

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

WILFRED LAURIER UNIVERSITY

(“the University” or “the Employer”)

- and -

UNITED FOOD AND COMMERCIAL WORKERS UNION

(“the Union”)

PRELIMINARY AWARD

Before: Mark Wright, Arbitrator

**Re: Individual Grievances of Brenda Lemon (R6-21-1024)
and Debbie Pinksen (R6-21-1143)**

Appearances

For the University:

Amanda Lawrence-Patel
Jamie Burns
Joanne Roberts
Pamela Cant
Shereen Rowe
Dahlia Bateman

For the Union:

Kendall Yamagishi
Jason Hanley
Mat Campbell
Melissa Dube

Hearing Date: June 15, 2022

Introduction

1. As described more fully below, Wilfrid Laurier University (“the University”) has campuses in Kitchener-Waterloo and Brantford. The United Food and Commercial Workers Union (“the Union”) represents a bargaining unit of approximately 90 food service employees who work on the University campuses.
2. The Union has filed two individual grievances on behalf of members who allege that the collective agreement was breached, and the *Ontario Human Rights Code* and the *Canadian Charter of Rights and Freedoms* was violated, when they were improperly denied an exemption from the terms of the University’s mandatory vaccination policy (“the Policy”). The Policy was implemented on September 22nd, 2021.
3. Prior to the first day of hearing, the parties agreed that the reasonableness of the Policy was a threshold issue that needed to be decided in advance of a hearing on the merits of the individual grievances.
4. The hearing proceeded by way of videoconference on June 15th, 2022. At that time, the parties provided me with a detailed Agreed Statement of Facts (“the ASF”) with attached documents, and a joint casebook of authorities upon which they relied in making submissions on the reasonableness of the Policy. This award deals only with that threshold issue.

The Facts

5. The ASF reads as follows:

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Introduction

1. This case arises in the context of a global pandemic that has in one way or another affected all Canadians and most of the world's population. It is important to appreciate this context as well as the nature of the workplace, a University, with respect to the Grievances.
2. The University in issue is located in Ontario and is incorporated pursuant to the *Wilfrid Laurier University Act*. It has campuses in Kitchener-Waterloo

and Brantford. Approximately 20,000 students attend the University. Typically, there are over 100 courses taught by the University in active learning classrooms, offered by 9 faculties.

3. As an employer, the University employs approximately 2,200 unionized and non-unionized employees and has entered into collective agreements with seven separate bargaining agents, including the Union.
4. In the context of the pandemic, the University, amongst all other universities, has faced unique challenges. On a daily basis universities provide students, staff and faculty with access to libraries, labs, courses, conferences, academic activities and social interactions. Furthermore, universities offer and facilitate certain activities which are high risk in the context of the COVID-19 pandemic, including accommodation in residence, dining halls, artistic performances and sports gatherings.
5. As a result, universities are by nature gathering places that have the potential to create a significant public health risk if that risk is not properly managed. In that regard, amongst outbreaks at other universities across the country at various times, three outbreaks were declared on the University's campuses. These occurred in October 2020, March 2021 and August 2021, respectively. This demonstrated to the University the very real risk of COVID-19 to members of its community.

The Union and the Collective Agreement

6. The Union is the sole and exclusive bargaining agent of all employees of the University in Waterloo, save and except unit supervisors, those above the rank of unit supervisor, office and clerical staff, persons employed in a teaching or academic capacity and those persons for whom any trade union held bargaining rights as of July 7, 1986.
7. More generally, the bargaining unit consists of approximately 90 food service employees employed by the University. All employees in the Union's bargaining unit must attend the workplace in order to perform their work and the vast majority work in close quarters with fellow employees. The employees may also be required to interact with students accessing the dining hall and outlets.
8. Given the spread of COVID-19, safety protocols such as vaccination, masking, social distancing, sanitization, ventilation, etc. have been especially important to ensuring the health and safety of employees of this bargaining unit. These protocols are outlined below.
9. The University and the Union are parties to a collective agreement with a term of August 1, 2021 to July 31, 2024. This collective agreement was in

force at the time the Grievances were filed. The following are the potentially relevant Articles of the collective agreement:

ARTICLE 4 - MANAGEMENT RIGHTS

4.01 It is recognized and agreed that the Employer has the exclusive right and responsibility to manage its business, to maintain order and efficiency in the Food Services operation, including the right to plan, direct and control the work force, to hire or decrease the work force, assign work hours, promote and transfer employees, provided the employer exercises these rights in a manner consistent with the terms of the Collective Agreement.

4.02 The Employer has the right to establish and enforce reasonable rules and regulations and to discipline, suspend or discharge employees for just cause.

...

ARTICLE 5: Hours of Work and Overtime

5.01 Due to the nature of the Food Service operation, it is understood that this Article does not constitute a guarantee of hours per day or hours per week. For the purposes of payroll only, the work week shall be Sunday through Saturday. For scheduling and overtime purposes only, the work week shall be Monday through Sunday.

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ARTICLE 13: Seniority

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13.05 An employee shall lose seniority, and will be deemed to have terminated their employment with the University if they:

(i) Voluntarily terminate their employment in writing;

(ii) Is discharged for just cause, and not reinstated through the grievance and arbitration procedures of this Agreement;

(iii) Fails to report for work on the date and at the time specified in the official recall notice, unless just cause exists. The official recall notice shall be sent at least seven (7) calendar days prior to the recall date, to the latest address given to the University by the employee;

(iv) Is absent for two (2) consecutive work days without notifying the University, unless they are physically unable to notify the University;

(v) Fails to report back to work after the expiration of the term of a leave of absence unless just reason exists;

(vi) Has been laid off for a period greater than their length of seniority at the time of layoff or twenty-four (24) months, whichever is the lesser;

(vii) Is absent from work for a continuous twenty-four (24) month period, subject to the Employer's obligations under the Human Rights Code;

(viii) Terminate their full-time or part-time employment status and move to, or return at a later date as, a casual employee. The employee will then be added to the Casual Seniority List (as per Article 10.01(a)) based on their new date of hire.

