

Case In Point

Arbitrator Upholds TDSB Mandatory Vaccination Policy

Date: March 25, 2022

On March 22, 2022, Arbitrator William Kaplan issued [The Toronto District School Board and CUPE, Local 4400 \(Re COVID-19 Vaccine Procedure\)](#), an award in which he upheld the mandatory vaccination policy (Policy) of the Toronto District School Board (TDSB). He found that the Policy did not infringe section 7 (life, liberty and security of person) of the *Canadian Charter of Rights and Freedoms* (*Charter*) and that it was a reasonable exercise of management rights.

Background

The Policy was implemented on September 14, 2021 and required all employees with direct contact with staff or students at a TDSB workplace to be fully vaccinated (two doses) against COVID-19. Employees were required to provide evidence of this by November 1, 2021 or establish they had a valid medical or *Human Rights Code* (*Code*) exemption. Students and their families were not subject to the Policy, as the TDSB had no authority to require them to be vaccinated. Employees who did not disclose their vaccination status by the prescribed deadline and those who did not become fully vaccinated within the prescribed timelines were to be placed on non-disciplinary leaves of absence without pay. The TDSB had consulted on the Policy before its implementation, including with the union, CUPE.

In both October and November 2021, CUPE wrote to the TDSB Director of Education requesting reconsideration of the mandatory vaccination requirement, suggesting members could be accommodated through frequent testing and other measures. The TDSB declined the requests, but did, however, establish a Decision Matrix for the purpose of granting temporary exemptions to approximately 300 unvaccinated CUPE members due to staffing requirements. A smaller number of unvaccinated employees also remained at work pending determination of their medical or *Code* exemption requests. All temporarily exempted employees were required to comply with the attestation and testing requirements under the Policy.

CUPE took issue with the disclosure of vaccination status and the mandatory vaccination requirements under the Policy, which resulted in most (but not all) unvaccinated employees being placed on non-disciplinary unpaid leaves. CUPE argued that rapid antigen tests (RATs) were sufficiently effective in reducing the likelihood of introducing infection into a school setting, if the testing protocol was being followed. It also argued that being fully vaccinated was not effective against Omicron, making the entire Policy unreasonable.

Before the Arbitrator

Two principal issues were to be determined before the Arbitrator: first, whether mandatory vaccination infringes section 7 of the *Charter*. Second, whether the Policy was reasonable, including its vaccine attestation and the requirement that non-compliant or unvaccinated employees be placed on a non-disciplinary leave without pay.

Both the TDSB and CUPE provided separate expert reports. The experts agreed on numerous issues, including the efficacy of vaccination. They disagreed on whether RATs reduce transmission of COVID-19 in the workplace and whether RATs are an effective substitute or alternative to vaccination. CUPE's expert said yes, the TDSB's expert said no. Where the two experts disagreed, Arbitrator Kaplan preferred the evidence of the TDSB expert.

The Decision

Arbitrator Kaplan concluded that the Policy did not violate section 7 of the *Charter* and that it was, while in force,* an entirely reasonable exercise of management rights (subject to any valid exemptions).

Section 7 of the Charter

Arbitrator Kaplan stated that section 7 of the *Charter* protects an individual's right to decide whether or not to be vaccinated. He noted that the Policy did not forcibly require anyone to get vaccinated. It did not mandate a medical procedure or seek to impose one without consent.

The Policy, therefore, did not violate anyone's life, liberty or security of the person. The Arbitrator stated that section 7 does not insulate a person who has chosen not to be vaccinated from the economic consequences of that decision: the law is settled on this point. He found no violation of the principles of fundamental justice.

Additionally, the Arbitrator found that the Policy was not arbitrary, overbroad or disproportionate in its requirements. Rather, it was tailored and nuanced.

Management Rights

The Policy, while in force,* was a reasonable exercise of management rights. The *Occupational Health and Safety Act* requires an employer to take every precaution reasonable in the circumstances for the protection of the worker. The expert evidence presented in this case was that vaccination is the best method of reducing the contraction and spread of COVID-19. The attestation requirement, albeit mandated by law, was a necessary corollary of this.

Applying the *KVP* test, the Arbitrator concluded that nothing in the applicable collective agreements fettered the right of management to promulgate rules and policies. The Policy was not unreasonable based on the medical evidence. It was clear and unequivocal, and both the TDSB and CUPE communicated it to employees. There was no evidence that anyone misunderstood what the Policy required or the consequences of non-compliance.

The Arbitrator also noted that the Policy was consistently applied. Introducing a regime which allowed exemptions for essential workers and which allowed employees with medical or *Code* exemption claims to continue to work under the testing regime did not mean that the Policy was inconsistently applied. Rather, it was being applied in a careful and nuanced fashion. The TDSB agreed to accept less than its desired outcome of full vaccination so as to respond to staffing issues, allowing schools to reopen and allowing it to await the determination of the medical or *Code* exemption claims.

The grievances were dismissed.

Conclusion

This award joins a growing number of arbitral awards which uphold employers' mandatory vaccination policies as reasonable.

The TDSB was represented by Hicks Morley's Steve Shamie, Sean Sells and Jordynne Hislop.

**On March 10, 2022 – the day following the final day of these proceedings – the TDSB Board of Trustees passed a resolution rescinding the Policy effective March 14th. This occurred after the Ministry of Education advised school boards they were no longer required to have the vaccination status disclosure in place.*