

Review of *Employment Law During a Pandemic* by Sean J. O'Donnell*

B R U C E J . C U R R A N * *

This short book aims to cover a lot of ground in 127 pages. As the title suggests, the author deals with employment law issues that are related to the COVID-19 pandemic. The back cover of the book sets out the scope of the work thusly:

This book provides employment lawyers, litigators, in-house counsel, and human resource professionals with a one-stop resource for dealing with the most common employment law issues arising during and as a result of the COVID-19 pandemic. It includes general guidelines and best practices, as well as relevant law and its application to employment law issues related to COVID-19, and discussion of current case law.

Despite the ambitiousness of the endeavour, the book achieves its mandate admirably (although I do have a few criticisms, which will be discussed in the latter half of this review).

The book is divided into eight chapters, and covers what are, in my opinion, the most important employment law issues coming out of the pandemic. Chapter 1, entitled “The Impact of COVID-19”, provides some general background on the pandemic, including a timeline, the public health adaptations required of employees and employers, a summary of the key legal areas impacted by the pandemic, and the government-sponsored programs aimed at ameliorating the worst economic impacts for employers and employees. Chapter 2 summarizes the general law of wrongful dismissal, then deals with COVID-19-specific issues related to that topic. Chapter 3, called “Constructive Dismissal and Temporary Layoff”, outlines the general law¹ surrounding those subjects, before delving into some COVID-specific

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** Bruce J. Curran is an Associate Professor, University of Manitoba, Faculty of Law.

¹ Constructive dismissal is where the employer demonstrates an intention to no longer be bound by the employment contract, and a temporary layoff may in certain

issues in the area. Chapter 4 on “Mitigation of Damages” provides a general primer on this area of employment law, discusses the likelihood that courts will consider the COVID-induced slack labour market when assessing dismissed employees’ mitigation efforts, and concludes by explaining the issue of the integration of wrongful dismissal damages with Employment Insurance and the Canada Emergency Response Benefit. Chapter 5, “Contract Law in a Global Pandemic”, focuses primarily on force majeure clauses and the doctrine of frustration. Chapter 6, “Compliance with Human Rights Law”, provides a primer on human rights law and then deals with a number of common human rights issues arising during the pandemic, such as the human rights of employees who have a disability themselves or a disabled family member, the duty to accommodate during the pandemic, and the ability of employers to request certain medical information, such as vaccination status. Chapter 7 deals primarily with occupational health and safety (OHS). It provides a detailed summary of the OHS regime, suggests OHS considerations for the process of returning employees to the workplace following COVID lockdowns, and gives advice on how to handle employee refusals to return to work and employee requests for accommodations. Chapter 8 is entitled “Vaccinations and the Workplace”. It presents an historical summary of COVID-19 vaccinations in Canada, and then tackles the thorny issue of vaccine mandates, both government-imposed and employer-imposed.

The book does many things well. It is written in a straightforward manner and is accessible to readers without formal legal training, such as a human resource professionals or sophisticated employees. The book is also well-researched and is a rich source of information on many topics related to COVID. For example, in the chapter on constructive dismissal and temporary layoffs, the author does an especially nice job of summarizing Ontario’s legislation, passed in the early stages of the pandemic, relaxing the rules for employers regarding temporary layoffs, and then providing a nuanced discussion regarding the complicated issue of whether the legislation has impacted the ability to claim constructive dismissal at common law. To be sure, the author wisely refrains from providing any solid conclusions on this unsettled issue, but does appropriately identify what still needs to be clarified by the Ontario Court of Appeal.² As another example,

circumstances be judged to be such a dismissal.