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ARTICLE 21: No Discrimination

21.01 The Employer and the Union agree that neither they nor their agents shall discriminate against any employee, or intimidate, interfere, restrain, or coerce any employee by reason of membership or non-membership in the Union, or by reason of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex/pregnancy, sexual orientation, age, record of offences, marital status, family status or disability, gender identity and gender expression.

ARTICLE 22: Health and Safety

22.01 The Employer agrees to provide protective equipment wherever it is required for the safe and

effective performance of duties. The Employer shall make all reasonable provisions for the occupational safety and health of its employees during the hours of their employment. Protective devices on machinery and other devices deemed necessary to properly protect employees from injury shall be provided by the employer. It is the responsibility of all employees to wear safety equipment which is supplied, to observe safe working practices and to report unsafe conditions to the Employer. All rights and privileges established under the laws of the Province of Ontario in respect to health and safety shall form part of this agreement.

22.02 For its part, the Union agrees to promote any education programs of information and instruction initiated by the Employer or as required by relevant legislation that will promote health and safety awareness and training among employees in the bargaining unit.

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|-----|--|-------------|
| 10. | The Union has filed the Grievances on behalf of the Grievors in relation to the reasonableness of the COVID-19 Vaccination Policy (the "Policy") and the alleged failure to accommodate the Grievors on the basis of their religious beliefs. The Grievors each received letters placing them on unpaid leaves of absence. | 2, 3 |
| 11. | By letter dated October 29, 2021, Ms. Lemon was placed on a three day paid leave of absence, during which time she was required to complete an educational module about the COVID-19 vaccination. She was thereafter placed on an unpaid leave of absence. | |
| 12. | By letter dated December 6, 2021, which was subsequent to Ms. Lemon due to the exemption and appeals process, Ms. Pinksen was placed on a three day paid leave of absence, during which time she was required to complete an educational module about the COVID-19 vaccination. She was thereafter placed on an unpaid leave of absence. | |
| 13. | Neither Ms. Pinksen nor Ms. Lemon has been terminated from employment nor have they otherwise been disciplined. To the Union and the University's knowledge, the Policy has been consistently enforced. | |

The University's Vaccination Mandate

14. In the spring of 2020, the University was quick to recognize the risk COVID-19 presented to its community. As a result, as of March of 2020 most, if not all, course offerings provided to students were entirely online or remote, with the exception of programs and courses which require in-person teaching. 4
15. On July 22, 2021, the Commissioner and Medical Officer of Health for the Region of Waterloo Public Health and Emergency Services issued the following letter: 5

As post-secondary institutions across Ontario prepare for students to return to in-person learning and on campus living for the 2021-2022 academic year, ensuring high rates of vaccination among the student population will be critical to Ontario's pandemic control.

The COVID-19 pandemic, and in particular, the Delta variant have had a significant impact on Waterloo Region. Since the second wave of the pandemic, overall case volumes have been highest among those age 20-29 years. While COVID-19 tends to be less severe among younger people, variants of concern have led to an increase in ICU admission rates across all age groups. Furthermore, due to the higher contact rates of younger populations, transmission among this age group has contributed to sustaining community transmission.

Congregate living settings also pose unique risks for transmission of COVID-19. On-campus residences are high density, contain shared common spaces, and may present challenges to effective isolation should a student become infected. For these reasons, the highest two-dose vaccination coverage achievable among the student population will be our strongest tool to prevent local outbreaks, including in such settings, in the upcoming academic year.

Region of Waterloo Public Health strongly recommends vaccination in all members of our community and that post-secondary institutions in Waterloo Region pursue policy options that would facilitate the highest vaccination coverage possible among its population, as well as readily available

and convenient access to vaccines through your post-secondary health services. I strongly encourage a mandatory reporting of immunization policy for students who choose to live on-campus in residences, which would substantially increase vaccine uptake. This could include a requirement for proof of vaccination against COVID-19 (or proof of exemption) for all individuals residing in on-campus residences. Ontario's Immunization of School Pupils Act and its associated regulations provide an example of a similar immunization policy, as well as an approach to providing rare and reasonable exemptions. Vaccination rates for the vaccines covered under the Act in Ontario schools are all very high.

16. On August 13, 2021, the University announced to all students, staff and faculty that it would be requiring, "all students, staff and faculty to be fully vaccinated or to have plans to be fully vaccinated with an approved COVID-19 vaccine to return in-person" in the fall of 2021. The University also announced that as of September 7, 2021, all University community members would be required to confirm their vaccination status in advance of attending at any of the University's locations. No grievance was filed by the Union in respect of the announcement. 6
17. On August 13, 2021, the University also sent out a Press Release announcing the vaccination requirements noted in paragraph 16, above. 7
18. On August 17, 2021 the Province announced that in response to evolving data around the transmissibility of the Delta variant and based on the recent experiences of other jurisdictions, the government, in consultation with the Chief Medical Officer of Health, is taking action to increase protection for its most vulnerable. In that same announcement, the government confirmed that vaccination policies will also be implemented in higher-risk settings, including post-secondary institutions 8
19. On August 24, 2021, the following occurred:
 - (a) The Council of Medical Officers of Health ("COMOH"), in consultation with the Chief Medical Officer of Health, issued a letter strongly recommending that universities have a vaccination policy that required: 9
 - (i) Full vaccination against COVID-19 for all individuals involved in any in-person activities on campus (students, staff, faculty, contractors, and visitors), with the rare

exception of those individuals who cannot be vaccinated due to permitted exemptions (medical and other protected grounds under the Ontario *Human Rights Code*). Individuals are to be required to submit proof of vaccination.

