Arbitrator Decides Employer Could Terminate Employee Who Refused Government-Ordered Vaccination

On April 4, 2022, in *Fraser Health Authority v British Columbia General Employees' Union, 2022 CanLII 25560,* Arbitrator Koml Kandola of the British Columbia Labour Relations Board dismissed the union's grievance respecting the dismissal of the grievor because she was ineligible to work under the order issued by the Provincial Health Officer of BC (PHO Order), and had no intention of ever becoming vaccinated. The PHO Order required all health authority employees to be vaccinated against COVID-19 in order to be eligible to work. The arbitrator rejected the union's argument that the employer did not have just and reasonable cause for terminating the grievor's employment as reasonable alternatives existed.

Background

The grievor had been employed without discipline by FHA as a substance abuse counsellor since February 2014. On October 14, 2021, the PHO issued its Order, which provided that as of October 26 all health authority employees "must be vaccinated or have an exemption to work." Employers were prohibited from allowing unvaccinated staff to work after October 25 unless the staff member obtained the vaccine within prescribed time frames, or had an exemption. The only exemption was on narrow medical grounds; there was no religious exemption. Staff who were not eligible to work as of October 26 could return to work seven days after obtaining their first dose, provided they did so by November 14. There were no further exceptions as of November 15.

The grievor was put on a three-week unpaid leave of absence effective October 26. FHA advised her that if she remained unvaccinated on November 15 her employment would be terminated. FHA met with the grievor on October 29 when she confirmed she was not vaccinated and did not ever intend to become vaccinated, indicated she objected to vaccination on religious grounds, and stated she felt the PHO Order was unlawful.

On November 10, FHA advised staff that the PHO announced that a limited supply of the Johnson and Johnson vaccine, which uses a different technology and requires only one dose, would be made available in priority to health care workers; staff would receive more time to receive that vaccine if they wished.

In a meeting on November 25, the grievor confirmed she had “absolutely” no intention of obtaining any vaccination, including Johnson and Johnson. As a result, FHA advised the grievor that her employment was terminated for just cause, specifically for non-compliance with the PHO Order and her inability to work. FHA did not consider it reasonable to place the employee on an unpaid leave of unknown duration, hoping that she or the PHO would change direction.

Union’s Argument

On behalf of the grievor, the union argued:

- A “temporary inability to work” under the terms of the PHO Order does not give rise to just cause for termination;
- Reasonable alternatives existed, such as an unpaid leave or layoff; and
- FHA’s approach was “automatic termination,” which did not allow for consideration of mitigating factors or individuals circumstances, as required in the just cause analysis.

Award

Arbitrator Kandola emphasized that the grievance was not a policy grievance but a grievance about whether the FHA had just cause to terminate in the context of the PHO Order.

The arbitrator acknowledged that the grievor had the right to make a personal choice not to get vaccinated, but stated that in making this choice, the grievor made herself ineligible to work for FHA in any capacity because of the of the PHO Order. She also noted that because the grievor advised FHA that she had no intention of ever becoming vaccinated, there was “no reasonable prospect of her becoming eligible to work under the Order in the foreseeable future.” The arbitrator accepted that in the circumstances FHA had been given cause to act, and framed the issue as follows: “Was termination an excessive response’ Should FHA have resorted to other alternatives such as layoff or an extended unpaid leave of absence'”

Layoff

The arbitrator noted that the layoff provisions of the collective agreement (CA) apply in the context of a loss of work or reduction of the workforce, which did not apply here. She further found that even if it was considered a layoff, the grievor could not accept recall because she is ineligible to work and would have been deemed to have abandoned her right to re-employment under the CA.

Unpaid Leave of Absence

While the arbitrator recognized that the CA provides for some extended unpaid leaves, she noted that the grievor did not apply for any nor would she have been eligible. Had FHA placed her on an unpaid leave generally, the union conceded that its duration would have been unknown. The arbitrator stated: “I was not pointed to any entitlement under the [CA] or in arbitral law to an unpaid leave of absence of indefinite length where an employee is legally prohibited from working and, due to her personal choices, has no foreseeable prospect of return.”

