IN THE MATTER OF AN ARBITRATION

B E T W E E N:

Toronto Professional Fire Fighters' Association, I.A.A.F. Local 3888

("the Association" or "Local 3888")

and

City of Toronto

("the City" or "the Employer")

Re: Mandatory Vaccine Policy Grievance

APPEARANCES:

For the Association:

Howard Goldblatt, Counsel
Heather Ann McConnell, Counsel
Anna Goldfinch, Counsel
Kevin McCarthy, President
John MacLachlan, Vice-President
John Blair, Grievance Committee Chair
Geoff Berenz, Grievance Committee Member
Ryan Morrison, Grievance Committee Member
Ken Webb, Grievance Committee Member

For the City:

Ian Solomon, Counsel
Sharon Duffy, Counsel
Sean Milloy, Director, Employee Relations
Michael Moran, Manager, Employee Relations
Ricky Brooks, Senior Consultant, Employee Relations
Debbie Higgins, Deputy Fire Chief, Administrative and Mechanical Services
Michael Pitoscia, Division Chief, Infrastructure & Development Services
Alison Anderson, Director, Occupational Health, Safety and Wellness (Retired)

Hearing on the merits of this matter was held by videoconference on March 28, April 5, April 6, May 9, May 12, June 13, and June 24, 2022.

AWARD

1. This decision deals with the dispute between the parties as to the reasonableness of the Employer's mandatory vaccination policy announced on August 19, 2021, made effective September 7, 2021, and updated October 6, 2021 (the "Policy").

2. By letter dated October 6, 2021 the Association initiated its policy grievance asserting that "the City policy on vaccination and, more specifically, its policy update of October 6, 2021 on enforcement of the vaccination policy . . . is unreasonable, arbitrary and discriminatory and imposes discipline by way of suspensions on employees without just cause as well as improperly threatening the termination of these employees without just cause." The Association complained that the City's action contravened numerous provisions of the collective agreement between these parties and "employment related legislation including the *Occupational Health and Safety Act* and the *Ontario Human Rights Code.*"

The Hearing

3. Arrangements for the conduct of the hearing were settled by preliminary orders dated December 17, 2021 and February 11, 2022. The parties exchanged extensive particulars prior to the commencement of the hearing on the merits. Those particulars were received as exhibits.

4. The City presented its case first, without prejudice to its position on the issue of onus.

5. The City delivered will say statements for each of its witnesses with the proviso that some supplementary *viva voce* testimony would be received. The Association elected to call no evidence. In the result, I received evidence from five witnesses: Alison Anderson, the City's Director, Occupational, Health, Safety and Wellness who retired January 31, 2022; Sean Milloy, Director, Employee Relations; Geoff Boisseau, Division Commander Operations Training and Continuous Improvement, Toronto Fire Service; Dr. Peter Juni; and Dr. Vinita Dubey, the City's Associate Medical Officer of Health.

6. As the Association did not intend to cross-examine Dr. Dubey, she was not required to attend; the other witnesses did attend, adopted their will says, and were cross-examined by counsel for the Association.

7. The parties made their closing submissions on June 13 and 24, 2022.

Background

8. The Policy at issue was adopted by the City in response to the COVID-19 pandemic and applied to "all City of Toronto employees, volunteers and students" and thus to Toronto Fire Service ("TFS") and all fire fighters represented by the Association.

9. Having regard for the evidence, the following statements drawn from particulars submitted by the Association and by the City summarize the context in which the dispute unfolded:

- On March 11, 2020, the World Health Organization (WHO) declared a pandemic of COVID-19, a new disease caused by the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).

- Following the WHO's pandemic declaration, the Ontario government declared a province-wide state of emergency three times, pursuant to s. 7.01(1) of the *Emergency Management and Civil Protection Act*. . .

- On March 23, 2020, the Mayor of Toronto issued a Declaration of Emergency for the City of Toronto due to the COVID-19 pandemic.

- To address the COVID-19 safety hazard in City workplaces, the City implemented an extensive COVID-19 safety plan that was communicated to all staff and updated regularly. The safety plan and Standing Orders were comprised of numerous components, including: masking; physical distancing and separation; space occupancy; work and travel in vehicles; strategies for outside workers; online and paper screening tools; touchpoint reduction strategies; cleaning, hygiene and disinfection; working from home where possible; personal protective equipment; and food preparation and congregate living protocols.

- As the pandemic continued to evolve, the City considered various options short of mandatory vaccination: encouraging staff to be vaccinated; vaccine or educate; vaccine or test . . . to meet its obligation to protect the health and safety of its employees. The City ultimately rejected these options in favour of a mandatory vaccination Policy, as the option that provides the best protection to employees, including mitigating the risk of non-compliance with other aspects of the City's COVID-19 Safety Plan.

- In August 2021, the City determined that a uniform mandatory vaccination policy, in addition to existing COVID-19 prevention measures, was the most effective means of preventing the introduction of the virus into City workplaces; controlling transmission of the virus among City employees, inclusive of employees of TFS, as well as mitigating the severity of the impact of the COVID-19 pandemic on employees, clients and the public being served by them. . . .

- On August 19, 2021, the City Manager announced that, effective September 7, 2021, the City of Toronto was implementing the Policy with a deadline of October 30, 2021 for all City employees to have received first and second doses of an approved COVID-19 vaccine.

- On September 13, 2021, Deputy Fire Chief Debbie Higgins sent a memorandum to all Toronto Fire Services staff to communicate that the deadline for submitting the vaccination disclosure form was extended from September 13 to September 17, 2021.

- The Policy provides for an exemption where an employee substantiates a *Human Rights Code* related accommodation request under the City's Accommodation Policy.

- The Policy further required employees who . . . disclosed that they had not received two doses of a COVID-19 vaccine, or who had not disclosed their vaccine status as required, to attend mandatory education about vaccination through the City's online education portal (ELI).

- Deputy Fire Chief Higgins sent another memorandum to TFS staff on October 1, 2021 with the mandatory vaccination policy and a Question & Answer document attached. The memorandum reiterated that all City employees were required to have two doses of the COVID-19 vaccine by October 30, 2021.

- On October 6, 2021, the City Manager announced that those City employees who, after an investigation meeting, were found to have failed to comply with the Policy would be placed on an unpaid disciplinary suspension until they achieved compliance, failing which they would be terminated for cause on December 13, 2021.

- The City Manager's message of October 6, 2021 identified that City employees who were suspended, but provided proof of full vaccination (both doses, or a full course of an approved COVID-19 vaccine) during their period of suspension before December 13, 2021, would be able to return to work.

- The City Manager's message of October 6, 2021 also stated that employees who received their first dose of vaccine and provided proof by October 15, 2021 would remain at work and be given until the week of November 15, 2021 to obtain their second dose and provide proof.

- On October 6, 2021, Deputy Fire Chief Higgins sent a memorandum to TFS staff outlining the next steps for enforcement of the policy. It confirmed that, as of October 5, 2021, 95% of the active workforce had disclosed their vaccine status and, of those who had disclosed, 89% were fully vaccinated. An additional 5% reported having received a first dose of the vaccine.

- The October 6, 2021 communication confirmed that the training module, “COVID-19 Vaccination: Understanding the Benefits and Risks”, would be “available in the coming days”, as would information about “targeted education sessions”.

- In order to “allow employees to take advantage of this education campaign and upcoming vaccination clinics,” Deputy Fire Chief Higgins confirmed that employees who provided proof of their first dose of vaccine before October 15, 2021 would be given until November 15, 2021 to obtain their second dose. Employees who failed to receive their second dose by the November 15, 2021 deadline would be required to meet with their manager/supervisor to review their status and would be suspended without pay until the December 13, 2021 termination deadline.

- On November 12, 2021 the City Manager extended the timelines for the second dose and announced that employees who provided proof of a first dose vaccination by October 31, 2021 would be given until the week of November 28, 2021 to obtain and provide proof of their second dose.

- The City Manager's message of November 12, 2021 provided that staff who disclosed that they had received one dose of vaccine and provided proof by October 31, 2021 would remain at work and have their vaccination status review meeting the week of November 28, 2021 to allow them four weeks from the time of their first dose to obtain their second dose.

- The City Manager confirmed that 99% of the City's active workforce had declared their vaccine status and 95% were fully vaccinated. He noted that 379 employees were placed on unpaid suspension for non-compliance with the Policy and 101 were on leave pending the review of their accommodation request.

- TFS members who received a first dose before November 1, 2021 were permitted to remain at work while awaiting their second dose. Those who obtained their first dose after November 1, 2021 were either suspended or placed on an unpaid leave until they obtained their second dose. Those who failed to receive a first and/or second dose, were scheduled to be terminated on December 13, 2021.

- In light of a new eight-week dosing interval based on an updated scientific review recommended by the National Advisory Committee on Immunization and the Ministry of Health, the City Manager's message of November 25, 2021 provided that employees who received their first dose of vaccine and provided proof by October 31, 2021 would remain at work and be given until January 2, 2022 to obtain their second dose and provide proof, failing which they would be terminated for cause. This message also extended the time to January 2, 2022 for already-suspended employees who had no doses to obtain both doses of the vaccine and provide proof.

- Effective January 3, 2022, thirteen Association members were terminated for cause under the Policy.

- The City noted in evidence that fifteen suspended fire fighters were reinstated after complying with the Policy.

The City's Communications

10. The City's Policy as announced on August 19, 2021 — effective September 7, 2021 — concluded with the following advice to employees regarding the consequences of non-compliance: "Employees who do not comply with this policy may be subject to discipline, up to and including dismissal."

11. The memorandum Deputy Fire Chief Higgins issued on October 6, 2021 duplicated the text of the City Manager's communication that day to all City of Toronto employees and advised TFS personnel as follows:

We have been notified by the City Manager of next steps regarding enforcement of this policy:

> Starting the week of November 1, staff who have not provided proof of both doses of a COVID-19 vaccine will be required to meet with their manager/supervisor to review their vaccination status. If both doses have not been received, staff will be **suspended for six weeks without pay.**
>
> During the suspension, staff members may return to work if they provide proof of full vaccination.
>
> After the unpaid suspension, on December 13, if staff members do not provide proof they have received both doses of a COVID-19 vaccine, **their employment will be terminated for cause** as they will have chosen not to comply with the mandatory vaccination policy.
>
> Staff will not be able to use their vacation or other banks to maintain their pay during the period of suspension without pay.
>
> Further, it is now a condition of employment that all new City hires be fully vaccinated.
>
> We will continue to support unvaccinated staff with getting the information they need to become fully vaccinated. The ELI training module, COVID-19 Vaccination: Understanding the Benefits and Risks, is available to all staff and in the coming days, information about targeted education sessions and vaccination clinics for certain City work locations will be available. As per FCC 21-231, a TFS specific town hall with Toronto Public Health staff is being held on October 13, 2021.
>
> In order to allow staff to take advantage of this education campaign and upcoming vaccination clinics, **employees who receive their first dose and provide proof by October 15 will be given until November 15 to get their second dose**. If they still do not receive their second dose by November 15, they will be required to meet with their manager/supervisor to review their vaccination status and will be suspended without pay until December 13. (emphasis in the original)[1]

12. Deputy Fire Chief Higgins issued a similar memorandum to TFS personnel on October 25, 2021. It included the following:

> Thank you to the majority of TFS staff who have completed the staff vaccination disclosure form.

[1] The words set in bold print in this communication to TFS staff were not emphasized in the document produced as the communication issued by the City Manager.

There remains, however, several TFS staff who have not yet accessed the portal to report their vaccination status. We would like to remind you of the requirement to do this, and that the deadline has now passed.

As per the City's policy, we are working on setting up meetings starting November 1 for staff who have not provided proof of both doses of a COVID-19 vaccine. These staff will be required to meet with select management staff involved in the process to review their vaccination status.

No Doses received: If both doses have not been received, staff will be **suspended for up to six weeks without pay**. During the suspension, staff members may return to work if they provide proof of full vaccination.

After the unpaid suspension, on December 13, if staff members do not provide proof they have received both doses of a COVID-19 vaccine, **their employment will be terminated for cause** as they have chosen not to comply with the mandatory vaccination policy.

First Dose received: **Employees who received their first dose by October 15 will be given until November 15 to get their second dose**. If they do not receive their second dose by November 15, they will be required to meet with their management/supervisor to review their vaccination status and will be suspended without pay until December 13 and face termination for cause if they cannot provide proof by December 13 of a second dose.

We want to reassure you that the number of staff not fully vaccinated is low and that we have begun to consider plans to mitigate any service or staffing impacts resulting from this to see enforcement. (emphasis in the original)

13. The City Manager's message on November 1, 2021 provided an update on progress at the "start of the next phase of the implementation of the City's mandatory COVID-19 Vaccination Policy". That text included the following:

> I'm very encouraged that the vast majority of City employees have received a complete COVID-19 vaccination course (2 doses of a two-dose series or one dose of a single dose vaccine) and that number continues to grow. Vaccines are the most effective way to protect the health and safety of our employees against the spread of COVID-19, so thank you to the thousands of City staff who made the right decision to get vaccinated.
>
> As of October 31, the vaccination rate of City staff is as follows:
>
> - Employees who have submitted their vaccination status: 31,742 (99 per cent of the active workforce)
> - The City employees who have received a complete COVID-19 vaccine course: 29,899 (94 per cent of the active workforce)

- Staff who report being partially vaccinated: 1,064 (4 per cent of active staff)

- Staff who report not having received any vaccine doses: 408 (1 per cent of active staff)

- Staff who completed the Staff Vaccination Disclosure form, but chose not to disclose their vaccination status: 356 (1 per cent of active staff)

- Staff who did not complete the Staff Vaccination Disclosure form: 533 (1 per cent of active staff)

Unfortunately, a small percentage of our employees remain unvaccinated or have not disclosed their vaccination status.

Starting this week, staff who are not compliant with the policy will be required to meet with their manager/supervisor to review their vaccination status and *may be suspended* for up to six weeks without pay. As communicated last week:

- Meetings will initially focus on those who have not received any doses of a COVID-19 vaccine or have not disclosed their vaccination status.

- Meetings for those who disclosed they received one dose of a COVID-19 vaccine by October 31 will start the week of November 15.

After the period of unpaid suspension, starting on December 13, if staff members do not provide proof of receiving both doses of a COVID-19 vaccine, *their employment will be terminated for cause* as they will have chosen not to comply with the mandatory vaccination policy. (emphasis added)

14. By way of example, the standardized text of the suspension letter issued to a fire fighter affected by the Policy and failure to comply was as follows:

> On August 19, 2021 the City introduced its Mandatory Vaccine Policy requiring that all staff be fully vaccinated and received both doses of a COVID-19 VACCINE no later than October 30, 2021. Staff were required to disclose and provide proof of their vaccination status. You have failed to comply with this Policy.
>
> An investigation meeting was conducted with you on November 15, 2021 in the presence of Ken Webb and Ryan Morrison from L3888 and Frank Mitchell from TFS Staff Services. Further to this investigation meeting with you, the City has determined that you have engaged in the following misconduct:
>
> - *you are insubordinate and have willfully disobeyed an important workplace health and safety rule by refusing to comply with the direction given to you in the Mandatory COVID-19 Vaccination Policy* ("*the Policy*") *to be fully vaccinated with a COVID-19 vaccination series, and;*
>
> - *by failing to get fully vaccinated, you have undermined a critical workplace health and safety measure, implemented by the City in the Policy, designed to*

maximize vaccination rates in order to protect employees from the serious hazards of COVID-19.

As a consequence of your very serious misconduct, described above, the City is imposing the following disciplinary penalty: You are hereby suspended without pay, beginning November 16 2021 and, subject to the notice period referenced in the paragraph immediately below, you will remain suspended without pay until you achieve compliance with the Policy by uploading proof of full vaccination by no later than 11:59 pm on December 12, 2021, failing which you will be terminated for cause effective December 13, 2021.

In the event that you have not already complied with the policy, effective December 6, 2021, this letter constitutes seven (7) days' notice of termination, as required by the Fire Protection and Prevention Act, 1997 ("FPPA"). Your pay will resume during the seven day notice period, however, your status will continue to be recorded as suspended until you either comply with the Policy or are terminated for cause on December 13, 2021. As such, you are not to attend a City workplace or carry on any work during the notice period.