- (ii) All individuals who are unvaccinated due to permitted exemptions or who are awaiting their second dose be required to adhere to additional health and safety measures, up to and including serial and frequent rapid testing.
 - (iii) Individuals involved in any in-person activities on campus (students, staff, faculty, contractors, and visitors) should be fully vaccinated as soon as operationally feasible.
- (b) The University announced COVID-19 safety protocols put in place to keep the University community safe. **10**
 - (c) The government filed Ontario Regulation 577/21 amending Ontario Regulation 364/20, i.e. the *Rules for Areas at Step 3 and at the Roadmap Exit Step*, which required businesses to operate in compliance with any advice, recommendations and instructions issued by a public health officer and/or the Chief Medical Officer of Health as follows: **11**

General compliance

2. (1) The person responsible for a business or organization that is open shall ensure that the business or organization operates in accordance with all applicable laws, including the Occupational Health and Safety Act and the regulations made under it.

...

(2.1) The person responsible for a business or organization that is open shall operate the business or organization in compliance with any advice, recommendations and instructions issued by the Office of the Chief Medical Officer of Health, or by a medical officer of health after consultation with the Office of the Chief Medical Officer of Health,

(a) requiring the business or organization to establish, implement and ensure compliance with a COVID-19 vaccination policy; or

(b) setting out the precautions and procedures that the business or organization must include in its COVID-19 vaccination policy.

(2.2) In subsection (2.1),

“medical officer of health” means a medical officer of health as defined in subsection 1 (1) of the Health Protection and Promotion Act.

20. For ease of reference, the Province had moved into Step 3 on July 16, 2021, this included the Region of Waterloo Public Health Unit. It was supposed to only last for 21 days, but it continued well into the fall.

<https://news.ontario.ca/en/release/1000501/ontario-moving-to-step-three-of-roadmap-to-reopen-on-july-16>

<https://www.cbc.ca/news/canada/toronto/ontario-covid-19-restrictions-exit-stage-3-1.6209162>

<https://www.regionofwaterloo.ca/modules/news/index.aspx?newsId=98f9a905-492e-4259-a73d-e59bbab5bb36>

21. On August 26, 2021, the University announced the expectation “that all students, faculty and staff will have received their second vaccination no later than October 8, 2021 unless they have an approved exemption”. **12**
22. On August 30, 2021, the University announced the next steps for all faculty, staff and students effective August 30, 2021. The announcement included the following: **13**
- By September 7, 2021 all students, staff and faculty are required to provide proof of their vaccination status.
 - Those who are not yet fully vaccinated, or who have received a medical or human rights accommodation to allow for an exemption from the mandatory vaccination requirement, will be required to follow the Rapid Testing Program requirements and health and safety protocols and policies.

- The University expects that all students, faculty and staff will have received their second vaccination no later than October 8, 2021 unless they have an approved exemption.
23. The University therefore required all students, staff and faculty to take immediate steps to ensure that they were fully vaccinated or had plans to be fully vaccinated prior to attending campus in the fall, to obtain their proof of vaccination, to download the SAFEHawk app, and to upload their vaccination status.
 24. Pursuant to the August 30, 2021 announcement, if a student, staff or faculty member was not yet fully vaccinated, their vaccine passport was denied and they were entered into the university's Rapid Testing Program. The program included an educational component about the COVID-19 vaccines and benefits of COVID-19 vaccination.
 25. All new hires that started before October 22, 2022 had to be vaccinated by this date like all other employees. Anyone hired after this date had to be fully vaccinated before being hired.
 26. Subsequently, on August 30, 2021 the Office of the Chief Medical Officer of Health issued its Instructions to the university sector which state as follows: **14**

Required Precautions and Procedures

1. Every Covered Organization must establish, implement, and ensure compliance with a COVID-19 vaccination policy requiring its employees, staff, contractors, volunteers, and students (herein referred to as "Required Individuals") who attend campus to provide:

a) proof of full vaccination against COVID-19; or

b) written proof of a medical reason, provided by a physician or registered nurse in the extended class that sets out: (i) a documented medical reason for not being fully vaccinated against COVID-19, and (ii) the effective time-period for the medical reason; or

c) proof of completing an educational session approved by the Covered Organization about the benefits of COVID-19 vaccination prior to declining vaccination for any reason other than a medical reason. The approved session must, at minimum address:

- i. how COVID-19 vaccines work;*
- ii. vaccine safety related to the development of the COVID-19 vaccines;*
- iii. the benefits of vaccination against COVID-19;*
- iv. risks of not being vaccinated against COVID-19; and*
- v. possible side effects of COVID-19 vaccination.*

2. Despite paragraph 1, a Covered Organization may decide to remove the option set out in paragraph 1(c) and require all Required Individuals to either provide the proof required in paragraph 1 (a) or (b).

3. Where a Covered Organization decides to remove the option set out in paragraph 1(c) as contemplated in paragraph 2, the Covered Organization shall make available to the Required Individuals an educational session that satisfies the requirements of paragraph 1(c).

4. Every Covered Organization's vaccination policy shall require that where a Required Individual does not provide proof of being fully vaccinated against COVID- 19 in accordance with paragraph 1(a), but instead relies upon the medical reason described at paragraph 1(b) or the educational session at paragraph 1(c), the Required Individual shall:

a) submit to regular antigen point of care testing for COVID-19 and demonstrate a negative result, at intervals to be determined by the Covered Organization, which must be at minimum once every seven days.

b) provide verification of the negative test result in a manner determined by the Covered Organization that enables the Covered Organization to confirm the result at its discretion.

...

