

FTR Now

Arbitrator Finds Mandatory Vaccination Policy to be Unreasonable

Date: November 12, 2021

In this *FTR Now*, we review the arbitration award issued on November 11, 2021 by Arbitrator John Stout in [Electrical Safety Authority and Power Workers' Union](#), in which he assessed the reasonableness of an employer's mandatory vaccination policy. In the specific context of the workplace, and its associated workplace dangers and hazards arising from COVID-19 at this time, the employer's policy was found to be unreasonable in that employees may be disciplined, discharged or placed on administrative leave without pay if they did not get fully vaccinated.

In arriving at this conclusion, the Arbitrator noted that the situation involving COVID-19 is fluid and ever evolving, and that circumstances for this employer may change. He also noted that in workplace settings where the risks are high (e.g. involving vulnerable populations) then "mandatory vaccination policies may not only be reasonable but may also be necessary and required to protect those vulnerable populations."

The Electrical Safety Authority (Employer) had a voluntary vaccination and testing policy in place prior to October 5, 2021, which permitted employees who did not voluntarily disclose their vaccination status to be tested for COVID-19 on a regular basis. The Power Workers' Union (Union) did not object to this policy. On October 5, 2021, the Employer introduced a mandatory vaccination policy (Policy) which required all staff to be fully vaccinated, subject to a valid exemption under the *Human Rights Code*, as of various dates depending on the employee's role.

The Union asserted in this grievance that the Policy was an "unreasonable and a significant over-reaching exercise of management rights, which violates the Collective Agreement as well as employees' privacy rights and right to bodily integrity." The Employer responded that the Policy was a "reasonable exercise of management rights that fulfills their legal obligations to take every reasonable precaution to protect their workers and the public."

The Arbitrator stated, among other things, that there was no specific provision in the Collective Agreement which addressed vaccinations, the employer had not previously required employees to be vaccinated and there was no legislated requirement that the Employer's employees be vaccinated.

The Arbitrator noted that when assessing employer rules or policies that affect employee's individual rights, such as privacy, arbitrators often apply the *KVP* test, which sets out the scope of when an employer can exercise its management rights and unilaterally impose a policy. The *KVP* test, among other things, requires that policy to be consistent with the collective agreement, be reasonable, be clear and unequivocal and be brought to the attention of the employee before the employer acts on it, among other things. The Arbitrator took a "nuanced contextual approach" to the *KVP* test and stated that "[c]ontext is extremely import when assessing the reasonableness of a workplace rule or policy that may infringe upon an individual employee's rights. The authorities reveal a consensus that in certain situations, where the risk to health and safety is greater, an employer may encroach upon individual employee rights with a carefully tailored rule or policy." He continued:

[16] While an individual employee's right to privacy and bodily integrity is fundamental, so too is the right of all employees to have a safe and health workplace. The interests in this case raise extremely important public policy issues during a very unique and difficult time in our history. The context is very unusual, but the existing law provides guidance for the analysis.

[17] In workplace settings where the risks are high and there are vulnerable populations (people who are sick or the elderly or children who cannot be vaccinated), then mandatory vaccination policies may not only be reasonable but may also be necessary and required to protect those vulnerable populations.

[18] However, in other workplace settings where employees can work remotely and there is no specific problem or significant risk related to an outbreak, infections, or significant interference with the employer's operations, then a reasonable less intrusive alternative, such as the [Employer]'s voluntary vaccination disclosure and testing policy (VVD/T Policy) employed prior to October 5, 2021, may be adequate to address the risks.

The Arbitrator stressed that the circumstances raised by the pandemic are unique and the situation is evolving: "What may have been unreasonable at one point in time is no longer unreasonable at a later point in time and vice versa." Arbitrator Stout also commented about the importance of the process associated with the adoption or change to a Policy. In the context of this grievance, the Employer previously enacted a voluntary vaccination and test policy and then changed to the mandatory vaccination Policy without any apparent analysis of danger and risk.

In the specific circumstances of the case before him, the Arbitrator stated that there was no evidence of any workplace dangers or hazards associated with the Employer's concerns. Nor was there evidence that lack of the Policy would cause substantial interference with the Employer's business. Some of the Employer's staff were required to access third party sites or locations, or might need to travel, but no evidence was presented that the work had been significantly impacted by the fact some employees were not vaccinated. The Arbitrator continued that the Employer's concerns were legitimate, but "at this point" did not justify imposing the Policy with threats of discipline or discharge.

However, the Arbitrator did note that if significant issues arose with respect to accessing third party sites to perform work, then the Employer may have cause to place an employee on administrative leave until they are vaccinated.

The Arbitrator concluded that aspects of the Policy were unreasonable and the vaccinate or test policy that existed prior to October 5, 2021 was a reasonable alternative. He stated that if the Employer has legitimate concerns, it should discuss those concerns with the Joint Health and Safety Committee, where the Union has representation. If the number of unvaccinated employees "creates real problems" for the Employer's business that "cannot be addressed in any other reasonable way, then the [Employer] may need to take other measures, including placing unvaccinated employees on administrative leave. If the [Union] objects to such measures, then the issue may be brought back before me on an expedited basis."

Going Forward

Arbitrator Stout's decision was very fact specific and contextual. He acknowledged the evolving nature of the COVID-19 pandemic and the fact some workplaces will need to implement mandatory vaccination policies. Moreover, he also recognizes that the circumstances giving rise to the need for a mandatory vaccination policy may change such that an unvaccinated employee would have to be put on administrative leave.

Employers should also be aware that on November 9, 2021, another arbitrator in a separate decision, [*United Food And Commercial Workers Union, Canada Local 333 and Paragon Protection Ltd.*](#), upheld a mandatory vaccination policy based on its reasonableness in the circumstances of that workplace and the unique language of that particular collective agreement. The two decisions read together highlight the importance of employers assessing their mandatory vaccination policies in the specific context of their circumstances, dangers and hazards associated with the workplace, the applicable collective agreement and any applicable legislated or regulatory requirements.

We will continue to monitor decisions relating to workplace vaccination policies and will provide updates as they become available. Should you require further information about the awards discussed in this *FTR Now*, please contact [your regular Hicks Morley lawyer](#).

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