We are requesting that you consider the seriousness of your actions. I am available to provide you with support and additional resources you may need to comply with this Policy. (emphasis in the original)

15. The form letter used by the Employer to confirm the dismissal of a non-compliant fire fighter opened with the following paragraphs:

On November 15, 2021 you were provided with a letter advising that you were insubordinate and willfully refusing to comply with the City's COVID-19 Vaccination Policy and that your employment with the City of Toronto would be terminated for cause unless you achieved compliance with the Policy by uploading proof of full vaccination. In the intervening time, you were suspended without pay to provide you with an opportunity to comply with the Policy.

As of January 3, 2022, you were still not in compliance with the City's COVID-19 Vaccination Policy and, as such, you have not remedied your insubordination and willful disobedience. Therefore, this letter confirms your termination for cause effective January 3, 2022.

16. While not communicated to the Association or bargaining unit fire fighters at the time meetings were held in late 2021, the City produced for the hearing its "Scripts for meetings with employees who were not compliant with the COVID-19 Vaccination Policy". The scripts directed interviewers to proceed as follows:

We are here today to discuss and review your decision not to comply with the City's COVID-19 Vaccination Policy and to communicate next steps.

All employees are required to be compliant with the City's COVID-19 Vaccination Policy.

Here is a reminder of why we are having this meeting with you today:

- On August 19, 2021 the City introduced its COVID-19 Vaccination Policy requiring that all staff be fully vaccinated no later than October 30, 2021.

- Staff were required to disclose and provide proof of their vaccination status by September 17, 2021.

- Effective October 30, 2021 you were required to have received both doses of a COVID-19 vaccine.

- To date you have failed to meet these requirements.

Why have you failed to comply with the COVID-19 vaccination policy?

17. The scripts went on to instruct the interviewer to record any reasons provided by the employee in response to that question; to advise the employee that the meeting would be placed in abeyance while the interviewer considered the response; and, while the meeting was in abeyance, to "review and determine whether the EES reason is compelling for not complying with the Vaccination Policy".

18. The scripts then gave separate directions as to what the interviewer was to do if the employee had not provided a "compelling reason" and what the interviewer was to do if the employee had given a "compelling reason" or the interviewer was "not sure". If either of the latter obtained, the interviewer was directed to consult Staff Services for assistance. In the absence of a "compelling reason", the interviewer was to issue the suspension letter "consistent with the TFS template letter" and to advise the employee of his or her insubordination and willful disobedience, and that, by failing to get fully vaccinated, the employee had "undermined a critical workplace health and safety measure".

19. The scripts also cautioned the interviewer that the "meetings are not an opportunity for the employee to debate the merits of the COVID-19 vaccination policy". Rather: "Meetings are being conducted in order for managers/supervisors to obtain the necessary response to allegations of policy non-compliance."

20. Another version of the City's instructions was included in the "COVID-19 Mandatory Vaccination Enforcement Guide for Managers". That text stipulated: "Managers/supervisors are responsible for the enforcement of the COVID-19 Vaccination Policy".

21. The Guide provided the following instructions with respect to meetings with employees who had received no doses of a COVID-19 vaccine or who had not declared their status as of November 1, 2021: "If the employee does not comply for a reason *other than an outstanding accommodation request* (e.g. the employee doesn't agree with the Policy) the manager/supervisor will consider the responses provided and issue a [suspension letter]" (emphasis added).

22. The document also set out: "If the employee provides a credible explanation for not complying with the policy, consult with your ER consultant to assist in evaluating the proper response." And then similar advice is given: "Employees on unpaid suspension pending termination who do not upload proof of vaccination by January 2, 2022 at 11:59 pm (extended

from December 12, 2021) will be sent a letter on January 3, 2022 . . . confirming their dismissal for cause and that they are no longer an employee of the City of Toronto."

23. One of the appendices to the Guide explained: "As per the Manager's Guide, disagreement with the policy, electing not to get vaccinated as a personal choice, and unsubstantiated accommodation requests are not compelling reasons for policy noncompliance."

24. The City filed material on June 13, 2022 setting out further information on the interviews of a number of fire fighters in November 2021. The record included the documentation of individuals' answers to the question — "Why have you failed to comply with the COVID-19 vaccination policy?" — that led initially to their disciplinary suspensions. Those ranged widely and included:

- "I don't want the vaccine"
- "Not comfortable following the policy"
- "I do not consent to share medical information"
- "I'm not comfortable answering that question"
- "I have chosen not to vaccinate or disclose. . . The policy counters human rights and has caused a drop in morale. It is counter to my values. I know the father of a 3 year old who died after getting shot."
- "Personal information is personal business"
- "The vaccine is in trial phases. It can kill you. I don't take drugs. How does my being vaccinated protect someone else?"
- "There is no medically specific facts. I consider things skeptically. I'm a farmer who lives isolated and have less risk. I'm a patriot who believes in the rule of law. This is unjust unlawful and immoral. I choose to see this through the courts. I assert my rights. I love the job and I'll fight for it.
- "Medical information is personal. I have rights and freedom. It's enough for me to say no."
- "I don't know enough about the vaccine. I've consulted my doctor and am thinking about having children."
- "I'm keeping personal medical records private. I'm not an anti-vaxxer. I'm an immigrant. My father was vaxxed and has suffered hearing loss. I'm a good employee. I'm stressed and anxious. This has created division."
- "Have ailment of autoimmune in my family"

- "There was a lack of explanation particularly to people of colour. What about long term effects?"

- "My religious convictions prevent me."

- "This is against my beliefs and conscience. I'm thankful to have worked here. I can't comply. I have a wife and three kids. This punishment is excessive. I'm disappointed and seek compassion."

Alison Anderson's Evidence

25. Alison Anderson occupied the role of Director, Occupational Health, Safety and Wellness in the City's People and Equity Division from March 2007 until her retirement at the end of January 2022. She reported to the City's Chief People Officer who reports to the City Manager. In essence, Ms. Anderson was responsible for the overall corporate COVID-19 workplace health and safety response and was the lead, from the health and safety perspective, on developing the Policy.

26. Ms. Anderson spoke about the "Hierarchy of Controls" applied to the assessment of responses to health and safety challenges such as those presented by COVID-19. She described it as "a top-down framework used in occupational health and safety to identify and implement measures to control hazards progressively using the most effective means (at the top) to the least effective means (at the bottom)." She explained that applying that approach to the hazard of COVID-19 transmission provided "an outline of recommended strategies and the order in which they should be considered." In sum, the hierarchy of controls relegated personal protective equipment ("PPE") in the form of masks to the status of "the least effective control at the bottom of the hierarchy". Ms. Anderson characterized PPE as "the last layer of protection after control measures which eliminate or prevent that hazard."

27. In contrast, having staff who are able to and have the technology to work remotely is "an elimination control because the employee is neither being exposed to the virus in the workplace, nor are they bringing the virus into the workplace." In her *viva voce* testimony Ms. Anderson identified vaccination as an elimination strategy offering a "best chance" at risk reduction in relation to serious illness or death.

28. Ms. Anderson testified about the requirement at the time of her retirement that all City staff were to complete a COVID-19 screening tool prior to beginning their shifts. She explained that the screening tool is "a measure to prevent workplace transmission and to facilitate contract tracing", adding that screening tools and contact tracing are administrative controls — ranking below elimination strategies on the hierarchy of controls.

29. Ms. Anderson's evidence was that her section collected and monitored City workplace data respecting lost time incidents due to workplace transmission of COVID-19. In that context she added:

> Coincident with the emergence of COVID-19 variants of concern in the spring of 2021, infections began to rise within various City divisions, despite broad compliance with the City's COVID-19 Safety Plan. Within TFS alone, there have been a number of declared outbreaks and numerous occupational exposures over the course of the pandemic.
>
> For Toronto Fire Services (TFS), the charts [in the City's Document Book] shows [*sic*] 13 lost time claims in 2020 and 27 in 2021, and 74 exposures in 2020 and 62 in 2021.
>
> Over the course of the pandemic . . . the WSIB has determined that four City of Toronto employees have died due to a work-related exposure to COVID-19.[2]

30. With that background, Ms. Anderson continued:

> Throughout the pandemic, the City's Plan has been dynamic and responsive to rapidly changing conditions. For example, new information about levels and mode of transmission (e.g. droplet, contact, airborne, aerosol) and severity of illness, which changed based on emerging variants of concern, required my section to constantly review and change safety procedures to ensure that the most protective measures continued to be in place. As another example, the requirements of the City's screening tool changed throughout.
>
> In such an environment, the City moved quickly from exploring a vaccine policy requiring disclosure of vaccine status to one requiring that employees be vaccinated for the following key reasons.
>
> - The rise in COVID-19 transmissions and outbreaks in City workplaces, despite the extensive COVID-19 health safety measures in place through the COVID-19 Safety Plan
> - The effect of variants of concern, including the highly transmissible Delta variant, emerging in summer, 2021
> - The wide availability of safe and effective vaccines in Ontario by August 2021
> - The emerging public health consensus that vaccines were very effective and the best measure to protect individuals and reduce transmission of COVID-19
> - The emergence of a 4th wave of the pandemic amidst the City's re-opening plans for September 2021.
> - The planned re-opening of businesses and services.

[2] Alison Anderson Will Say, paras. 48-50. Those four were not TFS employees.

As Director Occupational Health, Safety and Wellness, I considered four options respecting a workplace vaccination policy:

1) Encourage staff to be vaccinated

2) Mandatory disclosure of vaccination status, educational programs for those who did not get vaccinated

3) Mandatory disclosure of vaccination status, employee can elect to be vaccinated *or* undergo routine testing (e.g. every 48 hours)

4) Mandatory requirement for staff to be vaccinated, subject to bona fide medical/human rights exceptions.[3]

31. In explaining those alternatives, Ms. Anderson commented:

> Option 1 involved continuing to do what the City was already doing, providing encouraging messaging and information about where to get vaccinated and a policy that allowed for paid time off work to get vaccinated. I concluded that this option was inferior to requiring vaccination: it was the least effective.
>
> With respect to option 2, I agreed with and supported mandatory disclosure of vaccination status, however, I concluded that, while helpful, providing good science-based information to employees was inferior to requiring vaccination, the most effective protective measure.
>
> Option 3 would give employees the choice to either get vaccinated or undergo routine Rapid Antigen Testing (RAT). RAT is simply one more screening tool; an administrative control that falls toward the bottom of the hierarchy of controls as among the least effective measures. RAT, in particular, is not reliable because it generates a significant number of false negatives for those that are asymptomatic and is inferior to having employees protected by being vaccinated, in terms of the protection it offers from severe illness, hospitalization and death.
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> As Director Occupational Health, Safety and Wellness, it is my duty to take every precaution reasonable for the protection of City employees. Over the course of the pandemic, I was constantly re-evaluating the City's Plan to confirm the utility of our COVID-19 safety measures. In doing so, I consulted with my Employee Health and Wellness team, looked to publications of the Ontario Science Advisory Table and consulted with Toronto Public Health for the most up-to-date information on a range of issues, including masking and testing, among many other issues. I looked to guidance from the medical community for confirmation that vaccines were safe and effective and was satisfied that they provided important protection from transmission, hospitalization and death, including in relation to the variants of concern.
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> I concluded that the control measures in the City's existing Plan were no longer sufficient on their own to meet the very significant workplace safety hazard being

[3] Alison Anderson Will Say, paras. 65, 68 and 69.

> posed by COVID-19 and the variants of concern. It was my conclusion that a uniform mandatory vaccination policy (option 4), in addition to existing COVID-19 prevention measures, was the most effective means of preventing the introduction of the virus into City workplaces; controlling transmission of the virus among City employees, inclusive of employees of TFS, as well as mitigating the severity of the impact of the COVID-19 pandemic on employees, clients and the public being served by them, many of whom are vulnerable.
>
> Vaccination is an elimination control, the category of control at the top of the hierarchy which is the most effective at reducing hazards. Should an employee become infected, unlike all of the other measures, vaccination is the only measure that positively impacts health outcomes once the virus is in your body, decreasing the severity of illness, and the risk of hospitalization and death.
>
> Senior Leadership at the City adopted recommendation 4, that is, the mandatory requirement for staff to be vaccinated, subject to bona fide medical/human rights exceptions.[4]

32. Ms. Anderson testified that she "was not involved in the development of the City's disciplinary response announced to staff on October 6, 2021", adding: "This issue came within the responsibility of the Director, Employer Relations."[5] As for the development of the Policy, Ms. Anderson attested to having had "a lot of input into it"; however, she was not in attendance when the proposed policy was presented to and approved by the City Manager and his deputies.

33. Ms. Anderson testified about the timing of the introduction of the Policy with reference to the advent of the Delta variant and the observation that the City was seeing a dramatic drop in the incidence of transmissions where there was a high degree of vaccination.

34. On cross-examination, Ms. Anderson was asked whether there was any consideration given to putting fire fighters on unpaid leave as opposed to terminating their employment. She testified that the alternative of unpaid leave was not considered or discussed after the determination had been made to use termination as the endpoint for employees who did not comply with the Policy mandate.

35. Furthermore, on cross-examination, Ms. Anderson confirmed that, subject to a limited number of accommodations, the City did not vary the application of the Policy to reflect differences in fire fighters' assignments, station configurations, and the like. Rather, she explained, operating on the principle that vaccines were the most effective measures available to the City, the Policy was applied to all in TFS as the risk was present for all. When questioned about the possibility of the City's taking a different approach to the treatment of the thirteen members of the Association's bargaining unit whose employment had been terminated — whether there was some basis on which they could continue to work — Ms. Anderson responded that the City had not considered "less effective measures" for the protection of its employees. Rather than the individual circumstances of affected employees, the City had regard for the "overriding circumstances" it

[4] Alison Anderson Will Say, paras. 72-78.

[5] Alison Anderson Will Say, para. 95.

was responding to. In that context, Ms. Anderson referred to clause 25(2)(h) of the *Occupational Health and Safety Act* and the City's obligation to take all precautions reasonable in the circumstances. When challenged that the statute required a standard of reasonableness and not perfection, Ms. Anderson responded that, in her view, "reasonable precautions" in the context of the pandemic required recourse to vaccination, noting too that the City had responsibilities in connection with deaths attributed to workplace transmissions.

36. Ms. Anderson's evidence on cross-examination was that the Medical Officer of Health had recommended that employers adopt vaccination policies, but she agreed that the City was not obliged to have a policy requiring vaccination or precluding an individual's working without vaccination, and that the City was not advised by a medical doctor that it could not consider alternatives to termination of employment for unvaccinated staff.

37. In its statement of particulars, the City identified four other municipalities — Vancouver, Oshawa, Aurora and York Region — that had adopted mandatory vaccination policies and had provided for responses "up to and including termination" of the employment of those who refused to comply. Ms. Anderson stated that she did not look at those in developing the Policy. She was aware of the language used in the policies of those municipalities, but she was not aware of how the policies were applied or whether those municipalities were discharging staff who did not comply.

38. Ms. Anderson was asked on cross-examination whether anyone who was neither vaccinated nor intending to become vaccinated — and who did not have a valid claim for an accommodation under the *Human Rights Code* or otherwise — would be entitled to be continued in employment. She answered: "To my knowledge, no". When she was asked whether the only way for an individual to avoid termination was vaccination, she answered: "Yes". Ms. Anderson's evidence was that the City could not have employees in the workplace without their being vaccinated. When asked who had decided that the consequence of non-compliance would be termination and not a leave of absence, Ms. Anderson spoke about the typical process for establishing approvals, but could not testify to that distinction in the City's approach.

39. As for the experience with COVID-19 in TFS in 2021, the City's data showed twenty-seven lost time events January through December. In response to the suggestion on cross-examination that the number of occurrences in a workforce of approximately three thousand was "extremely low", Ms. Anderson's retort was that the number was "extremely high" and that their job was to ensure that "none of the employees gets COVID". While acknowledging that the City could not eliminate the risk, Ms. Anderson noted the view that vaccination was the best response.