The University's COVID-19 Vaccination Policy

27. On September 22, 2021, the University implemented its University-wide COVID-19 Vaccination Policy in accordance with its August 13, 2021 mandate and pursuant to the Instructions. On the basis of the nature of the University (i.e. the high risk setting described above), as well as the risks associated with COVID-19 and the Delta variant at the time, the University removed the option set out in paragraph 1(c) of the Instructions as expressly permitted by the Instructions. 15
28. The University's decision to remove option (c) pursuant to and as permitted by the Instructions was consistent with the August 19, 2021 letter from the COMOH, in consultation with the Chief Medical Officer of Health, which read:
- Vaccination against COVID-19 is the single most effective public health measure to reduce the spread of COVID-19. Its inclusion among the other public health measures (including physical distancing, capacity limits, and indoor mask use) is essential in the response to the COVID-19 pandemic. Rapid testing protocols are not preventive and are not a replacement for immunization and should be used only in instances where vaccination is not possible.
29. Existing employees were advised that they needed to be fully vaccinated by October 22, 2021 to access University property or conduct University work in-person, unless they had an approved exemption.
30. The Policy addressed confidentiality and outlined the use to which information relating to proof of vaccination will be put, confirming that privacy legislation will be complied with.
31. As per the Policy, employees were also advised that if they were found in violation of this vaccination requirement effective October 23, 2021, they "may be prohibited from accessing University Property or conducting in-person work for the University at any location and may be subject to remedial action, up to and including termination of employment for cause, in accordance with the applicable collective agreement, if any."
32. Employees who were non-compliant with the Policy by failing to provide proof of full vaccination as of October 22, 2021, without an approved exemption, and who were therefor unable to perform the required duties and responsibilities of their position without attending on University property, were placed on unpaid leave.

33. The Policy is expressly subject to change and review in the face of the evolving pandemic, providing that, “this Policy may be updated or revised as required to comply with public health guidance or other changing circumstances. At all times, the University will be guided by public health information, legislative requirements, and its existing obligations under, among others, the *Occupational Health and Safety Act* and the *Human Rights Code*”.
34. In addition to implementing its Policy, the University also implemented the following safety protocols:
- (a) **Self-Assessing Symptoms:** Anyone experiencing COVID-19 symptoms was not permitted to attend campus and self-isolation protocols were enforced.
 - (b) **Protective Equipment and Masks:** Anyone on campus was required to wear an approved face covering in all indoor common areas such as hallways, lobbies or elevators, in classrooms and laboratories.
 - (c) **Hygiene:** Individuals were strongly encouraged to frequently wash their hands for a minimum of 20 seconds and use the additional hand-sanitizing stations provided.
 - (d) **Gatherings, Events and Meetings:** On-site meetings were discouraged in favour of technological solutions. If gatherings in person happened, individuals had to follow physical distancing protocols.
 - (e) **Physical Distancing:** Classrooms, shared workspaces and other official gatherings had to comply with physical distancing guidelines of 2 metres (6 feet) separation.
 - (f) **Enhancing Cleaning:** Enhanced cleaning protocols including cleaning and disinfecting all touch points (e.g. doors, elevators, stair rails, washrooms, etc.) for occupied areas was implemented. Hand sanitizer in common areas, sanitizing products in workplaces and disinfectant sprays in washrooms were made available to encourage additional cleaning measures.
 - (g) **Signage and Floor Markings:** Signage was installed on campus to communicate and promote physical distancing and health and safety protocols.
 - (h) **Ventilation and Air Quality:** Ventilation systems were monitored to ensure they were operating properly and effectively. The ventilation system was enhanced where possible to control the spread.

35. The University also issued an “FAQ” on September 15, 2021 in advance of the implementation of the Policy. **16**
36. The University’s proof of vaccination requirements are paused as of May 1, 2022. However, all community members are encouraged to keep their vaccination status up to date to ensure work or study is not disrupted should vaccination requirements change in the future. The University’s face-covering policy remains in effect and has been extended beyond May 31, 2022.
37. The University’s position is that the implementation of its COVID-19 vaccination requirements were reasonable is consistent with the collective agreement and all applicable legislation.

The Impact of COVID-19 on the University

38. Between September 2021 and April 2022, COVID-19 has had a significant impact on the University and the employees in the Union’s bargaining unit in particular. In September 2021, of the seven University owned and operated Food Services locations, the University opened only the Fresh Food Company (which is the main dining hall) and Starbucks.
39. In January 2022 the University intended to open other outlets, but due to provincial directives, staff and students who were able to work and learn remotely were directed to do so. This resulted in the ongoing closure of the vast majority of on campus dining locations. In February 2022, once students began to return to campus, the University did open two additional dining outlets with reduced hours (Subway and Byte). At that time all bargaining unit members on layoff were recalled.
40. Since the implementation of the Policy:
- no employees of the University, including bargaining unit employees, have had their employment terminated as a result of their non-compliance with the Policy;
 - three employees of the University who are represented by the Union have been placed on unpaid leaves of absence due to their ongoing non-compliance with the Policy; and
 - 99% of the University’s staff, faculty and students have been fully vaccinated in accordance.
41. In the context of the pandemic, including the serious health risks posed by COVID-19, the nature of the University, and the University’s obligations pursuant to the *Reopening Ontario Act*, the *Occupational Health and Safety*

Act and the Instructions, the University submits that the Policy is reasonable and consistent with the collective agreement.

42. The parties agree that the reasonableness of the Policy is a threshold question to be determined in the context of the Grievances.

6. The parties filed a Supplementary Agreed Statement of Facts (“SASF”) on July 12th, 2022, which added significant detail to the chronology of events.

7. The SASF reads as follows:

The parties agree to the facts set out below for the purposes of the above-noted proceedings before Arbitrator Wright.