² Sean J. O’Donnell, *Employment Law during a Pandemic* (Toronto: LexisNexis, 2022) at

the book nicely summarizes the interaction of various government-sponsored benefits with wrongful dismissal damages,³ which is a tricky area for lawyers, employees, and employers. The book delivers, within reason, on its promise of being a “one-stop resource for dealing with the most common employment law issues arising during and as a result of the COVID-19 pandemic” by giving the readers not just the specific information on the legal issues of COVID, but also the pre-existing state of the law over which COVID developments are overlaid. This is no small feat. One thing that any potential purchaser should be aware of though, in relying on the “one-stop resource” promise, is that the author makes the very reasonable decision to focus on the Ontario and federal jurisdictions, as without this focus the book would become unwieldy. Despite the attention paid to these jurisdictions, much of the information and advice provided is applicable to other common law provinces in Canada.

The “one-stop resource” promise is not restricted to purely *legal* matters, but also extends to providing broader human resource guidance that is, strictly speaking, outside the legal realm. This human resource guidance enhances the book, rather than detracts from it, as so much of the response to COVID of employers and employees has required adaptations outside the bounds of clearly defined legal rules. An example of this human resource guidance is when the book, after identifying telecommuting as a means to satisfy the legal duty to accommodate, proceeds to examine telecommuting’s advantages and disadvantages for employers and employees, to provide some social science data on the impact of telecommuting on employee productivity, and to make some predictions about telecommuting’s place in the post-lock-down workplace.⁴ As another example, the author offers some sound policy and public health guidance to employers regarding practices they ought to adopt to keep their workplace safe in pandemic times.⁵

For all its strengths, the book does leave some things to be desired. Most seriously, I found the organization and writing of the book somewhat confusing in places. For example, in the introductory chapter, there isn’t an adequate provision of a road map for the rest of the book. The author could do a better job of signalling how some of the detail he is providing is relevant

60-65.

³ *Ibid* at 70-73.

⁴ *Ibid* at 98-99.

⁵ *Ibid* at 109-113.

to the workplace response to COVID, and he sometimes lapses into merely describing certain developments, without setting out the significance or providing legal or consulting advice. For instance, when reading the chapter on contract law, it was initially unclear to me why the author was spending so much time addressing COVID's impact on commercial contracts. Why do commercial contracts really matter in a book on employment law? As the Supreme Court of Canada and academics have pointed out on numerous occasions, there are many important differences between employment contracts and commercial contracts.⁶ Ultimately, it becomes clear that he is providing information on this topic for employers who find themselves bound by commercial leases for physical workspaces that exceed their operational needs in COVID times and may need to find some legal way of being released from their obligations to the commercial landlord. The confusion could have been avoided if the author signalled this earlier. In other places, the readability would be enhanced if the author foreshadowed that more detail was coming later. For instance, in the chapter on wrongful dismissal, the author should have signalled that mitigation, briefly introduced, would be dealt with much more fulsomely in chapter 4. Lastly, I would have liked to see a concluding chapter for the book. This would have enabled the author to integrate the material, address the broader implications, and give some predictions as to COVID's impact on workplaces in the future⁷ and how the law will evolve.

The book is very much written for a practitioner audience and does not attempt to approach the topic from an academic perspective, nor does it use legal theory. This is not so much a criticism as an observation. Even for a non-academic work, though, the citations leave something to be desired.

⁶ See e.g. *Machtinger v HOJ Industries Ltd.*, [1992] 1 SCR 986 at 1003; and Swinton, Katherine, "Contract Law and the Employment Relationship: The Proper Forum for Reform" in Barry J. Reiter and John Swan, eds, *Studies in Contract Law* (Toronto: Butterworths, 1980) 357 at 363.

⁷ See e.g. Christopher L Erickson & Peter Norlander, "How the Past of Outsourcing and Offshoring is the Future of Post-Pandemic Remote Work: A Typology, a Model, and a Review" (2021) 53:1 *Industrial Relations Journal* 71. These authors hypothesize that the pandemic's shifting of work from on-premises to remote sites may prompt the growth of specialist firms with "globally distributed platform work" that is outsourced, and "virtual companies" that are offshore and are off-premises. These academics also predict that the pandemic may also transform traditional workplace monitoring through the use of digital platforms, remote work arrangements, and outsourcing agreements with existing employees.