40. On cross-examination Ms. Anderson was confronted with data indicating that in December 2021 — that is, when fire fighters not fully-vaccinated were out of the workplace — there were eleven lost time claims for TFS staff members. She did not accept that as evidence of a failure of vaccinations or the Policy and referred to the Omicron variant's taking hold at that time. Moreover, she did not accept the data indicating that TFS had experienced only one lost time claim due to COVID-19 in the five months preceding the application of the Policy to remove unvaccinated fire fighters in November 2021 as evidence for the proposition that there was no demonstrable need to apply the Policy to TFS as a precautionary measure.

41. Ms. Anderson included the following commentary on the environment in which TFS employees work in concluding her evidence in chief:

> The primary nature of the work performed by TFS is emergency response. I am aware that a very high proportion of calls to which TFS members respond are classified as medical in nature. When attending on site in response to an emergency call, staff are administering aid to individuals with whom they are in close physical proximity and may have underlying medical conditions. TFS staff also, of necessity, travel together in vehicles to attend emergency calls when servicing the public.
>
> Various divisions within TFS are subject to differing hours of work and schedules. I am aware that the large majority of employees within TFS work in the Operations Division and work a 24 hour shift. This necessitates congregate living, inclusive of meal preparation and sleeping arrangements at TFS fire stations over the course of employees' shifts.
>
> In my view, it is unsafe for any City of Toronto employee to attend work unvaccinated. COVID-19 is a serious health safety hazard that continues to present a serious health and safety risk, regardless of the division, operational area or job function, including in relation to any jobs performed by TFS staff. Given the conditions in which most fire fighters work and live while on shift, for their safety, it is vital that they are vaccinated in accordance with the City's Policy.

Sean Milloy's Evidence

42. Sean Milloy has been Director, Employee Relations for the City since September 8, 2020. He reports to the City's Chief People Officer.

43. Mr. Milloy explained that while he was involved in discussions about options for a vaccination policy, Ms. Anderson had responsibility for assessing those from a health and safety perspective. As Director, Employee Relations Mr. Milloy "led the administration and implementation of the policy, including the City's approach to its enforcement."

44. Mr. Milloy explained that the enforcement piece was arrived at in late September, several weeks after the announcement of the Policy requiring vaccination:

> By the end of September, however, it had been approximately six weeks since the announcement of the Policy. Accordingly, the City turned its mind to enforcement of the Policy for those employees who remained out of compliance as of October 30, 2021, the deadline for full vaccination, which was still a month away. As Director, Employee Relations, I recommended a disciplinary response which allowed for further time and opportunity after the investigation meeting (by way of a suspension without pay) for the employee to choose to comply with the Policy before the termination date arrived.
>
> On October 6, 2021, the City Manager announced that those City employees who, after an investigation meeting, were found to have failed to comply with the Policy would be placed on an unpaid disciplinary suspension until they achieved

compliance, failing which they would be terminated for cause on December 13, 2021.[6]

45. Mr. Milloy spoke to the Policy and the justification for the City's approach as follows:

> In my view, the City's implementation of the Policy was appropriately flexible and generous. Employees were given significant advance notice (a total of approximately 4.5 months (from August 19, 2021 to January 2, 2022) of the requirements of the policy and approximately three months' notice of the consequences of non-compliance (from October 6, 2021 to January 2, 2022). The Policy requirements were well-known and continually reinforced through ongoing communication.
>
> Employee Relations staff instructed managers that, at investigation meetings, they were to ask employees why they had not complied with the Policy and to consider their response. These investigation meetings, at which Union and Association representation were provided, were called "vaccination status review meetings" in City-wide communications to staff. If the employee provided a credible explanation setting out a reasonable excuse for not complying with the Policy, the manager was to consult with their Employee Relations Consultant to assist. If the reason the employee did not comply was related to an accommodation request, a separate accommodation process was to be followed.[7]
>
> The [City's suspension] letter set out two grounds for the discipline. First, the employee was insubordinate and had wilfully disobeyed an important workplace health and safety rule by refusing to comply with the direction in the Policy to be fully vaccinated against COVID-19. Second, by failing to get fully vaccinated, the employee was undermining a critical workplace health and safety measure, implemented by the City in the Policy, designed to maximize vaccination rates in order to protect employees from the serious hazards of COVID-19.[8]
>
> As noted, the disciplinary penalty was structured to place non-compliant employees on a disciplinary path to termination, while providing a compliance "off-ramp". The outcome, therefore, was ultimately left to the employee to decide, after having had the perspective of living with the economic consequences of non-compliance for about two months.
>
> In my view, it is clear that a failure to comply with a health and safety rule is culpable misconduct. The City takes workplace health and safety very seriously and imposes significant disciplinary penalties for breaches of its health and safety rules, including for breaches of COVID-19 safety protocols, as is seen in the many disciplinary letters found at Tab 3 of Volume V [of Exhibit 3, the City's Document Book].

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[6] Sean Milloy Will Say, paras. 17-18.

[7] Sean Milloy Will Say, paras. 28-29; I note that the Association objected to Mr. Milloy's opinion evidence in that and subsequent paragraphs of his statement.

[8] Sean Milloy Will Say, para. 31.

> Toronto Fire Service employees have been disciplined for health and safety violations, including for breach of City health and safety policies. Three examples of the City's disciplinary response to certain health and safety breaches are set out at Tab 3 of Volume III [of Exhibit 3, the City's Document Book].
>
> I saw no reason why the failure to comply with the City's COVID-19 Vaccination Policy should be treated any differently. In my professional experience, employees are not given the discretion to decide whether or not to comply with a workplace health and safety rule.
>
> From my perspective, by refusing to comply with the Policy, employees committed very serious misconduct. They were insubordinate and wilfully disobeyed a very important workplace health and safety rule and undermined a critical workplace health and safety measure designed to protect employees from serious illness or death from COVID-19 acquired in the workplace.
>
> Employees who, following an investigation meeting and review, were ultimately terminated for non-compliance, had demonstrated a repeated and persistent refusal to comply with a succession of requirements under the Policy, culminating in their refusal to comply even when confronted with a lengthy unpaid disciplinary suspension leading to discharge. I determined, therefore, that where an employee exhibited such intransigence in relation to a critically important health and safety policy introduced during the extraordinary circumstances of the pandemic, the employment relationship was no longer viable.
>
> As of December 6, 2021, Toronto Fire Services had 3,010 Firefighter members of TPFFA Local 3888, of which 2,882 were "active" on that date. . . Out of these 2,882 active members of the Association as of December 6, 2021, only 13 employees . . . ultimately did not comply with the Policy and were terminated as a result.[9]

46. On cross-examination, Mr. Milloy spoke to the relationship between the Employee Services function and personnel and its client, the Staff Services function and personnel serving TFS. His evidence was that Staff Services made the discipline and termination decisions in relation to the application of the Policy. Mr. Milloy was asked whether he had personal knowledge or involvement concerning the application of the Policy in TFS, and he answered that he had some knowledge of the consequences, but was not involved with the termination of any individual's employment. The approach taken was his recommended approach; the decisions to suspend and discharge were decisions of others according to Mr. Milloy.

47. Mr. Milloy maintained on cross-examination that the Policy did not prescribe a specific penalty for non-compliance. Notwithstanding the references to advising that employees "will be suspended" and "will be terminated for cause", Mr. Milloy insisted that behind those statements were the "usual discipline considerations". The language chosen by the City was to communicate that there would be consequences and did not "go to nuances" according to Mr. Milloy. Even

[9] Sean Milloy Will Say, paras. 34-40; I note again that Local 3888 objected to the opinion evidence in three of the last four of those paragraphs.

though the original language in the September 7, 2021 communication was that employees "may be" disciplined was replaced by "will be" on October 6th, he said that nothing was "automatic" and the language was to serve as a guide to lead management through the process.

48. When asked why the language was changed from the August announcement to October 6th, Mr. Milloy testified that he did not write the texts, and the objective was to make clear that there would be significant consequences for those who did not comply. He added that he thought the unions understood that matters would follow the "normal course". Mr. Milloy confirmed that, while seniority was a factor considered in a "normal disciplinary process", seniority would not have a mitigating effect in relation to the deliberate misconduct of employees who were not going to comply.

49. Mr. Milloy also acknowledged that if Staff Services went against the advice — had a different opinion and chose to retain an employee based on his or her seniority — he could not stop them or change their decision. Similarly, he acknowledged that Staff Services or TFS could take into consideration an employee's disciplinary record. That too would be against the advice of Employee Services and, he added, against the City Manager's advice to all City of Toronto employees and "what we thought should be done regarding non-compliance". Similarly, Mr. Milloy allowed that TFS could "go against the advice" and permit a non-compliant employee to return to his or her crew or go on an unpaid leave of absence. He remarked that he or Employee Services had "no control", TFS management could do whatever they wished "against our advice" and "against the statement by the City Manager".

50. Mr. Milloy was asked to confirm that there was nothing in the instructions for managers regarding their ability to consider an employee's seniority before making a decision. He answered: "No" — explaining that the advice given was that seniority did not mitigate the consequence of non-compliance. In the same vein, Mr. Milloy was asked to confirm that there was nothing in the instructions to indicate that management could consider a response other than dismissal, such as a leave of absence. Mr. Milloy responded: "We didn't write something contrary to our advice."

51. When asked how Staff Services personnel were to understand that they had discretion, Mr. Milloy answered that it was made clear that this was "discipline in the normal course". Mr. Milloy was referred to the memorandum Deputy Chief Higgins issued to all TFS personnel on October 25, 2021 and asked where there was a statement that management would consider other factors. He responded that they "don't typically give that advice; it's part of the process — but not our advice" and he referred again to "discipline in the ordinary course".

52. Mr. Milloy was questioned about email communication with the Association's President, Kevin McCarthy, on September 29, 2021. When asked if he had told Mr. McCarthy that the City would consider typical factors in relation to possible discipline, Mr. Milloy answered that he had told Mr. McCarthy that there would be meetings and he was quite certain that Mr. McCarthy understands how discipline works. The question was repeated and Mr. Milloy answered "No", adding that he did not explain the discipline process and stating: "Our advice was that [other factors] weren't sufficient to ameliorate someone's saying they never would be vaccinated."

53. Mr. Milloy was then asked what an employee could say — other than seeking an accommodation or agreeing to be vaccinated — that would allow him or her to avoid suspension and eventual discharge. His response was that he could not think of anything; the City had allowed them to respond, and he could not think of "any reason for refusing".

54. When questioned about the specific data generated with respect to TFS and the various precautionary practices in place within TFS Mr. Milloy remarked that the City "did not go with peaks and troughs" and the Policy was based on its application to all employees.

55. Testifying on May 9, 2022, Mr. Milloy confirmed on cross-examination that the City had not modified the Policy to require employees to receive "booster shots", and that the Policy remained in place notwithstanding that both the provincial mandate and the state of emergency declared by the City had been lifted.

56. Mr. Milloy was asked again about the City's giving "any regard to unpaid leaves of absence" and he responded that they had thought about all consequences that could be imposed and leaves were not an appropriate way to deal with people who would not comply. He remarked that employees were "not immediately dismissed" and that the City had taken "a very unique approach".

57. As the City noted in its particulars, other municipalities had adopted mandatory vaccination policies. Counsel for the Association put to Mr. Milloy that those municipalities had stated that non-compliance "may" — rather than "will" — result in discipline and discharge. Mr. Milloy asserted that the Policy was the initial communication effective September 7th — in which the statement was that employees who did not comply "may be subject to discipline, up to an including dismissal" — and that the October 6th communications did not constitute the Policy.

58. Mr. Milloy testified that he did not know of any other municipality that had taken the "next steps" identified in the October 6th communications; he also commented that he had not asked about other municipalities' processes.

59. Mr. Milloy confirmed on cross-examination that decisions to suspend and discharge employees were not informed by medical authorities, but were a function of the enforcement process identified by the City to deal with employees' insubordination.

60. Mr. Milloy was questioned about a slide deck used in a presentation August 17, 2021 of the recommended approach to the vaccination policy attributed to Mr. Milloy, Ms. Anderson and the Chief People Officer. It set out the following as four options for a City-wide workplace vaccination policy:

1) Encourage staff to be vaccinated. (*current state*)

2) Mandatory disclosure of vaccination status, educational programs for those who do not get vaccinated. (*Current LTCH approach*)

3) Mandatory disclosure of vaccination status, employee can elect to be vaccinated *or* undergo routine testing (e.g. every 48 hours). (*UHN, provincial health care approach*)

4) **Mandatory requirement for staff to be vaccinated, subject to bona fide medical/human rights exceptions.** (emphasis in the original)

61. The same material included the following under the caption "Jurisdictional Landscape":

- Coincidental with the recent increase in cases there is also undeniable evidence that vaccines are effective in preventing the spread of and the worst health impacts of COVID-19.

- Current provincial direction regarding vaccination policies centres around a "vaccinate or test" approach for healthcare and long-term care employees.

- There is no legislation supporting employers in the development of their policies outside of a healthcare/LTC setting. As such, the City will likely be subject to grievances or other legal challenges to any policy that is introduced.

- The federal government announced a mandatory vaccination requirement (e.g. option four) for all federally regulated workplaces and crown agencies, subject only to medical accommodation exceptions.

- In the absence of provincial legislation, other municipalities, City agencies and even private sector organizations are looking to the City of Toronto for guidance.

- Although the City does not regulate occupational health and safety we can lead by the policy we adopt for our own employees.

62. The slide deck continued with the following under the caption "Policy Considerations":

- Disclosure of vaccination status is required.

- The less equivocal the Policy and related communications the more likely it is that staff will get vaccinated.

- A delay in the effective date of the Policy gives staff adequate time to get the message and get vaccinated — ideally both doses.

- The Policy will be accompanied by targeted education to unvaccinated staff.

- The focus will be on education, but we also need to indicate that we are not taking the possibility of discipline/dismissal off the table.

- Legal looking into approach for Purchase of Services shelters.

63. The slide deck set out the following under the caption "Recommended Approach — Option 4 Mandatory Vaccination – September 30th effective date":

- After Labour Day, all City staff will be required to provide proof of vaccination. Unvaccinated staff or those who prefer not to disclose their vaccination status will attend mandatory education on the benefits of vaccination. They may also be required to routinely submit proof of negative COVID test.

- Effective September 30th, 2021 it will be mandatory for all City employees to be vaccinated.

- The City will comply with its human rights obligations and accommodate employees who are legally entitled to accommodation.

- The public health situation, as of September 30, 2021, will determine the approach the City will take to employees who remain unvaccinated. Options will include continuing to accept proof of negative test AND discipline up to and including dismissal. Communication will emphasize our strong belief that employees to do [*sic*] the right thing and our hope that discipline will not be required.

64. When asked with reference to that document if the City considered whether alternatives would work, Mr. Milloy reiterated that approving leave in the face of non-compliance was not an acceptable approach. As for the possibility of moving people to other jobs, Mr. Milloy expressed the view that the Policy ought to apply across the work force and that once an employee contracted COVID-19 it would not matter where that employee was working. Re-assigning non-compliant employees was not a viable alternative.

65. Mr. Milloy confirmed on cross-examination that the most recent "Mandatory Vaccination Policy Guide for Managers" delivered with his supplementary will say of May 5, 2022 was produced by his office, Employee Relations, and provided the instruction to "take action" by considering an employee's refusal to comply "for a reason other than an outstanding accommodation request (e.g. the employee doesn't agree with the Policy)" and issuing a suspension letter that presaged dismissal for cause. The latest version of the scripts for meeting with employees directed the issuance of "the suspension/dismissal letter" if "the employee has not provided a compelling reason as to why they are not compliant with the COVID-19 Vaccination Policy". Mr. Milloy's evidence was that he did not regard "compelling reason" to be different from the "credible explanation" referred to in another version of the instructions.