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1. Commencing in March of 2022 there were several changes to the regulatory landscape in Ontario that had developed over the course of the COVID-19 pandemic and as described in the Agreed Statement of Facts. This includes the following that occurred on March 1, 2022:
 - (a) the Chief Medical Officer of Health, Dr. Kieran Moore, issued a memo to the university sector confirming that his October 5, 2021 “Instructions” to the post-secondary sector were revoked;
 - (b) the Government of Ontario ended the vaccine passport system for accessing specific indoor spaces; and
 - (c) all public health units in the province entered the Roadmap Exit Step under the *Reopening Ontario (A Flexible Response to COVID-19) Act*, 2020, S.O. 2020, c. 17 (“Reopening Ontario Act”).
2. However, the Roadmap Exit Step under the *Reopening Ontario Act* continued to require all businesses, including universities, to operate in accordance with all applicable laws, including the *Occupational Health and Safety Act* (“OHSA”) and the regulations made thereunder. This requirement is in addition to the independent and ongoing legislative obligation of the University to take every reasonable precaution for the safety of its faculty members and staff as required by OHSA.
3. This University’s obligations pursuant to OHSA, as well as a corollary obligation of the Union, is further captured by Articles 22.01 and 22.02, Health and Safety, of the collective agreement, which are as follows:

22.01 The Employer agrees to provide protective equipment wherever it is required for the safe and

effective performance of duties. The Employer shall make all reasonable provisions for the occupational safety and health of its employees during the hours of their employment. Protective devices on machinery and other devices deemed necessary to properly protect employees from injury shall be provided by the employer. It is the responsibility of all employees to wear safety equipment which is supplied, to observe safe working practices and to report unsafe conditions to the Employer. All rights and privileges established under the laws of the Province of Ontario in respect to health and safety shall form part of this agreement.

22.02 For its part, the Union agrees to promote any education programs of information and instruction initiated by the Employer or as required by relevant legislation that will promote health and safety awareness and training among employees in the bargaining unit.

[emphasis added]

...

4. Accordingly, consistent with its obligations pursuant to the *Reopening Ontario Act*, *OHSA*, and the collective agreement, as set out above, the University determined that its COVID-19 Vaccination Policy would remain in force until May 1, 2022, the end of the Winter 2022 academic term, in order to ensure that it continued to provide a safe learning and working environment. This decision followed consultation within the sector as well as with local public health units. The decision was further made in consideration of the unique circumstances associated with university spaces as described in paragraphs 4 and 5 of the Agreed Statement of Facts.

5. The University's announcement, dated March 22, 2022, read as follows:

1

As the province of Ontario relaxes public health restrictions as part of the Roadmap to Reopen, and with the support of Ontario's Chief Medical Officer of Health, Waterloo Region Public Health, and the Brant County Health Unit, Wilfrid Laurier University will pause its proof of vaccination and mask requirements beginning May 1.

These decisions are contingent on continued positive conditions in key public health indicators as determined by local and/or provincial public health. As

we have done throughout the pandemic, Laurier will continue to follow recommendations from public health. Should these recommendations change, vaccination and mask requirements can be brought back on short notice.

[emphasis added]

6. It is the University's position that its decision was consistent with the comments of the Chief Medical Officer of Health, Dr. Kieran Moore, in his March 1, 2022 memo to the Deputy Minister of Colleges and Universities, in which he stated the following: 2

I recognize that post-secondary institutions may wish to continue with COVID-19 vaccination policies for the remainder of the academic term and ongoing as part of overall health and safety requirements for their institutions. I wholeheartedly support that.

[emphasis added]

7. It is the University's position that its decision was further consistent with the decision of the broader university sector to maintain their existing vaccination policies until at least the end of the winter 2022 academic term. This is set out in the March 11, 2022 statement from the Council of Ontario Universities, which reads: 3

In order to minimize uncertainty and disruption to our students, staff, faculty and university communities, Ontario's universities will maintain their COVID-19 vaccination policies until at least the end of the current term.

8. During the period of time between March 22, 2022 and May 1, 2022, the University continued to regularly monitor the developing circumstances of the COVID-19 pandemic and was at all times prepared to revisit its decision regarding the pausing of the COVID-19 Vaccination Policy consistent with the most up to date scientific and medical recommendations. As an example of this, the University issued an announcement dated April 12, 2022, and subsequently June 20, 2022, extending the mandatory face covering policy until June 30, 2022. 4, 5
9. The University determined that in the circumstances that it remained appropriate to pause the COVID-19 Vaccination Policy effective May 1, 2022 and it has done so. However, the University continues to encourage the wearing of an approved face covering in all indoor common areas where the risk of transmission is higher.

The University has also advised that “should public health recommendations change, vaccination requirements can be brought back on short notice. Members of the University community are encouraged to remain up to date with their COVID-19 vaccinations, including booster doses.”

10. It is the University’s position that it has and will continue to act in manner consistent with its legislative and collective agreement obligations, on the basis of the most recent medical and scientific recommendations.

Submissions of the Parties

8. The University and Union counsel agree that the framework for analysis in this case is that established in the oft-cited decision *Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co.*, 1965 CarswellOnt 618, defining the six characteristics required of any unilaterally enacted workplace rule:

34. A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:

1. It must not be inconsistent with the collective agreement.
2. It must not be unreasonable.
3. It must be clear and unequivocal.
4. It must be brought to the attention of the employee affected before the company can act on it.
5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
6. Such rule should have been consistently enforced by the company from the time it was introduced.

9. Counsel also agree that the Policy is not inconsistent with the collective agreement, is clear and unequivocal, was brought to the attention of employees before it was introduced, and has been applied in a consistent manner. Moreover, no employees were terminated for breach of the Policy. As a result, the only issue before me under the *KVP* framework is whether the Policy is reasonable.

10. The University argues that the Policy is reasonable. As in *Coca-Cola Bottling Limited and Unifor, Local 973* (March 17, 2022, Wright), the Policy is to be judged by the balance it strikes between an employee's right to privacy, bodily integrity and autonomy, and the University's right and obligation to safeguard the health and safety of the workplace. In that regard, the University submits that it took a progressive approach to workplace consequences for non-compliance, providing multiple warnings to employees before placing them on a brief, paid leave of absence followed by an unpaid leave of absence (which has now ended).

