

FTR Now

Court Denies Injunction Motions and Allows Mandatory Vaccination Policies to be Implemented

Date: November 20, 2021

The Ontario Superior Court has refused to stay the implementation of two mandatory workplace COVID-19 vaccination policies, pending the outcome of grievance arbitrations challenging the validity of those policies. On November 20, 2021, the Court rendered its decision in [Amalgamated Transit Union, Local 113 et al v. Toronto Transit Commission and National Organized Workers Union v. Sinai Health System](#), denying injunctive relief sought in parallel cases by two unions to stay the implementation of two mandatory vaccination policies, imposed by the Toronto Transit Commission (TTC) and Sinai Health System (Sinai Health) respectively.

In this *FTR Now*, we discuss this decision and its implications for employers that have implemented similar policies.

The Sinai Health Decision

Justice Akbarali dismissed the application of the National Organized Workers Union (NOWU) for an interlocutory injunction on the basis that there was no gap in the legislative regime that would support the exercise of the Court's residual jurisdiction.

Background

Sinai Health implemented a revised vaccination policy (Policy) which came into effect on October 26, 2021. Among other requirements, the Policy mandates that Sinai Health employees confirm that they are fully vaccinated against COVID-19 by December 9, 2021, failing which their employment will be terminated. The Policy includes a process of accommodation for employees to apply for exemptions under the Ontario *Human Rights Code*, including medical and non-medical exemptions. In order to meet the deadline for full vaccination, employees were required to confirm that they had received a first dose of the vaccine on or before November 11, 2021.

NOWU brought an interlocutory injunction to restrain Sinai Health from taking any action (disciplinary or otherwise) against its members based upon their vaccination status, pending the outcome of a number of policy grievances brought by NOWU on November 4, 2021. The grievances have not yet been referred to arbitration.

At the injunction hearing on November 17, 2021, Sinai Health argued that the Policy was the most effective measure for reducing the transmission of COVID-19 in its workplaces, given international scientific consensus on the safety and efficacy of vaccines and the heightened risks of COVID-19 to the Sinai Health staff and the vulnerable patient populations it serves (including individuals who are elderly, immunocompromised or not eligible for vaccination), and that it should be entitled to implement its Policy immediately.

Sinai Health also argued that while the Court had residual jurisdiction to grant an interlocutory injunction in labour relations matters, it should decline to exercise its jurisdiction in the circumstances because adequate alternative remedies were available to unionized employees through the collective agreement grievance and arbitration procedures. Specifically, the statutory scheme provided by the *Labour Relations Act, 1995 (LRA)* includes the ability to expedite arbitrations and empower labour arbitrators to grant retroactive remedies, reinstate employment with seniority and compensation for time lost and address human rights concerns.

NOWU argued that its members who did not wish to be vaccinated would suffer irreparable harm because they would be

required to choose between receiving a vaccine and losing their employment. Accordingly, it argued, some of its members would suffer financial harm of such a magnitude that they would feel coerced into being vaccinated against their wishes. If the injunction was not granted, it was argued, a win at arbitration would be too late.

The Ontario Hospital Association (OHA) intervened in the application, arguing that Sinai Health's Policy is consistent with the mandatory vaccination policies of many other Ontario public hospitals and these vaccination policies are consistent with other vaccination requirements in hospitals, all of which are a necessary step in the protection of health care workers and patients in Ontario. Therefore, the Policy should not be stayed.

The Court Decision

Justice Akbarali dismissed NOWU's interlocutory injunction application. In essence, Her Honour determined that there was no gap in the legislative regime that would support the exercise of the Court's residual jurisdiction.

Finding that even if she agreed that that Court should exercise its jurisdiction, the Court held that NOWU had mischaracterized the harm at issue. Justice Akbarali found that employees were not being forced to be vaccinated under the Policy. Rather, she determined, they were being forced to choose between (i) getting vaccinated and keeping their job; and (ii) remaining unvaccinated and losing their jobs. Justice Akbarali noted that the requirement to "choose between two undesirable outcomes" did not create harm that would "render the arbitration moot." This analysis is consistent with a recent Québec Superior Court decision, *Michel Lachance c. P.G. du Quebec*, where that court similarly concluded that a vaccine mandate does not cause irreparable harm because employees are not forced to vaccinate.

Moreover, the Court found, the loss of employment has been repeatedly held by courts to be a reparable harm that can be compensated by monetary damages. The Court concluded that if it intervened to grant injunctive relief whenever a unionized employee faced the loss of employment, "... the courts would be full of applications for injunctions, and the labour relations scheme designed by Parliament would become impoverished."

Accordingly, the Court held that the statutory scheme provided by the *LRA* provides an adequate alternative remedy, and therefore declined to engage the Court's residual jurisdiction in these circumstances.

The TTC Decision

Justice Akbarali also refused to grant the interlocutory injunction sought by the Amalgamated Transit Union, Local 113 and Carlos Santos (ATU Applicants) to stay the TTC's mandatory vaccination policy (TTC Policy). Her Honour found that the ATU Applicants had failed to establish irreparable harm, and that the balance of convenience favoured the TTC and the continued implementation of the TTC Policy.

Background

The TTC implemented the TTC Policy effective September 7, 2021.

The TTC Policy requires that TTC employees be fully vaccinated by November 20, 2021 otherwise they would be placed on an unpaid leave of absence. During this leave, employees would continue to be eligible for certain benefits. Effective December 31, 2021, employees who have not yet confirmed they are fully vaccinated (i.e. approved dose plus two weeks) would have their employment terminated.

The TTC Policy allows for valid exemptions made under the Ontario *Human Rights Code* (e.g. based on creed or medical reasons). Employees who establish a valid exemption may request workplace accommodation, which they will be required to substantiate.