66. In his will say dated April 1, 2022, Mr. Milloy referred to the test of an employee's provision of "a credible explanation setting out a reasonable excuse for not complying with the Policy". On cross-examination, he was asked whether he could give an example and his answer suggested a situation of an employee's originally thinking the City would not follow through now subsequently agreeing to get vaccinated with the realization that the City would indeed act as indicated in the communications to staff. In that circumstance, Mr. Milloy said, he would expect the employee to be given leeway, but he reiterated his earlier statement that he could not think of a good reason not to be vaccinated. Counsel pursued that, challenging Mr. Milloy that the City was suggesting there was a possibility that an employee might avoid compliance, but Mr. Milloy could not offer a reasonable excuse. Mr. Milloy spoke again about discipline in the ordinary course and said that he could not suggest an excuse that would apply to vaccination.

Geoff Boisseau's Evidence

67. Geoff Boisseau has held the position of Division Commander Operations Training and Continuous Improvement since October 2020 and, having been a Fire Captain, has "accumulated extensive experience in front-line emergency response and operations as well as approximately 20 years of occupational health and safety experience, specifically within TFS." Commander Boisseau is the management Co-Chair of the central joint health and safety committee for TFS and testified to having been "the lead for TFS occupational health and safety response for COVID protocols" over the course of the pandemic. While he was not consulted or involved in the City's decision to introduce the Policy, Commander Boisseau's evidence was that he believes it to be "an essential component of the risk mitigation strategy for TFS over the course of the pandemic."

68. Commander Boisseau testified about the environment in which fire fighters work. He explained:

> One of the unique aspects of TFS is the congregate type living that operations personnel experience on shift. Operations staff work 24 hour shifts in a fire station. They work an alternating 24 hour shift which means they are scheduled in the workplace 7 shifts out of 29 shifts. There are a total of approximately 2700 TFS firefighters that work these shifts. When working a 24 hour shift, there are normally a minimum of 4 (single apparatus station) to as many as 12 (multiple apparatus station) firefighters assigned to a specific fire station where all the activities of daily living, including eating and sleeping, occur. As a result, there is a familiarity that exists when living with "your crew" that is atypical of most workforces. Given the congregate living experienced during shifts, firefighters are more apt to differentiate their behaviours in the "home" setting of the fire stations versus their behaviours when attending an emergency call. While firefighters are highly familiar with donning and doffing of PPE when attending to calls, within the fire stations, firefighters are not used to such precautions and are more likely to let their guard down given the comfort felt both with their crew and within the more home-like setting. In my estimation, this familiarity exacerbated a lack of compliance with risk mitigation strategies and posed a unique challenge for TFS.
>
> In addition, firefighters must travel in fire vehicles together when attending calls, with a minimum of 2-4 personnel travelling together in a single vehicle. While TFS takes precautions in this regard, including use of PPE and specific seating, the requirements for traveling to emergency calls may further exacerbate the possibility of transmission.
>
> As a general premise, occupational health and safety is highly important within TFS and taken very seriously. The City's Document Book, Volume 3, Tab 9 contains some of the occupational health and safety policies that are issued and in effect at TFS, beyond COVID-19 safety policies. These touch on a wide range of issues including, without limitation, seatbelts, use of defibrillators, eye protection safety, fall prevention, hearing protection, wearing and maintenance of Personal Protective Equipment including medical gloves, masks, boots, helmets, suits etc., heat and cold protocols, mandatory blood testing, slips/trips/falls prevention. It is an expectation of TFS that all occupational health and safety policies are complied with.

> The nature of the emergency calls that TFS responds to requires that our front-line personnel be prepared for numerous possibilities. The Yearly Event Matrix data (Vol. 3, Tab 1) confirms that over the last three (3) years over 50% of the emergency dispatch calls responded to have been classified as medical. These calls can take many forms for example, injecting epi-pens to sustain life, performing CPR, using a defibrillator, oxygen delivery, attending at accident scenes and rescuing or removing individuals who may have become trapped in wreckage and so on. All these interactions require close, sustained contact with members of the public who may be ill or otherwise vulnerable. In addition, TFS interacts with the public in numerous other instances; collecting information from individuals on scene and assisting other first responders as necessary. The varied nature of the calls that TFS responds to requires that we be prepared to attend on scene in a range of settings, which may include entering homes, cars, encampments and other areas where vulnerable individuals are in close proximity. TFS personnel are first responders who are often first on scene, and accordingly must be prepared to respond to a wide variety of situations.[10]

69. Commander Boisseau gave evidence about measures taken in response to COVID-19 to guide risk mitigation strategies for TFS including screening, physical distancing, occupancy limits, masking, mealtimes and disinfecting protocols, and observed:

> Despite all of the guidance and requirements for safety protocols that were created and communicated during the pandemic, TFS nevertheless suffered from compliance issues with its staff. There were a number of Ministry of Labour visits throughout the course of the pandemic, some that were initiated by the Ministry itself and some that arose as a result of complaints or occupational exposures. . .
>
> In December 2020, a TFS Supervisor received a compliance order from the Ministry of Labour as a result of an occupational exposure to COVID-19 that occurred at Fire Station 331. The order was issued in respect of a Supervisor/Acting Captain for failing to ensure that equipment/protective devices required by the employer were worn by the workers – in this case, a failure to ensure that masks were worn during a training exercise where workers were unable to maintain appropriate physical distancing. As a result of this incident a firefighter contracted COVID-19 through workplace exposure and crew members were required to remain off-duty and isolate. An Advisory dated December 30, 2020 was sent to all TFS personnel advising of the incident and reminding personnel of the importance of adhering to the various directives in place. . .
>
> Compliance issues with COVID-19 safety protocols resulted in TFS imposing discipline where appropriate. By way of example, in December 2021, a TFS Captain was demoted to the rank of First Class Firefighter for a period of one year. While it should be noted that this discipline is the subject of an active grievance, the discipline was imposed as a result of, amongst other things, the Captain not wearing a mask, remaining in the workplace while showing symptoms of illness that could have been COVID-19 related and failing to ensure that personnel under the Captain's direction followed relevant COVID-19 policies. . .

[10] Geoff Boisseau Will Say, paras. 24-27.

> There are other examples of lack of compliance that resulted in disciplinary action and, in some instances, contributed to significant work disruption as numerous staff were required to remain away from work on isolation. Any discipline imposed has been grieved by the Association. . .
>
> While these examples of non-compliance are not exhaustive, they are illustrative of the types of issues that TFS experienced over the course of the pandemic despite the clear written directives that were communicated to staff.
>
> Despite all the protections taken over the course of the pandemic, TFS workplaces suffered outbreaks and members of its personnel did contract COVID-19.[11]

70. Commander Boisseau testified about a schedule of TFS Designated Officer Contract Tracing that recorded data for three periods — March 6, 2020 – December 1, 2021, December 1, 2021 – January 16, 2022, and January 17, 2022 – February 2, 2022 — and indicated the tracking of the incidence of staff being found to be positive for COVID-19, at high risk due to travel, having been placed on quarantined paid leave due to workplace high risk exposure, being symptomatic, involved in an outbreak, or subject to an occupational illness report.

71. On cross-examination Commander Boisseau confirmed that he was neither consulted about nor involved in the decision to introduce the Policy. In his words, he had "no input whatsoever" and that extended to the consequences of a fire fighter's non-compliance. However, Commander Boisseau did have a significant role in the implementation of the Policy at the enforcement stage in that he attended most of the interviews with operations staff who were called upon to explain their failure to comply with the Policy.

72. Commander Boisseau was not involved in conducting any risk analysis or in discussions about accommodating employees. However, he has an involvement in planning TFS staffing and he testified that the dismissal of thirteen fire fighters would not cause TFS to change any staffing plans and had not negatively affected TFS operations. When asked to confirm the investment in training and the time it would take TFS to replace a Captain, Commander Boisseau responded that he has a list of Acting Captains and could replace a departing Captain in a day.

73. As for the interviews or meetings with employees not then in compliance with the Policy, Commander Boisseau said on cross-examination that some explained their concerns, that he did not try to find out why an individual was not getting vaccinated, and he simply tried to find out whether they had complied. Commander Boisseau testified that he issued a suspension letter if the individual did not confirm vaccination; if the individual subsequently complied, then he would issue a reinstatement letter.

74. Commander Boisseau acknowledged that if the employee did not qualify under the Policy, he had no latitude to consider whether the person had offered a reasonable basis for not complying. Moreover, he did not give any consideration to the person's disciplinary record or seniority, the person's rank, or the number of his or her crew members who were vaccinated. His

[11] Geoff Boisseau Will Say, paras. 18-23.

question to an interviewee was: "Why have you not complied?" There was no discussion or consideration of "credible explanations" and, he testified, the employee's response was not evaluated. He stated that the Association could take matters up with Staff Services.

75. Commander Boisseau confirmed that he had seen a version of the script for the interviews and when asked about the direction to consult Employee Relations he stated that he thought employees "had already gone through Employee Relations". His understanding was that he was to determine whether the employee had complied, and that Staff Services would consider any explanation a non-compliant employee offered.

The Expert Evidence

Dr. Peter Juni

76. Dr. Peter Juni attended the hearing on May 12, 2022. He was then the Scientific Director of the Ontario COVID-19 Science Advisory Table and the Director of the Applied Health Research Centre at the Li Ka Shing Knowledge Institute of St. Michael's Hospital. Dr. Juni holds a Tier 1 Canada Research Chair in Clinical Epidemiology of Chronic Diseases and is also a Professor of Medicine and Epidemiology at the Department of Medicine & Institute of Health Policy, Management and Evaluation at the University of Toronto.

77. Counsel for the Association cross-examined Dr. Juni with reference to his expert report delivered to the City on April 1, 2022.

78. Having noted that he had been asked to opine "on the value and benefits of a mandatory COVID-19 vaccination policy for employees of the City of Toronto" and "on the safety and effectiveness of COVID-19 vaccines currently available in Ontario", Dr. Juni's report (excluding a myriad of supporting references) included the following significant elements:

> 4. My opinion is that vaccination is by far the best way to ensure the protection of City of Toronto employees and members of the public with whom they interact from contracting and/or transmitting SARS-CoV-2, the virus causing COVID-19, as well as preventing Long COVID, hospital admissions, ICU admissions and deaths from COVID-19 in City of Toronto employees. My opinion is that the COVID-19 vaccines currently approved and in use in Canada are safe for use by all persons (other than the very small number who are contraindicated because of an allergy to one of the COVID-19 vaccine ingredients, or some other rare conditions), and that vaccines are the most effective way to reduce the risks of COVID-19.
>
> 8. In December of 2020, Health Canada approved vaccines for the immunization of Canadians against COVID-19. This was a monumental event, providing a key tool in protecting our population against infection and related serious consequences, including admission to hospital wards and intensive care units and death from COVID-19, and in reducing the spread of COVID-19.
>
> 9. Multiple trials and observational studies, which I have read and appraised, clearly indicate beyond any reasonable doubt that COVID-19 vaccines administered in Canada are both safe and effective.

12. Vaccine effectiveness was maintained for the Alpha variant that caused the third wave, and for the Delta variant that caused the fourth wave in Ontario. For all strains of the SARS-CoV-2 virus that were dominant in Ontario before December 2021 (the original SARS-CoV-2 virus, the Alpha and Delta variants), a vaccinated person was therefore much less likely to transmit COVID-19 to others, including unvaccinated children and vulnerable persons.

13. At the end of November 2021, the Omicron variant was detected in Ontario, and quickly became the dominant variant in the province. Omicron is extremely transmissible and spreads much faster than the original strain and previous variants. Unfortunately, Omicron is also better at evading the immune system and therefore vaccine protection against infection with 2 doses of an mRNA vaccine has been reduced significantly with Omicron. Despite this, as of March 31, 2022, the estimated daily rate of reported cases per million amongst unvaccinated Ontarians was 252.3, whereas the estimated daily rate of reported cases per million amongst Ontarians vaccinated with at least two doses of a COVID-19 vaccine was 168.1. This represents a 33.4% reduction in risk of infection associated with vaccination with at least two doses.

18. At least 2 doses of a COVID-19 vaccine continue to be effective in reducing the risk of hospital admission, ICU admission and death also after Omicron became dominant in Ontario and globally. As of March 30, 2022, the estimated number of COVID-19 cases in hospital per million amongst unvaccinated Ontarians was 226.4, whereas the estimated number of COVID-19 cases in hospital per million amongst Ontarians vaccinated with at least two doses of a COVID-19 vaccine was 45.2. This represents a 80.0% reduction in risk of hospitalization associated with vaccination with at least two doses. The estimated number of COVID-19 cases in intensive care per million amongst unvaccinated Ontarians was 50.8, whereas the estimated number of COVID-19 cases in intensive care per million amongst Ontarians vaccinated with at least two doses of a COVID-19 vaccine was 8.5. This represents a 83.2% reduction in risk of ICU stay associated with vaccination with at least two doses. The reductions in the risks of hospitalization and ICU stay were even higher when the Delta variant was dominant in Ontario in August to November 2021: an average 96% reduction in the risk of hospitalization, and an average of 98% reduction in the risk of ICU stay. The reduction in the risk of hospital admission, ICU admission and death is high after two doses, and is even more pronounced after 3 doses of a COVID-19 vaccine. In a recent analysis from Kaiser Permanente Southern California, the protection against hospitalization with Omicron was 84.5% after 2 doses of a COVID-19 vaccine, and 99.2% after 3 doses.

20. There is an Omicron subvariant, BA.2, which has become the dominant subvariant in Denmark and is becoming dominant in Canada and globally. This subvariant shows increased transmissibility (spread more easily) than the original Omicron variant. According to a recent study performed in Danish households, increased transmissibility of BA.2, as compared with the original Omicron variant, was only seen in unvaccinated individuals, but not in individuals who had received 2 doses of a COVID-19 vaccine, nor in individuals who had received 3 doses of a COVID-19 vaccine. This suggests that COVID-19 vaccination will continue to be important for the control of BA.2 in Ontario, not only after 3 doses were received, but also after 2 doses were received.

21. Vaccines are also *safe*. We know from the history of vaccines in general that any potential safety signals relating to a vaccine will typically be evident within 60 days after the vaccine is administered. The Advisory Table has reviewed randomized trials and observational studies generated worldwide on the potential side effects of the vaccines, has concluded that COVID-19 vaccines administered in Canada are safe, and advised Ontarians to get vaccinated with at least 2 doses of a COVID-19 vaccine unless contraindicated as a result of a medically documented allergy to one of the COVID-19 vaccine ingredients, for example. Moreover, with respect to safety it is important to note that being vaccinated against COVID-19 is considerably safer than bearing the increased risk of contracting COVID-19 as an unvaccinated person.

22. For example, the risk of myocarditis (an inflammation of the heart muscle) is approximately 10 times greater in unvaccinated persons who are infected with SARS-CoV-2 and have COVID-19 than after COVID-19 vaccination. It should be noted that the Delta and Omicron variants are so easily spread that it is a statistical certainty that nearly every Canadian who is not vaccinated will eventually contract one of them, or a future variant.

24. On October 15, 2021, Premier Doug Ford wrote a letter to hospital administrators soliciting their input on the idea of mandating vaccination for all healthcare workers.

25. On October 19, 2021, the Advisory Table issued a response entitled *COVID-19 Vaccine Mandates for Ontario's Hospital Workers: Response to the Premier of Ontario*. I participated in the drafting of this document and I agree with its contents.

26. In this report, the Advisory Table conveyed strong support for a vaccine mandate for hospital workers. The report indicated that there is now "conclusive evidence" that COVID-19 vaccines are highly effective and safe, and that the risks of serious side effects from vaccines are "vanishingly low". The report also noted that hospital workers who remain unvaccinated are at greater risk of contracting COVID-19 and of being unable to work due to COVID-19, which poses a "real and serious threat to the health of the hospital workforce". The same argument held true for City of Toronto employees for all pre-Omicron strains of the SARS-CoV-2 virus that were dominant in Ontario before December 2021 regarding infection, transmission, inability to work, Long Covid, hospitalization, ICU admission and death. Protection against infection, hospitalization, and ICU admission offered by at least two vaccine doses was considerably larger when the Delta variant was dominant in Ontario in August to November 2021.