11. Both parties submit that the most relevant awards in the present case are *Toronto District School Board and CUPE, Local 4400 (Re COVID-19 Vaccine Procedure)* (22 March 2022, Kaplan); *Canada Post Corp. and CUPW (N00-20-0008)* (27 April 2022, Joliffe); and *UNIFOR Local 973 and Coca-Cola Canada Bottling Limited* (17 March 2022, Wright).

12. In addition, counsel provided me with the following authorities: *Alectra Utilities Corporation v Power Workers' Union*, 2022 CanLII 50548 (9 June 2022, Stewart); *Public Health Sudbury & Districts v Ontario Nurses' Association*, 2022 CanLII 48440 (7 June 2022, Herman); *Poulos v Treasury Board (Regional Development Corporation)*, 2022 CanLII 37635 (NB LA) (10 May 2022); *Maple Leaf Foods Inc., Brantford Facility v United Foods and Commercial Workers Canada, Local 175* (10 April 2022); *Extendicare Lynde Creek Retirement Home and UFCW Local 175* (4 April 2022, Raymond); *Revera Inc. (Brierwood Gardens et al) v Christian Labour Association of Canada Award* (1 April 2022, White); *BC Hydro and Power Authority and International Brotherhood of Electrical Workers, Local 258* (21 March 2022, Somjen); *Teamsters Local Union 938 and Purolator Canada Inc.* (15 March 2022, Wilson); *Algoma Steel and USW Local 2251 RE: Grievance 22-0022 (James Collins)* (22 February 2022, Murray); *Algoma Steel Inc. and USW, Local 2724* (8 February 2022, Kaplan); *Chartwell Housing REIT and HOPE, Local 2220* (7 February 2022, Misra); *Power Workers' Union v Elexicon Energy Inc.*, 2022 CanLII 7228 (ON LA) (4 February 2022, Mitchell); *Hydro One Inc. and Power Worker's Union* (31 January 2022, Stout); *CKF Inc. and TC, Local 213 (COVID Testing), Re*, 2022 CarswellBC 198 (28 January 2022); *Richmond (City) v International Association of Professional Firefighters, Local 1286*, 2022 CanLII 707 (BC LA) (12 January 2021); *Teamsters Local Union 847 v Maple Leaf Sports and Entertainment*, 2022 CanLII 544 (ON LA) (12

January 2022, Jesin); *Bunge Hamilton Canada, Hamilton, Ontario and United Food and Commercial Workers Canada, Local 175* (4 January 2022, Herman); *Canada Post Corporation and Canadian Union of Postal Workers* (30 November 2021, Burkett); *Hydro One Inc. and Power Worker's Union* (22 November 2021, Stout); *Ontario Power Generation and the Power Workers' Union* (12 November 2021, Murray); *Electrical Safety Authority and Power Workers' Union* (11 November 2021, Stout); *United Food And Commercial Workers Union, Canada Local 333 and Paragon Protection Ltd.* (9 November 2021, Von Veh).

13. Following the hearing, the parties provided me with a copy of Arbitrator Nairn's award in *FCA Canada Inc. and Unifor Locals 195, 444, and 1285* (17 June 2022, Nairn) ("FCA"). In *FCA*, Arbitrator Nairn concluded that the mandatory vaccination policy before her had been reasonable when it was introduced on October 14th, 2021, but she found it was no longer reasonable at the date she released her award. The situation had been changed by the increased transmissibility of the Omicron variant of COVID-19, which had become the dominant strain of the virus in the winter and spring of 2022. Based on the evidence presented to her, she concluded as follows: "(T)here is negligible difference in the risk of transmission in respect of Omicron as between a two-dose vaccine regimen and remaining unvaccinated."¹ The policy at issue defined "fully vaccinated" to mean two doses of an accepted vaccine. The award was issued June 17th, 2022. She declared the policy to be of no force or effect, effective June 25th, 2022. The employer was thereby given a short window of opportunity to address the problems with the policy identified in the award.

14. The University submits that the *FCA* award is distinguishable from the present case. It notes that the University paused its Policy effective May 1st, 2022. It submits that there is no need to decide whether the Policy remained reasonable after that date. The University also suggests that the *FCA* award departs from the arbitral decisions that have so far addressed the issue of the reasonableness of mandatory vaccination policies.

¹ *FCA, supra*, para. 107.

15. The Union takes no position on the relevance of the *FCA* award to this case.

Decision

16. Based on the evidence, the submissions of the parties, and the authorities provided to me, all of which I have considered carefully, I conclude that the Policy was a reasonable exercise of management rights in accordance with the framework established by *KVP*.

17. The initial analysis in this case is somewhat narrower than in many of the other cases that have so far addressed the issue of the reasonableness of a mandatory vaccination policy, because the University, like all universities in the province, was required to have a mandatory vaccination policy by the Office of the Chief Medical Officer of Health who issued instructions to that effect on August 30th, 2021 (“the Instructions”).² To the extent that the Policy implemented by the University on September 22nd, 2021, was consistent with the Chief Medical Officer of Health’s Instructions, it is immune from challenge at arbitration. A challenge to the reasonableness of the Instructions themselves would have had to proceed by way of judicial review of the Chief Medical Officer of Health’s decision to issue the Instructions. As set out in the ASF there was, however, a choice provided to universities under paragraph 1(c) of the Instructions, whereby a university could include or remove an option to allow non-vaccinated employees to continue to work so long as they completed an educational session and submitted to regular rapid antigen testing. The University chose to remove that option from its Policy. The first question before me is, therefore, whether it was reasonable for the University to remove the rapid antigen testing option from its Policy. Secondly, however, it is required that I determine whether the Policy was generally a reasonable one, as the University chose to extend its operation to May 1st, 2022, which was two months after the Chief Medical Officer of Health had revoked the Instructions.