Before the Court, the TTC argued that the TTC Policy was driven by health and safety considerations, and was in line with the policies of other employers, including those adopted by the City of Toronto (City) and the government of Canada. As an employer, the TTC is obligated under the *Occupational Health and Safety Act* to take every precaution reasonable in the circumstances to protect the health and safety of its workers, of which a key part is the vaccination of employees in light of the gravity of the ongoing COVID-19 pandemic. Moreover, as an essential service serving some of the most vulnerable populations in the City, it was critical that TTC employees be vaccinated to protect each other and also the customers they serve.

The ATU Applicants brought an interlocutory injunction to restrain the TTC from suspending or terminating bargaining unit members who refuse to get vaccinated pending the outcome of a challenge to the TTC Policy currently underway before a labour arbitrator.

A party seeking an injunction must meet the three-pronged test set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*: is there a serious issue to be tried, will the applicant suffer irreparable harm if the injunction is not granted and does balance of convenience weigh in favour of granting the injunction.

Without conceding that a serious issue had been established, the TTC focused on the latter two criteria, submitting that: (i) termination of employment does not result in irreparable harm at law because labour arbitrators have broad remedial authority to grant reinstatement or damages where they conclude the termination was unjust; and (ii) the balance of convenience favours implementation of the TTC Policy because it is geared at protecting the health and safety of workers and the community at large.

The ATU Applicants argued that its members who did not wish to be vaccinated would suffer irreparable harm if they were put on unpaid leave and if their employment was eventually terminated because they would suffer financial harm and would be compelled by economic duress to be vaccinated against their will.

The Court Decision

The Court found that the ATU Applicants had failed to establish two elements of the *RJR MacDonald* test for an interlocutory injunction, namely: whether irreparable harm would result if the injunction was not granted and whether the balance of convenience favoured granting the injunction.

The Court stated that the threshold for the first element of the *RJR MacDonald* test, whether there was a serious issue to be tried, was a low one and that test was met.

The Court, however, concluded the ATU Applicants did not meet the test for irreparable harm. Justice Akbarali confirmed that irreparable harm is harm that “cannot adequately be compensated by damages.” It must be clear, not speculative, and the evidence must establish that the applicant would suffer the harm.

Here, as with the finding for Sinai Health, the Court stated that “the harm at issue is the loss of employment or income that the unvaccinated will suffer. Choosing vaccination as a less undesirable alternative than the loss of one’s income (which may be restored if the challenge to the TTC Policy in the labour arbitration is successful) is not properly characterized as the harm.” The Court continued:

[77] Fundamentally, I do not accept that the TTC’s vaccine mandate policy will force anyone to get vaccinated. It will force employees to choose between two alternatives when they do not like either of them. The choice is the individual’s to make. Of course, each choice comes with its own consequences; that is the nature of choices.

The Court rejected the argument of the ATU Applicants that the emotional stress arising from termination of employment gave rise to irreparable harm, stating that stress resulting from a termination was expected and does not give rise to a request for extraordinary relief by way of injunction.

The Court also rejected the argument of the ATU Applicants that stigma attaching to those who were suspended or terminated due to their decision not to be vaccinated amounted to irreparable harm. Justice Akbarali found that any stigma was speculative at best, and did not arise as a result of the TTC's policy but as "a societal consequence of the choice not to be vaccinated."

Justice Akbarali also found that not granting the injunction would "respect the proper role of the arbitrator, who has expertise in labour relations, consistent with Parliament's statutory scheme."

With respect to the third element of the *RJR MacDonald* test, the Court concluded that the balance of convenience weighed in favor of the TTC in refusing to grant to the injunction.

The Court accepted the arguments of the TTC that, as one of the most heavily used mass transit systems in North America whose ridership includes vulnerable individuals, its workplace is unique and its operations involve the public interest. Furthermore, the TTC has a responsibility to protect the health and safety of its employees and the customers it serves. It opted to implement the TTC Policy after the City encouraged all City corporations and agencies to adopt a mandatory vaccination policy similar to that adopted by the City.

The Court concluded that the TTC "has established that the enforcement of its mandatory vaccination policy aligns with the public interest broadly, as well as the interests of the TTC's workforce and ridership specifically."

"If even one TTC rider or worker dies or is seriously harmed after catching COVID-19 from an unvaccinated TTC employee, it will be one too many," Justice Akbarali concluded, "That harm is truly irreparable."

Going Forward

The Court's decision is an important precedent for employers facing this type of process and confirms that challenges to mandatory vaccination policies are to be determined through the labour relations, not judicial, process.

Labour arbitrators have exclusive jurisdiction to determine the reasonableness of mandatory vaccination policies imposed in unionized workplaces. While the *RJR MacDonald* test must be assessed on the facts of each case, Justice Akbarali's decision (including as to jurisdiction, irreparable harm, and balance of convenience) will make it more difficult for unions to seek injunctive relief to halt the suspension or termination of workers who refuse to be vaccinated pending the outcome of an arbitration process.

The following parties in this decision were represented by Hicks Morley lawyers:

For Sinai Health: [Bonnie Roberts Jones](#), [Elisha Jamieson-Davies](#), [Sarah Eves](#), [Rachel Counsell](#)

For TTC: [Frank Cesario](#), [Dolores Barbini](#), [Eleanor Vaughan](#), [Sean Sells](#), [Julia Nanos](#), [Jordynne Hislop](#)

For Ontario Hospital Association, Intervenor in Sinai Health: [Frank Cesario](#), [Eleanor Vaughan](#), [Danika Winkel](#)

Should you require any information about this decision, please contact your [regular Hicks Morley lawyer](#).

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