27. For the Omicron variant the argument continues to hold true for City of Toronto employees regarding Long Covid, hospitalization, ICU admission and death. It also continues to hold true regarding infection, transmission and inability to work provided that, at least 2 doses of a COVID-19 vaccine were received and receipt of the second dose was received no longer than 3 months ago, at least 2 doses of a COVID-19 vaccine were received and the vaccinated person was infected with SARS-CoV-2 no longer than 3 months ago, or a 3rd dose was received and the 3rd dose was received no longer than 3 months ago. For the control of BA.2, which is

becoming dominant in Ontario, COVID-19 vaccination will likely continue to be important, not only after 3 doses were received, but also after 2 doses were received.

28. The Advisory Table also confirmed in its report that fully vaccinated individuals have a lower probability of contributing to ongoing transmission of the virus compared to the unvaccinated, and if infected, appear to be infectious for a shorter period of time compared to the unvaccinated. Accordingly, a fully vaccinated workforce reduces the risk of transmission to both unvaccinated people (including young children who are not yet eligible for vaccination) and vulnerable fully vaccinated people (including the elderly and/or immunocompromised, who are at greater risk of breakthrough infections and severe COVID-19 disease). The same argument held true for City of Toronto employees for all pre-Omicron strains of the SARS-CoV-2 virus that were dominant in Ontario before December 2021, including the Delta variant. For the Omicron variant, the argument continues to hold true for City of Toronto employees under the conditions described in paragraph 27.

29. The Advisory Table concluded that a requirement for all hospital workers to be vaccinated against COVID-19 is an "evidence-based policy" that protects hospital workers, patients, and Ontarians generally. I believe that a requirement for all City of Toronto employees to be vaccinated against COVID-19 is also an evidence-based policy that protects City of Toronto employees, vulnerable individuals, and Ontarians generally.

32. It is my view that the use of rapid antigen testing to rule out SARS-CoV-2 infection among City of Toronto employees, even combined with the use of PPE, is not the most secure way to prevent and/or reduce the transmission of COVID-19. The use of rapid antigen testing to rule out SARS-CoV-2 infection was less effective than full vaccination in decreasing the risk of infection and transmission for all pre-Omicron strains of the SARS-CoV-2 virus that were dominant in Ontario before December 2021, including Delta.

33. For the Omicron variant, we have additionally witnessed a decrease in the sensitivity of rapid antigen tests, especially in the first 1-2 days after infection, when people with Omicron infections are likely already infectious. We found the average sensitivity of rapid tests for nasal specimens with high viral concentration of people with Delta infection to be 81.0%, whereas the average sensitivity of rapid tests for nasal specimens with high viral concentration of people with Omicron infection was only 37.1%. Sensitivity is defined here as the proportion of Omicron infections that are correctly identified by a positive rapid antigen test. This has resulted in a greater number of false negative test results with Omicron than with previous strains of SARS-CoV-2. A negative test result with a rapid antigen test would therefore not provide a guarantee that a City of Toronto employee has not been infected with SARS-CoV-2, especially not with Omicron.

34. Sensitivity of rapid antigen tests for Omicron infections can be improved through a combined specimen sampling from the back of the throat or back of the tongue, the inner cheek and the nose, instead of just the nose. In our Science Brief on rapid antigen tests for Omicron infections, we assume that this will result in a sensitivity of approximately 60%. In view of the currently high rate of infections in Ontario and this limited sensitivity, rapid antigen tests need to be done multiple times a week to be somewhat effective. Sampling of the back of the throat or back of the

tongue frequently triggers a gag reflex, which in turn will result in limited adherence with proper sample taking multiple times a week, including the back of the throat or tongue. Rapid antigen tests will become less effective if adherence to frequent rapid antigen testing of City of Toronto employees multiple times a week is less than 100%, or if the sampling technique used is less than optimal.

35. While rapid antigen tests may help with detection of infectious cases, they are likely insufficient for controlling spread. Successful implementation of a rapid antigen testing program relies on ensuring that supports are in place for all related activities, including distribution of rapid antigen tests, case and contact management, lab-based testing to confirm positive rapid antigen tests (depending on the case rate in Ontario), and education to ensure proper specimen taking and performance of the test. Additional implementation challenges include the current global supply shortage of rapid antigen tests, which may prevent the high frequency testing strategies needed to keep testing effective.

36. Prior to the availability of vaccines, we were forced to rely solely on Protective Equipment ("PPE") and rapid antigen testing to reduce the spread of COVID-19. This was far from an optimal solution.

37. A Canadian study of rapid antigen testing for SARS-CoV-2 published on October 19, 2021 by the Journal of Clinical Microbiology evaluated rapid antigen testing in healthcare workers. This study evaluated a large-scale, multi-centre implementation of asymptomatic antigen testing of healthcare workers in continuing care facilities. The study found that rapid antigen tests had a high proportion of false positives (55.2%), consistent with a number of previous studies that raised similar performance concerns relating to rapid antigen tests.

38. Before the Omicron waves, and in the near future, at the end of the sixth wave when rates of infection are decreasing, a low positive predictive value and high incidence of false positives can lead to operational challenges, as the need to isolate in response to a false-positive result can contribute to staff shortages and add further stress on City of Toronto employees.

39. Rapid antigen tests may have reduced the risk of SARS-CoV-2 transmission by a factor of 4 for all pre-Omicron strains of the SARS-CoV-2 virus that were dominant in Ontario before December 2021, including the Delta variant, if adherence to testing was very high, but the COVID-19 vaccine reduced transmission by a factor of 5 to 6, a considerable reduction in the risk of transmission compared with rapid antigen testing. An additional advantage is that this reduction in transmission did not depend on adherence of individuals, unlike the reduction associated with rapid antigen testing regimes.

40. For the Omicron variant, rapid antigen tests could potentially reduce the risk of SARS-CoV-2 transmission by a factor of 2.5. However, this assumes 100% adherence to the applied testing regime multiple times per week and optimal use of rapid antigen tests, swabbing the cheek, the back of the throat or tongue and the nose. Any lack of adherence with such a regime or suboptimal use of rapid antigen tests will reduce the effectiveness of a rapid antigen testing strategy. As any lack of adherence would reduce effectiveness and any such rapid antigen testing program would require constant oversight to ensure adherence.

> 41. For these reasons, it is my opinion that mandatory vaccination policies implemented by the City of Toronto present by far the greatest protection from COVID-19, to workers and the public, and should remain implemented.

79. Under cross-examination, Dr. Juni testified that he had no input into the City's Policy, its application, or its consequences. His opinion did not extend to the appropriateness of the enforcement consequences and those were not relevant to the opinion he had delivered.

80. When asked on cross-examination about the environment in which fire fighters work, Dr. Juni commented that transmission of the virus can happen in a short time — over a short lunch or in small rooms with limited ventilation — with the result that there was a "high risk" even if employees were in contact for as little as fifteen minutes.

81. Dr. Juni was also asked on cross-examination to confirm that his opinion did not indicate that other approaches to addressing COVID-19 in the workplace were not appropriate. Dr. Juni commented that problems encountered were attributable to difficulties humans had in sticking to viable practices, adding later that testing was an example of a circumstance in which it was "challenging to maintain adherence" to protocols. He spoke to Rapid Antigen Testing as an area in which adherence to protocols and requirements slip over time and Dr. Juni noted that even hospitals have challenges enforcing adherence to RAT requirements. He reiterated the opinion that RAT is not the most effective approach to combating the virus. Counsel for Local 3888 asked Dr. Juni how difficult it would be to monitor thirteen fire fighters for compliance with RAT protocols, he answered that he did not know, but they would have to be monitored directly. He said that he thought that would be a "logistical challenge" although not impossible.

82. Questioned about the long-term efficacy of the Policy that required no more than two doses of a vaccine and as he had testified to the waning effects of the vaccine or, alternatively, the need for subsequent injections or an individual's being infected in order to have continued protection via vaccination, Dr. Juni referred to the high incidence of vaccination in the general population and in the City's staff. Counsel put to him that there was no evidence that the Policy has had any significant effect in reducing transmission, infection, inability to work and hospitalization. Dr. Juni agreed, but added that the absence of evidence did not establish the absence of the desired effect and outcomes.

83. As for his expressed belief[12] that "a requirement for all City of Toronto employees to be vaccinated against COVID-19 is also an evidence-based policy that protects City of Toronto employees, vulnerable individuals, and Ontarians generally", Dr. Juni agreed that he did not know the City's thinking in introducing the Policy, but stated that he could supply the evidence to support it.

[12] Paragraph 29 of Dr. Juni's report.

Dr. Vinita Dubey

84. In addition to her role as the Associate Medical Officer of Health, Communicable Disease Control for the City of Toronto, Dr. Vinita Dubey is an Adjunct Professor at the Dalla Lana School of Public Health, University of Toronto and an emergency medicine physician at Lakeridge Health Bowmanville. As well as her Medical Doctorate degree from the University of Calgary, Dr. Dubey has a Master of Public Health degree from Harvard University, School of Public Health.

85. Dr. Dubey's will say statement was accepted as an exhibit in the proceedings and she was neither cross-examined nor contradicted regarding any of the following observations:[13]

> 21. Over the course of the pandemic, the MOH [Medical Officer of Health] and TPH [Toronto Public Health] have provided detailed and updated evidence-based guidance and recommendations in response to evidence on COVID-19 and prevailing epidemiological trends. Workplaces have been identified as a site of COVID-19 transmission through case and contact management investigations and outbreaks. Accordingly, and despite that TPH's mandate is to provide public health advice rather than occupational health and safety guidance to employers, on August 20, 2021, the MOH strongly recommended that employers implement workplace vaccination policies to protect their employees and the public from COVID-19. The MOH recommended that employers' vaccination policies should require at minimum:
>
> a. Workers to provide proof of their vaccination series approved by Health Canada or the World Health Organization;
>
> b. Unvaccinated employees to provide written proof of a medical reason from a physician or nurse practitioner that includes whether the reason is permanent or time-limited; and
>
> c. Unvaccinated workers to complete a vaccination education course on the risks of being unvaccinated in the workplace.
>
> 29. Toronto has been particularly hard hit by the pandemic and has had some of the highest COVID-19 case, death and ICU admission rates in the province. As of November 26, 2021, there were 182,909 (6,167 per 100,000) COVID-19 infections in Toronto, 11,671 (6.4%) were hospitalized, 2,325 (1.3%) were in ICU, and 3,713 (2.0%) deaths were related to COVID-19. As of March 23, 2022, there were 295,730 (9,972 per 100,000) COVID-19 infections in Toronto, 13,784 (4.7%) were hospitalized, 2,653 (0.9%) were in ICU and 4,129 (1.4%) deaths were related to COVID-19. As noted above, due to limited testing in Ontario starting in December 2021, data with respect to number of COVID-19 infections in Toronto are likely under-representative of the true number of cases.
>
> 36. The Delta variant was the dominant strain of COVID-19 circulating in Toronto from approximately July 2021 to the end of November 2021. It was

[13] Again, I have omitted Dr. Dubey's references to her source materials.

therefore the predominant strain of COVID-19 circulating in Toronto at the time that the MOH issued her recommendation on August 20, 2021, that employers implement COVID-19 vaccination policies. It was also the predominant strain circulating at the time that many employers in Toronto, including the City of Toronto, announced their intentions to make vaccination mandatory for staff. I am aware that the City of Toronto announced its intention to introduce a mandatory vaccination policy on August 19, 2021.

37. The risk of infection with SARS-CoV-2 was particularly acute with the Delta variant, which was more than twice as transmissible as the original strain of the virus. Transmission as a result of the Delta variant occurred quickly between an infected person and many others, especially among the unvaccinated.

38. The risk of hospital and ICU admission after infection with the Delta variant was two to three times higher than with the original strain.

39. Accordingly, Toronto Public Health continued to advise the public, and all those eligible for vaccinations, to receive their full vaccine series so as to prevent and mitigate the risks of the Delta variant and anticipated future waves of COVID-19. Notably, vaccines were widely available in Toronto by June or July of 2021.

40. The science continued to show that vaccinations, while available, were the single best preventive and public health measure against the Delta variant. In addition, other public health and preventive measures were recommended including masking, physical distancing, ventilation, reducing the risk of gatherings (for example, by limiting the size of gatherings), preferring outdoor versus indoor settings, and having many layers of prevention in schools and workplaces.

41. Looking at the period immediately prior to the MOH's August 20th recommendation, it is notable that at the beginning of July 2021, COVID-19 cases began to increase in Toronto, peaking at 1,073 cases during the last week of August.

42. Between July and November 2021, the effective reproductive number increased to a high of 1.2. A reproductive number greater than 1 means that the overall number of new cases is growing in a region. During this time period, there was an increase in community and workplace outbreaks, followed by an increase in school outbreaks at the start of the new school year.

53. As of November 29, 2021, 85.7% of individuals 12 years of age and older in Toronto had been fully vaccinated with 2 or more doses of a 2-dose vaccine series. Each week, this percentage continued to slowly increase. However, there were many who remain unvaccinated. As of March 21, 2022, 89.0% of individuals 12 years of age and older in Toronto have received at least two doses.

56. In light of removing public health measures as we come out of the Omicron surge, vaccination remains the most important public health measure available to combat the pandemic and the illness caused by SARS-CoV-2.

57. TPH is recommending vaccination for the reasons outlined below. In short, the vaccines approved by Health Canada have been conclusively shown to be highly

effective at protecting against severe consequences of COVID-19, and have with few contraindications and severe side effects. Data also demonstrates that vaccines may also assist in reducing virus transmission, even in the case of an Omicron infection (which is much more transmissible than previous variants).

58. The chief purpose of any vaccine, including COVID-19 vaccines, is to prevent or reduce serious illness, hospitalization and death. Vaccines approved by Health Canada are highly effective at achieving these goals. They have been shown to dramatically decrease the risk for severe illness, including hospitalization and death from a COVID-19 infection, across the variants that have appeared to date including Alpha, Delta and Omicron. Fully vaccinated individuals are much less likely to die from COVID-19 compared to someone of similar age who is unvaccinated.

59. Approved COVID-19 mRNA vaccines may also assist in addressing transmission.

60. For example, in the Delta context, there was an 82% reduction in case rates among those fully vaccinated compared to unvaccinated in Ontario. Still, vaccinated individuals carried a risk of "breakthrough" infections, which are more likely to occur when there is a higher burden of COVID-19 infection more broadly or in specific settings (e.g. in a workplace or community).

71. To protect workplaces and keep them safe, Public Health Ontario recommends that workplaces implement a "Hierarchy of Controls" as a comprehensive strategy to reduce the risk of COVID-19 transmission in the workplace. Similar to a pyramid, the most effective control, which is elimination, would be implemented to have the greatest impact. Elimination refers to eliminating the hazard (e.g., the risk of serious illness, hospitalization and death), such as through vaccination. The full hierarchy includes:

- Elimination: Eliminate the hazard (e.g. vaccination to reduce community transmission, working from home)

- Engineering: Remove/block the hazard at the source (e.g. physical distancing through workspace design, physical barriers such as plexiglass booths, ventilation/filtration).

- Administrative: Optimizing the movement of workers to minimize potential contact with the hazard (e.g. staggered shifts, breaks, and meals; work station spacing; work from home policies, limited hours, virtual meetings, paid sick leave, screening/reporting).

- Personal Hygiene: Worker actions or behaviors to reduce hazard exposure (e.g. clean hands, coughing or sneezing into the sleeve, masking for source control).

- Personal Protective Equipment (PPE): e.g. surgical/procedure

masks, gloves, eye protection, gowns or coveralls.

> 73. In the context of the Delta variant, vaccines were the single most important measure to protect employees and residents of Toronto from infection, hospitalization, ICU admission and death due to COVID-19, as part of a comprehensive public health strategy.
>
> 74. In the context of the Omicron variant, vaccines remain the single most important measure to protect employees and residents of Toronto from the serious consequences of COVID-19 and, as outlined above, may also help limit transmission of the virus both in the workplace and in the community, thereby protecting vulnerable persons such as those who cannot be vaccinated and those with weakened immune systems.
>
> 75. Requiring employees to be fully vaccinated means that employers are also well prepared to protect their employees from future variants and/or waves of COVID-19. In the event a fully vaccinated employee has not received a booster dose, they still receive considerable protection from serious illness, hospitalization and death through full vaccination. In addition, being fully vaccinated means when they are eligible for a booster dose and receive it, they will enjoy further protection from that dose within 7 days.
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> 82. Experience over the course of the pandemic to date clearly demonstrates that COVID-19 vaccination mandates reduce vaccine hesitancy and improve vaccination rates.