18. On the question of whether it was reasonable for the University to remove the rapid antigen testing option from its Policy, the University points to advice provided by the Council of

² *Instructions Issued by the Office of the Chief Medical Officer of Health, August 30th, 2021.*

Medical Officers of Health in consultation with the Chief Medical Officer of Health (“the COMOH”) in a letter dated August 19th, 2021:

Vaccination against COVID-19 is the single most effective public health measure to reduce the spread of COVID-19. Its inclusion among the other public health measures (including physical distancing, capacity limits, and indoor mask use) is essential in the response to the COVID-19 pandemic. Rapid testing protocols are not preventive and are not a replacement for immunization and should be used only in instances where vaccination is not possible.

19. In my view, it was reasonable for the University to have given serious weight to the advice provided by the COMOH, especially in the context of the university sector. Universities are complex, multi-faceted institutions, serving the needs of students, staff, faculty and the community. Some students live on campus, others commute. Students, faculty, and staff use, or work in, lecture halls, labs, libraries, conference rooms, bars, and eating facilities. The evidence established that at Wilfrid Laurier three COVID outbreaks were declared on campus: October 2020; March 2021; and August 2021. The series of recommendations directed at post-secondary institutions made by various public health officials, culminating in the Instructions made by the Chief Medical Officer of Health on August 30th, 2021, underline the pressing health concerns that universities and other post-secondary institutions presented during the pandemic.³ Given the context, it was entirely reasonable for the University to have removed the option of rapid antigen testing from its Policy in favour of one requiring vaccination, which the COMOH described as “the single most effective public health measure to reduce the spread of COVID-19.”

20. Arbitrator Kaplan’s decision in *The Toronto District School Board* case is instructive on the question of whether rapid antigen tests are a viable alternative to vaccination. The case is especially germane because it considers the question in the context of educational facilities.

³ Commissioner and Medical Officer of Health for the Region of Waterloo Public Health and Emergency Services letter issued July 22, 2021; Announcement by the Province of Ontario in consultation with the Chief Medical Officer of Health on August 17, 2021; Letter issued by the Council of Medical Officers of Health, in consultation with the Chief Medical Officer of Health on August 24, 2021; Instructions to the University Sector issued by the Office of the Chief Medical Officer of Health on August 30, 2021.

Basing his decision on evidence from the two expert witnesses who appeared before him, Arbitrator Kaplan concluded as follows:

Frankly, it is not immediately apparent to me – in a process informed by the precautionary principle – why the TDSB would accept RATs as an alternative to vaccination, especially in congested workplaces like schools, where the expert evidence is clear that vaccination is safe and more effective than RATs in reducing the risk of becoming infected and spreading COVID-19.

...

Accordingly, it is my finding, agreed to by the experts, that vaccination is the best way of preventing transmission in schools. It is also my finding that whatever the value of RATs, they do not provide the same level of protection to staff and students and should only be relied on in cases of absolute necessity such as to facilitate essential and otherwise justified exemptions.⁴

21. Moving from the general context to the specific context of the present bargaining unit, all the approximately ninety members are food services workers who must attend the workplace to work, and the majority work in close proximity to other members. Some also interact with students in dining halls and food outlets. Remote work is not an option. There have been three outbreaks since the start of the pandemic. This is not a situation like that considered by Arbitrator Stout in his *ESA* case, in which he found that a combination vaccination/testing regime could adequately address health and safety concerns where employees could work remotely and there was no significant risk of an outbreak.⁵ Moreover, the advent of the Omicron variant has made rapid antigen testing less reliable. As I noted in *Coca-Cola Canada Bottling Limited, supra*: “the Ontario COVID-19 Science Table notes in its Brief published on February 10th, 2022, ‘Rapid antigen tests are less sensitive for the Omicron variant compared to the Delta variant in nasal samples, especially in the first 1-2 days after infection,...(A) single negative rapid antigen test

⁴ *Toronto District School Board, supra*, pp. 29-30. Arbitrator Joliffe comes to a similar conclusion as Arbitrator Kaplan with respect to the whether a mandatory vaccination policy can or should be abandoned in favour of a rapid antigen testing regime: See *Canada Post and CUPW, supra*, at paras 91, 94, and 95.

⁵ *Electrical Safety Authority v Power Workers’ Union, supra*, paras. 71 and 72.

result cannot reliably rule out infection; a single negative test result is not conclusive and should not be used as a green light for abandoning or reducing precautions.”⁶

22. Based on the foregoing considerations, I find that it was reasonable for the University to exercise the discretion granted to it under the Instructions from the Chief Medical Officer of Health to remove the rapid antigen testing option from its Policy.

23. On the question of whether the Policy is otherwise reasonable when considered by itself without reference to the Instructions from the Chief Medical Officer of Health, it is very similar to other mandatory vaccination policies in other sectors that have been found by arbitrators to be a reasonable response to the threat posed by COVID-19.⁷ Students, staff, and faculty were notified on August 13th, 2021, that they would have to be fully vaccinated to return in-person in the fall semester of 2021. They were advised that they would have to confirm their vaccination status by September 7th, 2021. Further communication on August 26th, and August 30th, 2021, reiterated the September 7th, 2021, deadline for proof of vaccination status, and clarified that all students, staff, and faculty who did not have either a medical or human rights exemption would be required to obtain a second dose of an approved vaccine by October 8th, 2021, so they would be considered fully vaccinated by October 22nd, 2021. The Policy that was then implemented University-wide on September 22nd, 2021, reiterated these deadlines for compliance. The Policy allowed for medical and human rights exemptions to the vaccination requirement of the Policy. It guaranteed that personal information collected in the process would be consistent with the requirements of privacy legislation. It expressly contemplated that it would be renewed and updated in accordance with public health information and legislative requirements.⁸ The definition of “fully vaccinated” under the Policy was designed to change with public health pronouncements. Those employees who were non-compliant with the Policy by October 22nd,

⁶ *Coca-Cola Bottling Limited and Unifor, Local 973* (March 17, 2022, Wright), para. 33.

