

COVID-19 Vaccination Policies: Early Employer Successes In Round Two



A number of arbitration awards dealing with COVID-19 vaccination policies were released in late 2021 and early 2022. While most of these policies were upheld, it remained to be seen how COVID-19 vaccination policies would be viewed once governments started lifting COVID-19 public health measures, and how arbitrators would assess discharges. Two awards released last week have provided some early answers to these questions.

Extendicare Lynde Creek Retirement Residence and *UFCW, Local 175* considered a union policy grievance which challenged a retirement home's COVID-19 vaccination policy in Ontario. The policy required newly hired and existing employees to be fully vaccinated (subject to accommodation requirements under the *Human Rights Code*), including having received all booster vaccinations that were recommended by Health Canada. If employees were not fully vaccinated in compliance with the policy, they were to be placed on an unpaid leave of absence and 'may be subject to additional corrective action up to and including termination of employment.'

Arbitrator Stephen Raymond was asked to consider the policy's reasonableness and lawfulness in the context of Ontario reducing or eliminating public health measures; particularly those impacting retirement homes. In a bottom line decision (as requested by the parties), Arbitrator Raymond stated the following:

Having carefully considered the evidence, arguments and authorities, it is my view that the Policy has been and remains a reasonable workplace rule, consistent with the Collective Agreement, the *Occupational Health and Safety Act*, *Retirement Homes Act*, 2010 and the related regulations and requirements, and the relevant authorities. More specifically, this is my view even in the context of the Ontario Government and other public health authorities recently reducing or eliminating various vaccination and other COVID-19 related requirements for staff, contractors and visitors in the context of retirements (sic) homes, long-term care homes and, more generally, other facilities and venues.

Arbitrator Raymond also held that the requirement to receive all booster vaccinations recommended by health authorities now, or in the future, 'also has been and remains a reasonable workplace rule, consistent with the Collective

Agreement, the *Occupational Health and Safety Act*, *Retirement Homes Act*, 2010 and the related regulations and requirements, and the relevant authorities.'

Fraser Health Authority and *British Columbia General Employees' Union* was an individual grievance in British Columbia which challenged the discharge of a health authority employee who refused to be vaccinated against COVID-19. British Columbia's Provincial Health Officer ('PHO') issued an order requiring all health authority employees to be vaccinated against COVID-19 in order to be eligible to work. The order did not allow for any exemptions other than certain medical reasons, and it did not include an expiry date.

The employer sent a letter to its employees which advised them that if they did not receive the required vaccination by certain dates, they would be placed on a three week unpaid leave of absence, and, if they did not receive the vaccination in that period, their employment would be terminated for inability to work in accordance with the PHO order.

The Grievor was a substance abuse counsellor who made it very clear, on repeated occasions and despite meetings with management, that she would not obtain vaccination. The Grievor acknowledged receiving the employer's vaccination communications, and had sent a 'personal notice of liability' to her manager alleging that the vaccination requirement was unlawful. The Grievor also alleged that the PHO order violated the *Charter of Rights and Freedoms* and her religious beliefs. The Grievor did not qualify for a medical exemption and the union confirmed that there was no religious discrimination component to the grievance. Given her continued refusal to be vaccinated, the Grievor was placed on a three week unpaid leave of absence and, subsequently, was discharged for cause.

Arbitrator Koml Kandola framed the question as follows: did the employer have 'just and reasonable cause to terminate the Grievor's employment, in the context of a PHO order imposing mandatory vaccination requirements that apply to health sector employees across the province,' where the order applied to the Grievor, the Grievor was ineligible to work under the order, and has no intention of taking a COVID-19 vaccine' The arbitrator believed it did and dismissed the grievance.

The union argued that the employer's interests in providing a safe workplace could have been achieved by other means, including placing the Grievor on an unpaid leave of absence or a layoff. The union also argued that the employer's approach was one of automatic termination which did not allow for consideration of mitigating factors or individual circumstances.

Arbitrator Kandola disagreed with the union. The Arbitrator held that the collective agreement's layoff provisions did not apply: there was no loss of work or reduction of the workforce as contemplated by those provisions, and even if the Grievor had been laid off she would not have been able to accept a recall because she was ineligible to work under the order. An unpaid leave of absence would have been of unknown duration, and there was no entitlement for such a leave where an employee is 'legally prohibited from working and, due to her personal choices, has no foreseeable prospect of return.' Moreover, the Arbitrator found that the employer's evidence of serious operational impacts of leaving unvaccinated employees on undefined unpaid leaves of absence, was compelling. The employer gave employees opportunities to raise individual circumstances which would be considered if they were relevant in the context of

the order. Finally, the Arbitrator noted that the order has no expiry date and, as a result, at the time of the Grievor's discharge there was no indication that the order would be lifted in the foreseeable future.

Take Away for Employers

While these decisions, like all arbitration awards, are dependent on their facts, they provide some early indications on how arbitrators may address these issues as society starts to lift public health measures. As always, Miller Thomson LLP will continue to monitor developments in this area and will provide further updates in the future.

Source: Miller Thomson

Written By: Justin Diggle