The City's Submissions

— Foundational Topics

86. The City opened its submissions reminding me that this was a health and safety policy case in which the issue for determination is whether the Policy was a reasonable exercise of management discretion. Its position was that both the mandate and the enforcement mechanism were reasonable, and that the Association bore the onus of establishing the contrary in each context.

87. In addition to the matter of onus, counsel for the City identified as additional "foundational topics" the necessity of my deferring to the discretion of management and to recognize the employer's strict duty under the *Occupational Health and Safety Act,* R.S.O. 1990, c. O.1 ("*OHSA*").

88. The City contended that management was in the best position to assess what was necessary for its organization and I ought not step into its shoes to substitute other views. In that context I was referred to the decision of the Newfoundland Court of Appeal in *Western Avalon Roman Catholic School Board v. Newfoundland Assn. of Public Employees*, [2000] N.J. No. 206, 2000 NFCA 39 (CanLII) ("*Western Avalon*") for the proposition that management were not required to be correct in the exercise of a reserved discretion. The essence of the ruling relied upon by the City was as follows:

> [38] . . . However, this Court has not been referred to any case which would require management to meet a standard of correctness in the exercise of a discretion. Indeed, it is hard to conceive of circumstances where the exercise of discretion would be required to be correct in the result. So then, when the arbitrator stated that management's exercise of its rights must not be inconsistent with the "principles and tests of correctness and reasonableness," that was a patently unreasonable interpretation of the law. Even if one accepted that it was not patently unreasonable to require reasonableness of the employer, the question before the arbitrator would not have been whether the School Board made the best management decision. The question would have been whether the Board had made a reasonable decision. The arbitrator was not, under either of the approaches discussed above, free to substitute her view of what was the best way for the Board to implement the 10-hour reduction in work at the school unless the Board's decision was unreasonable on the doctrine of fairness or lacked the requirements of good faith and non-discriminatory manner on the traditional view.
>
> [39] The task of an arbitrator when examining an exercise of a discretionary right is different than when interpreting a collective agreement. When interpreting an agreement, the object of the exercise is a declaration of the intention of the parties as expressed in the words used in the collective agreement. The arbitrator decides what interpretation the parties must live with. In contrast, when examining the exercise of discretion by management, the object is not to have the arbitrator decide how the discretion should have been exercised but to determine whether management's exercise of its discretion is within the range of reasonable responses to the circumstances, if one accepts the reasonableness test, or simply whether the decision was made bona fide and without discrimination, if one follows the traditional test.

89. The City noted that *Western Avalon* was applied in *Newfoundland and Labrador Teachers' Assn. v. Western School District (Travel Allowances Grievance)* [2011] N.L.A.A. No. 8, a labour arbitration decision, in *United Food and Commercial Workers, Local 1400 v. Extra Foods, a Division of Loblaws Inc.,* [2012] S.J. No. 125, a decision of the Saskatchewan Court of Appeal upholding an arbitration award, in *Canadian Blood Services v. United Nurses of Alberta, Locals 155 and 411(Grievance 150422 and 15047, Shared Accommodations)*, [2019] A.G.A.A. No. 9, and in the decision of the Supreme Court of Canada in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*, [2013] S.C.R. 458 ("*Irving Pulp & Paper*") in which the Court recognized the familiar tests promulgated in *KVP Co. v. Lumber & Sawmill Worker's Union, Local 2537 (Veronneau Grievance)*, [1965] O.L.A.A. NO. 2 ("*KVP*") and approved the "balancing of interests" approach by arbitrators confronted by issues such as those presented by the Association's grievance.

90. As for its third foundational topic — its duties under the *OHSA* — the City argued that while the Province had left the determination of vaccination policies to employers, the duty under clause 25(2)(h) of the statute to take every precaution reasonable in the circumstances for the protection of workers married with the requirement of reasonableness called for by *KVP*. The statutory obligation was recognized to apply to deal with a variety of situations not otherwise provided for and had led the courts to go so far as to describe employers as the "insurer of health

and safety in the workplace". The City submitted that the circumstances inform what is reasonable and urged me to have close regard for the strict duty imposed by clause 25(2)(h).

91. The authority relied upon by the City is the decision of the Court of Appeal for Ontario in *R. v. Wyssen*, [1992] O.J. No. 1917 ("*Wyssen*"). Referring to the provisions of what was then section 14 of the *OHSA*, the Court stated:

> Section 14(1) imposes on an employer what s. 14(2) properly describes as a "strict duty". An "employer" is obliged by s. 14(1) to "ensure" that the "measures and procedures" prescribed by the Regulations are carried out in the "workplace". The relevant definition of "ensure" in the Shorter Oxford English Dictionary, (3rd ed.) is "make certain". Section 14(1), therefore, puts an "employer" virtually in the position of an insurer who must make certain that the prescribed regulations for safety in the workplace have been complied with before work is undertaken by either employees or independent contractors.
>
> The duty imposed by s. 14(2)(g) is even more sweeping, requiring an employer "to take every precaution reasonable in the circumstances for the protection of a worker". The duties imposed on an "employer" by s. 14(1) and (2) are undeniably strict and, in my opinion, non-delegable. The legislature clearly intended to make an "employer" responsible for safety in the "workplace".

92. Counsel for the City argued that the Court's reference to the employer's duties being "non-delegable" established that the City's obligations could not be passed off to its employees.

93. The City asserted that the precautionary principle justified the position it had taken in introducing and applying the Policy. In that context, Mr. Solomon referred to the decisions of the Ontario Labour Relations Board ("OLRB") in *Ste. Anne's Country Inn and Spa v. A Director under the Occupational Health and Safety Act,* 2020 CanLII 64749 (ON LRB) and in *United Food and Commercial Workers Canada, Local 175 v. Hazel Farmer*, 2020 CanLII 104942 (ON LRB) ("*Hazel Farmer")*, an appeal seeking the application of clause 25(2)(h) of the *OHSA* to have the Board direct a nursing home to install a plexiglass barrier at its nurses' workstation.

94. The Board in *Hazel Farmer* tied the precautionary principle to the pandemic, noting as follows:

> 37. In the specific context of the COVID-19 pandemic, section 25(2) (h) gives effect to the precautionary principle that there is an obligation to take all reasonable measures in the circumstances to protect the health and safety of workers. In the context of an epidemic caused by a new and previously unknown virus, the precautionary principle was given voice to by Mr. Justice Campbell following the SARS crisis in Ontario and was as described by Justice Morgan in *Ontario Nurses Association v. Eatonville/Henley Place*, 2020 ONSC 2467 (CanLII) as follows:
>
> > An important recommendation of the Commission of Inquiry chaired by Justice Archie Campbell in the wake of the SARS outbreak of 2003 – an outbreak of a virus related to COVID-19 - is that the precautionary principle is to be put into action in order to prevent unnecessary illness

> and death. As explained by Justice Campbell, this principle applies where health and safety are threatened even if it cannot be established with scientific certainty that there is a cause and effect relationship between the activity and the harm. The entire point is to take precautions against the as yet unknown.

95. Counsel also noted that the Board in *Hazel Farmer* had regard for the parties' references to the same hierarchy of hazard controls applied here by Ms. Anderson and the City, and the proposition that clause 25(2)(h) of the *OHSA* gives effect to the precautionary principle relied on by the City.[14]

— Key Submissions on the Merits

96. In its "key submissions on the merits", the City first argued that "mandating vaccines for fire fighters is a reasonable health and safety precaution in all of the circumstances".

97. Mr. Solomon reviewed those circumstances extensively — including recognition of the pandemic as a "once in a century" global event, to the state of emergency declared by Toronto's Mayor, the persistence of variants of concern as testified to by the expert witnesses, and transmission data in TFS and the City's broader workforce.

98. In short, the City contended that the Association's position regarding the numbers and timing of infections in the TFS relied upon flawed premises that the justification for the mandate turned on the percentage of workplace participants and infections and that an employer is required to wait for those numbers "to be bad enough to justify its taking action". Those positions did not accord with *OHSA's* clause 25(2)(h) and the fact that the Policy applied to all City employees, many of whom were reflected in the exposure and infection data submitted in evidence. Moreover, the nature of the fire fighters' roles and conditions — living in congregate settings twenty-four hours at a time — were said to amply justify the mandate.

99. In keeping with the precautionary principle, Mr. Solomon asserted, the City had adopted the Policy and applied it "universally" because it was the most effective risk reducing measure, while all of the other precautions and requirements (even though not a substitute for vaccination) were continued in place.

100. Relying on the scientific evidence that vaccines are safe and effective, the City argued that vaccination was the single, most important protective measure and the only elimination control that can protect employees against the risks of contracting and transmitting the virus, hospital admissions, ICU admissions, and death. The expert evidence established the "very high degree of protection" enjoyed by the vaccinated while the recent lifting of public health restrictions resulted in "the risk for an unvaccinated person to get infected had never been greater during the entire pandemic". Moreover, counsel submitted that obtaining the two doses required by the Policy "set the workforce up to be well protected in the face of future waves and variants".

[14] *Hazel Farmer*, at paras. 20 and 36-37.

101. The City observed that while its Policy did not require employees to have booster vaccination, it had apprised employees of COVID-19 vaccine third dose eligibility in early December 2021 and had encouraged them to get a third dose as soon as possible. Counsel observed that employees could not be "boosted" without first having the two doses required by the Policy.

102. In sum, the City's position was that the evidence was overwhelming in establishing that vaccination was the best protection during the Delta wave in which the Policy was introduced.

103. The City contended that the enforcement mechanism for its mandate was shown to have been necessary in order to get a number of fire fighters to comply with the Policy. Counsel referred to the evidence that fifteen fire fighters initially suspended for non-compliance subsequently complied with the Policy, avoided termination, and were reinstated. Moreover, five others had provided proof of compliance at the meetings held to review their status; they continued on staff and on shift.

104. Mr. Solomon referred to the evidence of Dr. Dubey (at paragraph 82 of her will say): "Experience over the course of the pandemic to date clearly demonstrates that COVID-19 vaccination mandates reduced vaccine hesitancy and improved vaccination rates." For his part, Dr. Juni commented on cross-examination that vaccination rates increased when vaccination passports were introduced. Accordingly, it was submitted, I should accept that the mandate increased compliance. Given the experience in TFS — with thirteen of approximately three thousand fire fighters terminated due to their non-compliance — it was to be concluded that the City's mandate had a dramatic effect on TFS employees' uptake of vaccination in 2021.

105. The City maintained that, in the context of its obligations under the *OHSA*, the mandate was a reasonable precaution that it was duty bound to implement. I was reminded of the considerations testified to by Ms. Anderson and admonished not to interfere with the Policy as it emerged from the process she described. The Policy was characterized as a reasonable precaution in the context of the extraordinary circumstances of the pandemic and the fire fighters' environment.

106. The City's second key submission was that it "reasonably concluded that employees found to have failed to comply engaged in culpable misconduct warranting a disciplinary response."

107. The City's evidence included documented discipline imposed on employees for breach of health and safety policies. Mr. Solomon argued that employees do not have discretion to decide not to comply with health and safety policies and referred to *Wyssen* for the Court's statement of the employer's duties under what is now clause 25(2)(h) of the *OHSA* being "non-delegable". In that context, the City cited the decision in *Canadian Airlines International Ltd. v. C.U.P.E., Local 4045*, 2000 CarswellBC 3152 ("*Canadian Airlines"*). The employer had dismissed the grievor because he had stowed away in a lavatory during a flight. The passage relied upon by the City is as follows:

> 38. Safety in the Commercial Aviation Industry is paramount. The public expects the highest standards, and employees, who have direct responsibility for these high standards, must be the first to obey and enforce them. A breach of these

> standards does not fall within the "no harm, no foul" rule. In other words, simply because nothing actually went wrong, one is not free to argue that little or no discipline ought to be the result. These safety standards are crucial, and simple non-compliance is grounds for discipline. A gross or serious safety violation warrants serious discipline up to and including discharge. Therefore, the Employer's response in this case, is in my view, presumptively the correct response.

108. The City also referred to *Island Tug and Barge Ltd. and CMSG (Reid)*, 2012 CarswellNat 5503 ("*Island Tug*"), an arbitration of a grievance regarding the dismissal of an employee for smoking while a fuel barge was unloading. The City relied on paragraph 76 in which Arbitrator Lanyon agreed that the grievor's conduct amounted to a "gross safety violation" which warranted discipline up to and including discharge, adding: "The Employer's response is therefore presumptively a correct one." He continued:

> As I stated in Lamar Lake Logging v. U.S.W.A., local 1-2171 [2008, 174 L.A.C. (4th) 118 (B.C. Arb.)], June 25, 2008 (Lanyon) more severe penalties may be imposed in respect to infractions concerning health and safety matters. In such circumstances progressive discipline gives way to the seriousness of any breach of health and safety regulations, and as a result, general deterrence is given greater weight.

109. Mr. Solomon cited *Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 364T v. Imperial Tobacco Canada Ltd. (Lambert Grievance)*, [2001] O.L.A.A. No. 565 ("*Imperial Tobacco*"), an arbitration of a grievance regarding the dismissal of an employee for a safety violation involving the misuse of an air gun nailer that resulted in the injury of a worker. Arbitrator Lynk offered the following frequently referred to observations:

> 27. In cases involving the discipline or dismissal of an employee for a safety-related infraction, the arbitral case law establishes a number of guiding principles to judge the appropriateness of the punishment. A non-exhaustive list of the pertinent principles would include the following:
>
> 1. Safety in the workplace is both a stringent statutory obligation and an important industrial relations concern that involves employers, unions and employees. Given the potential consequences, safety infractions are among the most serious of workplace offences.
>
> 2. As the industrial relations party with the pre-eminent control over the workplace, the employer has a legal obligation to provide a safe and secure workplace for its employees. Hand in hand with this obligation is the employer's authority to insist that workers perform their duties in a safe and efficient manner.
>
> 3. Workplace misconduct arising from deliberate, reckless, or negligent behaviour and which results in a potential safety threat or an actual injury is grounds for significant discipline, up to and including dismissal.
>
> 4. There does not have to be a physical injury or actual harm to establish the seriousness of the incident.

5. The mitigating circumstances that an arbitrator will consider in a safety discipline case are those accepted disciplinary elements as listed in Steel Equipment Co. Ltd. (1964), 14 L.A.C. 356 (Reville) and William Scott and Co. Ltd. [1977] 1 Can L.R.B.R. 1 (B.C.L.R.B.). In any particular safety-related offence, the most important mitigating factors are those that will address the probabilities of the grievor repeating the same type of offence.

6. Safety rules have to build in the concept of the duty to accommodate. These rules have to ensure that, while they may be stringent and demanding, they are also they also incorporate concepts of equality that eliminate all forms of discrimination.

110. The City also cited the decision in *City of Calgary and CUPE, Local 709*, 2021 CanLII 134634 (AB GAA) ("*City of* Calgary") in which one of the grounds for the discharge of the grievor was his failure to comply with a directive to wear steel-toed boots. The union acknowledged that the failure to comply with the directive constituted insubordination. The arbitrator concluded that the grievor's "rehabilitative potential is very low if he was to be reinstated" and that the grievor's long service did not outweigh the factors supporting his discharge.

111. The decision in *Hodgkin v. Aylmer (Town)*, 1996 CarswellOnt 4343 ("*Aylmer*"), was relied on by the City as an example of a civil judgment upholding the termination of an employee for his persistent refusal to comply with the requirement that he shave his beard in order to be able to use respiratory equipment in compliance with CSA safety standards. The Court stated:

> 55. In fact it is clear from the correspondence exchanged between January 1993 and March 1993 . . . that the plaintiff did not accept the fact that it was necessary for a person responding to an ammonia leak with self-contained breathing apparatus to be clean shaven. The plaintiff then continued to stand by his position that he was the individual who should respond to an ammonia leak and took the position that it was possible to purchase appropriate equipment to allow him to do so without being clean shaven.
>
> 56. I consider the plaintiff's conduct incompatible with his duties and going to the root of his employment contract with the result that the employment relationship was too fractured to expect the employee to be provided a second chance. . . .