Jurisprudence Referred by the Parties

Arbitrator Kandola considered the authorities put before her by the parties, and explained that, "[a] clear feature of the jurisprudence is that each case will turn on its own facts and must be decided within its specific context." After stating that there was no case directly on point, the arbitrator considered two arbitration decisions: *Ontario Power Generation and the Power Workers Union (OPG)*, which we discussed here, and *Chartwell Housing REIT and Healthcare, Office and Professional Employees Union Local 2220 (Chartwell)*, which we discussed here.

In the context of a rapid testing regime, the *OPG* arbitrator found it reasonable for the employer to put unvaccinated employees who refused to participate in testing on an unpaid leave for six weeks to consider their decision and terminate their employment thereafter. In *OPG*, the arbitrator stated, "…unvaccinated individuals who refuse to participate in reasonable testing are, in effect, refusing of their own volition to present as fit for work" and "will likely have made a decision to end their career with the Company."

In considering *Chartwell*, the arbitrator found that the analysis regarding the reasonableness of the mandatory vaccination policy "was driven by specific collective agreement language regarding the continuation of existing practices" and, based on that language, the arbitrator found the employer had violated the CA when it made termination a penalty. The arbitrator in *Chartwell* stated, however: "No employer has to leave a non-compliant employee on a leave of absence indefinitely. At some point, and subject to the Employer warning employees of the possibility of termination, and having considered other factors, it will likely have just cause to terminate the employment of such an employee."

Arbitrator Kandola determined that *Chartwell* was factually distinguishable for the following reasons:

- She had not been pointed to CA provisions similar to those relied upon in *Chartwell*;
- Unlike in *Chartwell*, compelling evidence had been put before her of the operational impact of leaving unvaccinated employees on undefined unpaid leaves, and there is nothing to suggest that the staffing implications would be different for the grievor's position or at her worksite; and
- Unlike in *Chartwell*, FHA provided employees opportunities to raise individual circumstances relevant to the PHO Order and have them addressed.

Additional Factors Supporting the Conclusion

Additional contextual factors noted by the arbitrator were:

- The provincial parties did not negotiate an agreement that allowed unvaccinated employees to be put on unpaid COVID-19 leave, nor was there a CA requirement to do so;
- The PHO has said we are still in a pandemic, and any opinion on when the pandemic may end would be speculation;
- The PHO Order does not include an expiry date, and the parties could not assume when it might be rescinded;
- At the time of termination, the PHO had not provided any indication that

the PHO Order would be lifted in the foreseeable future and repeatedly stated that vaccination is a key tool in both the short-term and long-term response to COVID-19;
- Evidence was provided (and not persuasively challenged by the union) regarding staffing challenges at FHA throughout the pandemic, including the significantly increased number of unfilled shifts, and how difficult it would be to temporarily fill the positions of 460 unvaccinated employees on unpaid leaves of unknown duration;
- FHA did not consider it reasonable to place the employee on an unpaid leave of unknown or limited duration; and
- Termination was not an automatic consequence of refusing vaccination, as the FHA considered and accommodated individual circumstances when feasible.

Taking the factors above into account, the arbitrator concluded that FHA was not required to place the grievor on a leave of indefinite duration, and the grievance was dismissed.

Bottom Line for Employers

Employers subject to government vaccination mandates, or that issue their own vaccination policies, should become familiar with this decision. It provides support for the argument that an employer will not be considered to be acting excessively if it terminates a unionized employee who has made the personal choice to be ineligible to work because of a refusal to comply with the vaccination policy and who has no intention to do so in the foreseeable future. The decision instructs, however, that an employer in this position should warn such an employee their employment will be terminated upon refusing to comply with the policy, and should inquire about individual circumstances and, when feasible, accommodate them.

Source: Littler LLP

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