here, an employee makes the election to accept an alleged act of repudiation by their employer, but fails to establish at trial that a constructive dismissal has occurred, the employee is treated as having resigned from their employment as a matter of law: *Potter* at para. 152. Mr. Clark's wrongful dismissal claim therefore cannot succeed and is dismissed.

[85] In the ordinary course, as the successful party, the City is entitled to its costs at Scale B. However, if the parties wish to make submissions on costs, they may do so in writing. In that event, their submissions (not to exceed five pages each) and any affidavit evidence they wish to rely on should be exchanged according to a schedule to be agreed between counsel, with the first submission to be filed with the registry within 30 days of the release of these reasons.

“Bantourakis, J.”