112. Similarly, the City argued, it was reasonable for it to conclude that the employment relationship with a fire fighter who refused to comply with the Policy was at an end.

113. The City relied on *Hunter Rose Co. v. G.A.U., Local 28B*, 1980 CarswellOnt 1217 ("*Hunter Rose*"), for its identification of the bases for disciplinary action in response to insubordination, one of the offences relied on in the City's suspension and termination letters issued to non-compliant fire fighters:

> 22. Insubordination is a common type of disciplinary action in labour relations matters and is considered to be of a serious nature because it strikes at the very heart of an employer's prerogative; the right to manage. Generally, it is felt that the right to order employees to carry out work activities without debate or action which causes a loss of respect is essential to the role of management. In order to constitute

> insubordination in law, it has been held that there are three essential components which must be present in the proven version of events. First, there must be a clear order understood by the Grievor; see *Re Holland Hitch*, 23 L.A.C. 378 (Brant, 1972). Second, the order must be given by a person in authority over the Grievor; see *Municipality of Metropolitan Toronto*, 21 L.A.C. 330 (H.D. Brown, 1970). Finally, the order must be disobeyed; see *Re Holland Hitch*, *supra*.

114. The City further submitted that it was reasonable for it to adopt a consistent enforcement framework — that is, the disciplinary suspension followed by the discharge for cause of non-compliant fire fighters — and that the framework was reasonable in all of the circumstances.

115. Mr. Solomon reminded me that I was not dealing with an assessment of the presence or absence of just cause for the discharge of any of the affected fire fighters, but with the reasonableness of the Policy and of the mechanisms chosen for its enforcement.

116. In that context, counsel referred to Arbitrator Misra's decision in *Chartwell Housing REIT v. Healthcare, Office and Professional Employees Union, Local 2220, UBCJA (Mandatory Vaccination Policy Grievance)*, [2022] O.L.A.A. No. 53, ("*Chartwell*"); Arbitrator Herman's decision in *Bunge Hamilton Canada, Hamilton, Ontario and United Food and Commercial Workers Canada, Local 175*, 2022 CanLII 43 (ON LA) ("*Bunge Hamilton*"); and Arbitrator Wright's decision in *Unifor Local 973 v. Coca-Cola Canada Bottling Limited,* 2022 CanLII 25769 (ON LA) ("*Coca-Cola*").

117. The City characterized the disciplinary process adopted for the Policy as demonstrating a consistent approach to its enforcement that was fair, just and reasonable. It contended that it would be unfair to leave decisions regarding enforcement of the policy to hundreds of managers operating in some forty City divisions and that the scripted approach and instructions provided to managers evidenced a serious and deliberate effort to be fair and consistent in the enforcement while ensuring that individual cases were addressed. Managers were instructed to ask employees to explain why they had not uploaded proof of vaccination by the deadlines established by the City. Those managers were instructed to consult if they believed that an explanation required further investigation.

118. The City noted again that there were five cases arising in the meetings held in which fire fighters had provided proof of vaccination and had returned to work. There were fifteen additional cases in which fire fighters — having complied with the Policy — were ultimately returned to work. The City terminated the employment of the rest and counsel invited me to conclude from the documented meetings that the reasons offered by those individuals for their non-compliance were neither compelling nor reasonable.

119. The City argued that the "very unique" disciplinary response fashioned by Mr. Milloy was appropriate in a global pandemic in which it was judged that it was unsafe for employees who were unvaccinated to attend the workplace; however, the City stressed that while employees who, without reasonable excuse, did not comply were not eligible to work there was no immediate termination and no suspension of a predetermined duration with the result that the consequences were argued to be flexible and self-regulated as they were under the control of the individual employee.

120. Mr. Milloy had testified that a very important health and safety policy was at issue and that failure to comply without a reasonable excuse constituted very serious misconduct for the grounds set out in the City's disciplinary letters. Mr. Solomon submitted that Mr. Milloy and the City had turned their minds to seniority and the relevance of an employee's record, but had concluded that neither would mitigate a failure to comply with the Policy. Rather, employees would be guilty of serious misconduct in their deliberate and ongoing failure to comply. Employees had been given a long period in which to consider their positions and achieve compliance. It was left to them to decide whether they would remain on a disciplinary suspension for the full period to which they were exposed. It was reasonable for the City to conclude that, after all of that, an employee was permanently committed to a position, and would never comply with this health and safety mandate. Accordingly, the City considered that the employment relationship would be at an end and, again, that an employee's seniority and record as an employee could not mitigate the wrongdoing of non-compliance with the Policy.

121. In contrast, the City considered a non-disciplinary leave without pay to be an inappropriate response as there would be no reason to conclude that an recalcitrant employee would ever conform.

122. In contending that it had adopted a consistent enforcement framework, the City addressed the variation in the language used to advise employees of the effects of non-compliance with the Policy. The first expression when the Policy was announced was that employees who did not comply with it "may be subject to discipline, up to and including dismissal." The message from the City Manager on October 6, 2021 (dealing with "next steps regarding the enforcement of the policy") was that employees who had not received both doses "will be suspended for six weeks without pay" starting the week of November 1, 2021. The City Manager's message continued to indicate that after the unpaid suspension non-compliant employees "will be terminated for cause as they will have chosen not to comply with the mandatory vacation policy."

123. The language regarding the suspension phase changed in the message from the City Manager on November 1st — it used "may be" rather than "will be" in speaking to the employee's being suspended "for up to six weeks without pay" — but the second piece remained the same as it stipulated: "if staff members do not provide proof of receiving both doses of a COVID-19 vaccine, their employment will be terminated for cause as they will have chosen not to comply with the mandatory vaccination policy."

124. Mr. Solomon argued that the language of those communications did not support the Association's position that there was no *bona fide* process in place. The City maintained that the language was important to communicate consequences to employees and reminded me that Mr. Milloy had testified that managers were expected to apply fundamental principles of labour relations concerning the application of discipline.

125. Mr. Solomon urged me to look to "what had happened on the ground" rather than the language in the communications in assessing the reasonableness of the City's enforcement mechanisms. The reality, it was suggested, was that employees were provided with a process in which they had an opportunity to make a case to the Employer and the City maintained that there

was no evidence from the Association to establish that the process was unfair. Again, the City insisted that it acted reasonably in adopting a consistent enforcement mechanism.

126. The City's fourth key submission on the merits was that the balancing of interests under the Policy — taking into account the Employer's compelling interest in and duty to protect employees from COVID-19 in contrast to an employee's individual interest — clearly favoured the Employer's position.

127. In that context, counsel for the City reviewed a substantial number of the cases that have been decided in relation to employers' varying approaches to the COVID-19 pandemic and the protection of employees. The City noted that arbitrators have overwhelmingly determined that the interests of the employer prevail. In an exception, the early decision in *Electrical Safety Authority and Power Workers Union,* 2022 CanLII 343 (ON LA) ("*ESA*"), Arbitrator Stout concluded:

> [5] After carefully considering the parties' submissions, I find that the ESA's current Vaccination Policy is unreasonable to the extent that employees may be disciplined or discharged for failing to get fully vaccinated. It is also currently unreasonable to place employees on an administrative leave without pay if they do not get fully vaccinated. *However, that may change as the situation unfolds in the coming weeks and months. I do not find it to be unreasonable for the ESA to require employees to confirm their vaccination status* if the personal medical information is adequately protected and only disclosed with their consent. (emphasis added)

The City distinguished the *ESA* ruling on several factual bases, not the least of which was that the award recorded that "the vast majority of the work that is undertaken by ESA employees has been effectively undertaken remotely". That was not the case for virtually all of the fire fighters here.

128. Mr. Solomon argued that *Ontario Power Generation and The Power Workers Union,* (unreported, November 12, 2021) ("*Ontario Power Generation*") supported the City's position. There Arbitrator Murray dealt with several issues, one of which touched on the treatment of employees who were unvaccinated or who refused to disclose their vaccination status and who would not agree to undergo COVID-19 testing. Arbitrator Murray noted that the employer had indicated its intention to place some employees on an unpaid leave of absence and opined as follows:

> . . . In this situation, where most employees have been vaccinated, and virtually all the rest are willingly participating in the reasonable alternative of Regular Rapid Antigen Testing, employees who refuse to do either can be sent home on an unpaid leave pending completion of the discipline process.
>
> . . . Unlike other occasions when the Company sends someone home pending potential discipline, in these circumstances, it is completely within the control of the employee to decide when to come back to work. All they need to do is to agree to participate in the Rapid Antigen Testing program which is designed to reduce the risk they present to their fellow employees by remaining unvaccinated — a test that has been endorsed by the Chief Medical Officer of Health and other appropriate authorities as being safe and effective. I view this as sensible [*sic*] and necessary part of a reasonable voluntary vaccination and testing program.

. . .

> The Company has given employees who are sent home without pay 6 weeks to consider whether they are willing to partake in the testing regime like so many of their colleagues. I think it is important for them to understand that, in my preliminary view, in the context presented by this global pandemic, when lives of co-workers are at risk, unvaccinated individuals who refuse to participate in reasonable testing are, in effect, refusing of their own volition to present as fit for work and reduce the potential risk they present to their co-workers. The Company has made it clear that termination of employment at the end of the 6-week period will typically occur. It is important for those individuals who are fired for choosing to not be tested to understand that they are very likely to find the termination of employment upheld at arbitration. Effectively, employees who refuse testing will likely will [*sic*] have made a decision to end their career with this Company.[15]

129. In *Bunge Hamilton*, Arbitrator Herman dealt with a grievance in which the union asserted that the employer's COVID-19 vaccination policy "violates employee personal privacy/personal information and employee privacy rights". The employer was obliged under the terms of its property lease with Hamilton Oshawa Port Authority ("HOPA") to conform to a vaccination policy that required "all employees of companies located at the port . . . to be fully vaccinated by January 24, 2022" and, further, that employees were to provide attestation of vaccination via HOPA's website. If employees failed to comply with the attestation requirement, the HOPA policy would not permit their entry onto its property until such time as they could attest to their being fully vaccinated. The employer incorporated the attestation requirement in the policy it applied to its employees.

130. Arbitrator Herman found the requirement to disclose vaccine status to be reasonable. He explained that "management can generally establish rules that require the production of employees' medical information if necessary in order to protect the health and welfare of other employees, which would be the case here". He added that "vaccinated employees working at the facilities and others who entered those facilities from time to time are entitled to be aware of whether unvaccinated persons are working on site and within their vicinity." Moreover, he considered "the intrusion upon an individual's privacy with respect to the disclosure of personal health information" to be "relatively minimal", adding "employees are only being asked to reveal their vaccine status, and nothing more concerning their personal health". Arbitrator Herman also noted that, since they were required to be fully vaccinated in order to enter the property, employees would be aware of individuals' vaccine vaccination status if they were continuing to work after January 24, 2022. He commented that the vaccine policy of the employer provided a reasonable period of time for employees to attest to their status and that the disclosure was limited to Facility Manager and HOPA.[16]

131. The City cited *Hydro One Inc. and Power Workers Union* (unreported, January 31, 2022) ("*Hydro One Inc*") for the following by Arbitrator Stout:

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[15] The decision is unpaginated and the paragraphs were not numbered. These appear on the fifth page of the text.

[16] Bunge Hamilton, at para. 24.

> [11] I am also of the view that prohibiting employees from attending work if they do not provide proof of vaccination or a negative COVID-19 RAT is fair and reasonable in the circumstances of this pandemic. Hydro One is complying with their obligations under the *Occupational Health & Safety Act*, to take reasonable precautions to protect the health and safety of their employees and the public that they serve. The policy is a reasonable compromise that respects employee rights and balances the various important interests.

132. The City also referred extensively to the decision of Arbitrator Mitchell in *Power Workers Union v. Elexicon Energy Inc.*, 2022 CanLII 7228 (ON LA) ("*Elexicon*").

133. Arbitrator Mitchell summarized his rationale for upholding the employer's policy requiring vaccination by its employees to be reasonable in the circumstances of the case — "particularly as it requires a small minority of unvaccinated employees to become vaccinated with three doses of the vaccine and requires the large majority of employees with two doses of the vaccine to become vaccinated with the third or booster dose" — as follows:

> 6. To summarize, the first essential reason for my finding is that all employees have the right by law to a safe workplace and the Employer under the law has a duty to take every reasonable precaution in the circumstances to that end. Here vaccinated employees are at less risk of becoming infected with the Omicron virus than are unvaccinated employees, and the more likely employees are to become infected, the more likely they are to transmit the disease to others. The Union's argument that there is no evidence vaccinations will be more effective in preventing the spread of Omicron, even in conjunction with testing, masking, and distancing, than those measures alone without vaccination, is inconsistent on these facts with the precautionary principle which justifies that action be taken to protect employees where health and safety are threatened "even if it cannot be established with scientific certainty that there is a cause and effect relationship between the activity and the harm. The entire point is to take precautions against the as yet unknown": *Ontario Nurses Association v. Eatonville/Henley Place*, 2020 ONSC 2467 (CanLII).
>
> 7. The second reason the policy is reasonable is that the Employer has the responsibility of providing essential services, namely the transmission of electricity in the community, and must assure that it has a workforce that can provide the necessary services. The enormous transmissibility of the virus and the scientific data that third doses of the vaccine decrease significantly the likelihood of severe disease, means it is reasonable for an employee of an electrical utility with two doses to be required to have a third dose and for unvaccinated employees to have three doses to attempt as much as possible to preserve the health of the workforce.
>
> 8. I have also found, however, that the policy is not reasonable at this time as it applies to unvaccinated employees who have been working exclusively from home and for whom there is no expectation of a return to the office until April at the earliest, or to employees who work exclusively outside or who can be accommodated such they can work exclusively outside.

134. The City referred as well to Arbitrator Kaplan's decision in *Toronto District School Board v. CUPE, Local 4400*, 2022 CanLII 22110 (ON LA) ("*TDSB*"), dealing with a policy that

provided for non-disciplinary leaves of absence without pay for employees who failed to conform to the Board's vaccination mandate. Arbitrator Kaplan wrote as follows concerning the application of the precautionary principle and the rejection of a mechanism less effective than vaccination:

> 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 are RATs in reducing the risk of becoming infected and spreading COVID-19.[17]

135. In *Chartwell*, Arbitrator Misra dealt with four long-term care homes and bargaining unit staff who were to go on unpaid leaves if not fully vaccinated by October 12, 2021. The employer's policy also indicated that employees who failed to comply with its policy might have their employment terminated. The Province had made COVID-19 vaccinations mandatory for all staff working in long-term care homes, subject only to authorized medical exceptions, by Ministry directives that staff who chose not to provide proof of vaccination or proof of a valid medical exemption would not be able to attend a long-term care home to work.

136. Arbitrator Misra noted that the union advised that sixteen bargaining unit employees were put on an unpaid administrative leave of absence due to their failure to get vaccinated or to provide proof of a medical exemption. Then, in October 2021, the employer advised the union that it was going to be moving to the disciplinary stage of its mandatory vaccination policy and that employees on leaves of absence would be notified that their employment would be terminated if they were not fully vaccinated by December 10, 2021.

137. Chartwell Residences began terminating the employment of non-compliant staff and took the position that it had just cause for termination as a consequence of the employees' failure to comply with its mandatory vaccination policy and the Ministerial Directive regarding COVID-19 vaccinations.

138. Arbitrator Misra was able to say in *Chartwell* that the mandatory nature of the employer's policy was not a live issue because of the Ministerial Directive requiring vaccination. Accordingly, there was no dispute that the mandatory nature of the vaccination policy implemented by Chartwell was reasonable.

139. Nevertheless, the union's case was that the nature of the employer response for non-compliance with the policy was unreasonable to the extent that it resulted in termination of employment. It argued that there was no legitimate or important management interest in requiring the disciplinary response of termination when the policy had already had and continued to have the unpaid administrative leave of absence penalty for non-compliance.