⁷ *Alectra Utilities, supra*; *Canada Post Corp., supra*; *Maple Leaf Foods, supra*; *Extendicare Lynde Creek, supra*; *Toronto District School Board, supra*; *Coca-Cola Canada Bottling Limited, supra*; *Purolator Canada Inc., supra*; *Elexicon Energy Inc., supra*; *Maple Leaf Sports and Entertainment, supra*; *Bunge Hamilton Canada, supra*.

⁸ Arbitrator Stewart describes this feature of mandatory vaccination policies as “one of the hallmarks of reasonableness.” See *Alectra Utilities, supra*, para. 24.

2021, and who had not obtained an exemption, were placed on unpaid leaves of absence. It was contemplated that violations of the Policy could lead to further remedial actions up to and including termination of employment; however, no employees of the University, including no bargaining unit members, had their employment terminated because of non-compliance with the Policy.

24. The Policy was one of many steps that the University took to keep staff, students, and faculty safe during the pandemic. For example, the University initiated a host of other safety measures including self-assessment protocols, protective equipment and masking requirements, physical distance guidelines, enhanced cleaning protocols, signage and floor markings to promote physical distancing, and the monitoring and improvement of ventilation systems, all designed to keep students, staff, and faculty as safe as possible during the pandemic.

25. Eventually, 99% of staff, faculty, and students were vaccinated in accordance with the Policy.

26. Based on the foregoing, and consistent with the authorities listed in footnote 6, I find the Policy, considered on its own terms, to have been a reasonable management response to the extraordinary threat to health and safety posed by the COVID-19, in all its variant forms, especially when considered in the context of the University as described above. It was clearly communicated to staff, students, and faculty, and it struck a reasonable balance between an employee's interest to privacy and bodily integrity, and the University's interest in maintaining the health and safety of the workplace and campus.

27. I also find it was reasonable for the University to extend the operation of the Policy to May 1st, 2022, even though the Chief Medical Officer of Health revoked the Instructions to post-secondary institutions on March 1st, 2022. The University was perfectly entitled to continue to enforce its Policy, which I have found to have been reasonable, from March 1st, 2022, to May 1st, 2022, in order to keep staff, students and faculty safe, and to meet its obligations under the collective agreement and the *Occupational Health and Safety Act*. It based its decisions on

consultations with local public health units, and with other universities. The Chief Medical Officer of Health made clear in his memo to the Deputy Minister of Colleges and Universities that he “wholeheartedly” supported the decision of post-secondary institutions to extend their vaccination period to the end of the winter term. The decision was clearly reasonable in the circumstances.

28. Finally, I agree with the University’s submission that the award of Arbitrator Nairn in *FCA* is distinguishable from the present case for two reasons. First, the University paused the Policy effective May 1st, 2022. That was well before Arbitrator Nairn issued her award on June 17th, 2022, and well before the deadline of June 25th, 2022, that she gave the employer to amend its policy. The evidence upon which she relied in finding that the policy was no longer reasonable included scientific articles from late April 2022, and other recent publications.⁹ She took notice of the federal government’s announcement of June 14th, 2022, that lifted vaccine mandates for federal public servants and for federally regulated transportation workers effective June 20th, 2022. She rejected Union counsel submission that she could conclude the policy was unreasonable as early as December of 2021.¹⁰ She indicated that more evidence was required before she could come to that conclusion. Certainly, by the time she wrote the award, June 17th, 2022, Arbitrator Nairn believed she had enough evidence to conclude that the policy was no longer a reasonable one. There is nothing in the award to suggest she believed there was sufficient evidence for her to conclude that the policy was unreasonable from March 1st, 2022, to May 1st, 2022, which is the relevant period in the present case. Second, the Arbitrator’s reasoning in the *FCA* case was specific to a vaccine mandate requiring two doses of vaccine: “(T)he evidence supports a conclusion that there is negligible difference in the risk of transmission in respect of Omicron as between a two-dose vaccine regimen and remaining unvaccinated.”¹¹ The University’s Policy, by contrast, did not define “fully vaccinated” to mean two doses of vaccine. It rather tied the definition of “fully vaccinated” to on-going public health pronouncements. The Policy also incorporated periodic review in accordance with public health

⁹ *FCA, supra*, paras. 48-62.

¹⁰ *FCA, supra*, para. 107.

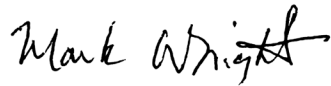
¹¹ *FCA, supra*, para. 107.

information and legislative requirements. Arbitrator Nairn noted that the policy under review in *FCA* did not incorporate “periodic review”; she suggested that incorporating periodic review into a vaccine policy “may be prudent.”¹² The University’s Policy is therefore clearly distinguishable from that considered by Arbitrator Nairn in *FCA*.

29. In light of this conclusion, it is unnecessary for me to consider the extent to which Arbitrator Nairn’s decision in *FCA* may be a departure from or inconsistent with the other arbitral decisions that have so far addressed the issue of the reasonableness of mandatory vaccination policies.

30. The threshold issue put to me by the parties is, therefore, answered: I have found the Policy to have been a reasonable one. The hearing of the grievances continues on July 27th, 2022.

Dated at Toronto this 22nd day of July 2022.

A handwritten signature in black ink, appearing to read "Mark Wright". The signature is fluid and cursive, with a stylized "W" and "R".

Mark Wright - Arbitrator

¹² *FCA*, *supra*, para. 108.