For instance, the book does not adhere strictly to the citation style of the McGill Guide. Moreover, certain assertions and propositions are either not cited, or are cited insufficiently. In places, more social science research and context would have been helpful. For example, the book does not deal with the phenomenon of fissuring, which has become increasingly discussed and studied since the publication of the ground-breaking book on this topic by David Weil about a decade ago.⁸ Fissuring is the process of employers increasingly moving work outside the boundaries of the firm through the use of a network of businesses, contributing to general deterioration of working conditions for workers. COVID has, in all probability, accelerated this trend because it has encouraged employers to have work performed on a flexible basis with a minimum of commitment to workers. This has, in turn, likely led to an uptick during COVID times in precarious work arrangements with legal implications, such as the use of independent contractors, dependent contractors, and temporary help agencies. As another example of where more social science research would have enhanced the book, there is ever-increasing data on the opinions of employers and employees about various aspects of COVID-19, including employees' desire to continue working from home, and it would have been nice to see a greater treatment of this.

At times, it is difficult to escape the conclusion that the time and effort the author spent laying out the necessary legal background crowded out (either by virtue of page or time limitations) his ability to delve into certain COVID topics in a more meaningful way. For example, in the 30 pages of chapter 2 on wrongful dismissal, 26 pages were spent setting out the general law on wrongful dismissal, with only the last four dealing with COVID-specific issues. (To be sure, these four pages are very well done, though.) Another example is the section on privacy law in the chapter on compliance with human rights law. The author recommends that employers “modify their written policies to address COVID-19-related collection, use, or disclosure”, but he provides insufficient advice in terms of *how* employers ought to do this.

Moreover, certain important topics are not addressed at all, or addressed too briefly. Examples of these include the following:

⁸ David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge, MA: Harvard University Press, 2014).

- The need for employers to ensure appropriate air quality in work environments to reduce the likelihood of COVID transmission.
- The possibility of employees claiming constructive dismissal on the basis of being required to return to the physical workplace after many months of working from home.⁹ (The risk of a claim succeeding is particularly great if employers dally in requiring the return to work after lockdowns are lifted.) Related to that, what is an employer to do about employees who have moved far away from the physical workplace during a lengthy work-from-home period, and want to continue working remotely?
- Employer monitoring of employees working remotely, especially by electronic means.
- Discharge/discipline for employees attending the workplace infected with COVID.
- Limitations on employees' freedom to express political views regarding the government response to COVID, such as participation in the so-called "Freedom Convoy" in Ottawa.
- The difficulties associated with accruing and tracking vacations and overtime for those employees working from home.

There are several factors that, no doubt, made the writing of the book difficult, and they, at the same time, make its publication all the more significant. Time and change were the enemy of the author. The author had to draft and publish a book that captured the shifting policies of various levels of government, the evolving scientific understanding, the changing regulations in response to said understanding, and extract concrete guidance for employers and employees from the developing jurisprudence, all before the pandemic ended and the information became stale-dated. The book was published in early 2022. There have, obviously, been developments both in the science¹⁰ and the jurisprudence¹¹ since the

⁹ In fairness, this issue was briefly addressed at page 113 of the book.

¹⁰ For example, as the book was being published, evidence started to indicate the preferability of N95 and KN95 respirators over surgical masks in preventing transmission.

¹¹ See e.g. *Verigen v Ensemble Travel Ltd.*, 2021 BCSC 1934 (CanLII), which essentially

publishing of the book, but the book has stood up remarkably well. I'd encourage the author to draft a second edition, updated to reflect the evolving caselaw and to include an expanded list of topics, a directory of resources, and ideally even some sample policies. Additionally, serious thought should be given to broadening the focus of the second edition to deal with pandemics more broadly. While I hope I'm wrong, COVID is unlikely to be the only pandemic employees and employers will face in the next few decades.

confirms the author's prediction (at 84-86 of the book) that courts will generally not find the COVID pandemic to have frustrated employment contracts.