[17] *TDSB*, at pp. 29-30.

140. Counsel for the City distinguished the inappropriate approach taken by Chartwell in that it had married a disciplinary discharge and a prior non-disciplinary unpaid leave in response to the same employee conduct.

141. In *Coca-Cola*, Arbitrator Wright dealt with a policy that required employees to be fully vaccinated with two doses of an approved vaccine by January 1, 2022 or face workplace repercussions that *might* bring disciplinary consequences, including termination. On January 12, 2022, the company advised employees that effective January 31, 2022, all employees not vaccinated would be placed on an indefinite unpaid leave. At the time Arbitrator Wright wrote, no bargaining unit employees had been disciplined or terminated for non-compliance with the policy, but a number of non-compliant employees had been placed on unpaid leaves of absence. Arbitrator Wright found that the employer's mandatory vaccination policy established a reasonable balance between an employee's interest in privacy and bodily integrity and the employer's interest in maintaining the health and safety of the workplace. He wrote: "Given the context, I find that the company acted reasonably when it added the further protocol that unvaccinated employees be put on an unpaid leave of absence effective January 31st, 2022."[18]

142. In *BC Hydro and Power Authority and International Brotherhood of Electrical Workers, Local 258,* 2022 CanLII 25764 (BC LA) ("*BC Hydro*"), Arbitrator Somjen addressed a policy requiring employees to be fully vaccinated against COVID-19 before January 10, 2022 with the further indication that those who failed to comply would be placed on an unpaid leave of absence until such time as they could prove a vaccination. The policy also stipulated that the employer would regularly review the status of all employees placed on unpaid leaves of absence pursuant to the policy and that those employees who remained unvaccinated "may be subject to discipline up to and including termination of their employment". None of the IBEW bargaining unit employees had been terminated for non-compliance with the policy, but forty-four were on unpaid leave under it.

143. Arbitrator Somjen's conclusions were as follows

> 69. Having considered the interests of the 44 employees, BC Hydro, its employees, customers, contractors in the public, I conclude that the Policy is reasonable. The interests that led to the Policy outweigh the significant intrusion on the interests of the 44 employees. This result is consistent with the decision in *Elexicon* where a similar conclusion was reached . . .
>
> 70. This case is similar to the *Elexicon* decision for various reasons but particularly because BC Hydro is an essential service provider and the employees in the bargaining unit cannot generally work remotely, with little contact with others as was the case in *ESA*. The same distinctions from the *ESA* case were also noted in the *Elexicon* case . . .

144. As for the disciplinary aspect of the policy in *BC Hydro*, Arbitrator Somjen asked: "Since I have upheld the Policy as reasonable, what does the possibility of discipline add to

[18] *Coca Cola, supra,* at para. 35.

resolving the employer's health and safety concerns?"[19] He concluded that the sentence in the policy referring to discipline for continuing to be unvaccinated was unreasonable "at present and should be struck from the Policy", noting: "The employer may still consider discipline in cases where an employee's conduct warrants it, other than remaining unvaccinated."[20]

145. Counsel for the City noted that *BC Hydro* was a similar to *Chartwell* in that it presented what he referred to as "an incoherent approach" of the employer's starting with a non-disciplinary response in the unpaid leave of absence and progressing to a disciplinary response or at least the possibility of a disciplinary response in relation to the same alleged misconduct on the part of the employees. In Mr. Solomon's submission that was entirely different from the circumstances before me in that the City has been consistent from the outset. Its enforcement mechanisms were always premised on a disciplinary response and, in that regard, the City had never wavered.

146. In *Canada Post Corporation and Canadian Union of Postal Workers*, (unreported, April 27, 2022) ("*Canada Post 2022*"), Arbitrator Joliffe dealt with a mandatory vaccination policy that required employees to attest to their vaccination status and provided that those who were unwilling to be fully vaccinated would be placed on leave without pay. CUPW took the position that the policy was unreasonable and ought not to have been implemented.

147. Arbitrator Joliffe referred to "well-documented consequences of the COVID-19 pandemic across the postal system", to its having become "hugely disruptive of the Corporation's operations", and its unquestionable impact on the overall employee safety across the mail processing, collection and delivery system.[21] He concluded that the policy was "a reasonable exercise of management rights and responsibilities under the collective agreement, and pursuant to the employer's obligations under the *Canada Labour Code*."[22]

148. In addressing the balancing of interests in *Alectra Utilities Corporation*, 2022 CanLII 50548 (ON LA) ("*Alectra*"), Arbitrator Stewart recognized the significant effects on employees placed on unpaid leave, but found that those were necessarily subordinated to the employer's interests and obligations in protecting the health of those in the workplace. The City urged me to follow her analysis.

The Association's Submissions

149. Counsel for the Association asked at the commencement of his submissions whether there has been a case in which an arbitrator has considered a policy addressing this COVID-19 or another challenge where the employer's initial response is the suspension of an employee followed by discharge for culpable misconduct. The Association contended that everything the City had put forward was to be carefully considered for what it was, a "unique construct".

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[19] *BC Hydro,* at para. 77.

[20] *BC Hydro,* at paras. 86-87.

[21] *Canada Post 2022,* at para. 86.

[22] *Canada Post 2022,* at para. 97.

150. As will be seen in the following paragraphs, the Association returned to recurring themes and issues throughout its submissions. At the outset, the Association urged me to be cautious in accepting the City's reliance on "evolving circumstances", noting that, having implemented the Policy, the City had done nothing thereafter with respect to significant shifts by the Provincial and municipal governments to lift mandates.

151. The Association did not dispute that a policy requiring vaccination is reasonable — to that point; however, fashioned as it was and as it has been applied to Local 3888's members, the City's policy was argued to have become unreasonable. The Association argued that a policy that was unilaterally imposed and included mandatory suspension and termination could not be found to be reasonable.

152. Counsel for the Association reiterated its position several times throughout his submissions: The Policy was flawed and undoubtedly unreasonable in that its enforcement mechanism relied on the automatic determination of culpable misconduct and termination. Accordingly, the Association argued, the determination ought to be that the discharges of its members could not be allowed to stand.

153. The Association acknowledged the fact and the significance of the pandemic, that the recommended vaccinations were safe and effective, and that a vaccination policy was required. However, the unreasonable disciplinary consequences relied upon by the City were unreasonable and could not be accounted for or supported on the grounds of the Policy's being a necessary health and safety measure.

154. The Association objected that the City had given no consideration to whether its policy was appropriate in each of the numerous bargaining units and employee groups affected by it or to whether transmission data available to it at the time of implementation could justify its introduction. Rather, the Association asserted, the City had proceeded to and with its decision without an evidentiary basis — entirely distinguishing this matter, for example, from the situation assessed by Arbitrator Wright in *Coca-Cola*.

155. Mr. Goldblatt maintained that the Policy was both coercive and punitive — as well as unreasonable in its attempt to address all employees with the same mandate rather than with measures that were appropriately developed and applied. I was referred to the Court's endorsement in *Irving Pulp & Paper* of the balancing of interests approach and of the need to consider all of the surrounding circumstances and assessing whether "any less intrusive means" were available to the City. The Association's position was that it simply could not be said that the only way to address this issue was the disciplinary route of suspension and termination adopted by the City.

156. In that context, the Association pointed to the significant change in the City's position from the first expression of its intended enforcement of the Policy — which referred to the *possibility* of a non-compliant employee's being disciplined up to and including termination of employment — to the adoption of the enforcement mechanism identified and put in place on October 6, 2021 providing for the *certainty* of suspension and of a subsequent termination of employment for any non-compliant and unexempt employee.

157. Given that Mr. Milloy testified that he did not hold the pen when it came to the announcement of the Policy and the enforcement mechanism that was to be used — incorporating the words that a non-compliant employee "will be suspended" and "will be terminated for cause" — and given that neither Mr. Milloy nor Ms. Anderson had any involvement with the disciplinary process affecting individuals, the City's case was said to be deficient in failing to account for the bases for the options adopted and the rejection of options not adopted and the considerations not considered.

158. The Association submitted that there was no information provided by key deciders as to why the change had been made from "may" to "will" with reference to discipline, suspensions and terminations. The Association contended that it was absurd to assert that the Policy did not change from introduction to early October in that respect. Neither Ms. Anderson nor Mr. Milloy — nor indeed anyone on behalf of the City — had information to establish how or why disciplinary suspensions and terminations were required in order for the City to accomplish its objectives in reducing workplace transmissions or how disciplinary suspensions and terminations were "the less intrusive means available to address its concerns."

159. Counsel for the Association devoted substantial attention to a review of the documentary and other evidence with respect to employee exposures, lost time, and other incidents involving workplace transmission or anticipated workplace transmission of COVID-19, particularly in TFS. Mr. Goldblatt referred several times to the evidence of Dr. Juni who considered the fact of there having been only one lost time claim in the Local 3888 bargaining unit in one period of five months in 2021 to be "tremendous". Counsel emphasized too that the TFS experienced a greater number of lost time incidents after the removal of unvaccinated fire fighters in November 2021 than in the prior period.

160. Mr. Goldblatt submitted that the data produced with respect to the experience in the Local 3888 bargaining unit compared very favourably to the data reflected in various decisions submitted in the course of argument. Moreover, he noted that the experience in TFS and in the bargaining unit compared very favourably to other City divisions, yet all were treated without differentiation and subject to the same mandate. The Association concluded that the data did not support the need for a mandatory vaccination policy in this bargaining unit, did not support the need to remove employees in this bargaining unit from active service, and did not support the need to terminate the employment of individuals in this bargaining unit. The Association contended that the TFS safety specific precautions were working and argued that the higher number of lost time claims in the bargaining unit after the removal of unvaccinated fire fighters was evidence that the Policy did not work in controlling transmission.

161. Mr. Goldblatt referred to the evidence that fifty percent of the calls attended to by fire fighters were medical calls, asserting that to be indicative of fire fighters being used to dealing with communicable diseases and using PPE. He also argued that the City had avoided the experience of significant numbers of transmissions as recounted, for example, in *Coca-Cola* by the early application of protocols that had proved to be effective. Ms. Anderson had testified that there had been no change between August 2021 and the end of September 2021 and therefore, counsel submitted, there had been no justification for the significant change in the City's approach.

162. The Association contended that the City's enforcement process was "not remotely minimally impairing". It stressed that the precautionary principle did not require termination of unvaccinated employees and noted that none of the authorities cited stood for the proposition that the precautionary principle required termination of employment at first instance.

163. The Association referred me to Arbitrator Mitchell's comments at paragraph 97 of *Elexicon* — where he agreed with Arbitrator Stout regarding the reasonableness test in *KVP* fitting neatly with the requirements for precautions measures to be taken under clause 25(2)(h) of the *OHSA* — and to the lengthy excerpt from the *Hazel Farmer* decision he reproduced in *Elexicon*.

164. Mr. Goldblatt also referred me to the discussion at paragraph 14 in *ESA* about the importance of context and in paragraph 40 where Arbitrator Stout differentiated the context in *United Food and Commercial Workers Union, Canada Local 333 and Paragon Protection Ltd.* (unreported, November 9, 2021) on various grounds, including the requirement in that collective agreement for Paragon's security employees to receive any specific vaccination required at an assigned site.

165. The Association noted Arbitrator Jolliffe's reference in *Canada Post 2022* to the level of operational issues there which were worse than those faced by other employers and unlike anything alluded to in TFS. Arbitrator Wright's reference in *Coca-Cola* (at para. 27 *et seq*.) to the importance of context in assessing the reasonableness of a workplace rule or policy was apposite given the development by that employer of a significant evidentiary base for the need to add to existing protocols in response to adverse experiences.

166. Mr. Goldblatt addressed the need to consider the actual risk of transmission, noting that arbitrators look at various factors — the nature of the workplace and the like — and inviting me to compare the circumstances in *Coca-Cola* where the evidence was that the employer's policy was adopted as other efforts failed to produce acceptable results.

167. The Association argued that the pyramidal hierarchy of controls was a health and safety concept, and as such does not necessarily inform a *KVP* analysis. Counsel reminded me that I am to do a labour relations analysis.

168. Mr. Goldblatt referred to Arbitrator Mitchell's comments in *Elexicon* (at para. 92) in addressing the coercive nature of the Policy and the deep dilemma occasioned employees by the City's approach, referring to a significant financial loss incurred by fire fighters who were suspended and then discharged in circumstances where their livelihood and their families' welfare were put up against their understandable concerns for their bodily integrity. Toronto was identified as an outlier in its approach, exacerbated by the City's giving no consideration to collective agreement provisions relating to leaves of absence or to meeting with Local 3888 in circumstances where there could be no downside to Mr. Milloy's doing so.

169. Counsel returned several times to the proposition that there was nothing in the City's evidence to establish that suspension and discharge were necessary and appropriate measures to achieve the desired result. The precautionary principle did not require the City to terminate unvaccinated employees and the principle could not be used to justify the City's approach to

enforcement of the mandate. Counsel for the Association asked where discharge — as opposed to removing an employee from the workplace if there were no alternatives available for his or her continuation of active service — fits in.

170. The Association noted that the City's approach offered no alternative to the imposition of discipline and no consideration was given to factors that are normative to a decision to discipline. The only question posed to an employee was whether the employee could explain the decision not to be vaccinated. The City failed to consider any other factors — whether there were any mitigating factors, whether the employee could be re-deployed — before deciding to react. The reality was that there was nothing the individual could have said to change the outcome in the absence of vaccination or a verifiable basis for exemption on medical or *Human Rights Code* grounds. In the result, the Association submitted, the Policy ought to be seen to be simply unreasonable for its failure to consider whether a less draconian alternative could achieve the protection of fire fighters, their colleagues, and the public they serve.

171. Mr. Goldblatt reverted to the data as to the low level of transmission in the TFS suggesting that there should be no surprise about the low incidence rate given the very specific information that had been provided regarding the management of the congregate work and living settings experienced by most of the operational fire fighters, ending with a question: "Do we really need a mandatory vaccination policy in Fire?"

172. Counsel noted that in the August 17th presentation there was reference to September 30th determining the approach that would be taken but there was no evidence of any consideration by Public Health to disciplining employees. Moreover, the City's witnesses were said to be vague and unresponsive when asked to address the extent to which data were taken into account in formulating and implementing the Policy.

173. Mr. Goldblatt emphasized that the Association was not arguing about the background and science disclosed by the evidence of Drs. Juni and Dubey, but Local 3888 did note that the doctors were not involved in the development of the Policy, did not address contextual information respecting the TFS, and were not competent to address labour relations circumstances. Neither of the doctors advocated for the consequences of non-compliance with the Policy.

174. The Association referred to Dr. Juni's recognition that the effectiveness of the vaccines was reduced with the advent of the Omicron variant and that, according to counsel, called into question the efficacy of the Policy as the doctor supported a mandatory third dose that is not a requirement of the Policy.

175. Mr. Goldblatt also noted that when he asked Dr. Juni whether the thirteen fire fighters discharged by the City could have continued to work with PPE and other protocols, Dr. Juni responded that it was a difficult question to answer, but he did not say "No".

176. The Association submitted that the effect of the absence of a required booster and Dr. Juni's inability to provide a definitive answer echoed the conclusion in *FCA Canada Inc. v. Unifor, Locals 195, 444, 1285*, 2022 CanLII (ON LA) ("*FCA Canada*") wherein Arbitrator Nairn dealt with the employer's policy that employees and others were required to be fully vaccinated with two doses of a two-dose vaccine in order to attend FCA Canada worksites. Employees who were

not fully vaccinated or who did not disclose their vaccination status by December 31, 2021 were placed on unpaid leaves of absence. Arbitrator Nairn also noted that the policy "further stipulates that employees *may* be subject to discipline up to and including termination of employment for non-compliance", and that, while employees had been placed on unpaid leaves, no employees had been terminated".[23]

177. Arbitrator Nairn concluded her analysis of the employer's policy as follows:

> 96. This decision is being written while COVID-19 restrictions continue to change. I take judicial notice of the federal government announcement of June 14, 2022, lifting vaccine mandates for federal public servants and federally regulated transportation workers effective June 20, 2022. Both levels of government have concluded, not without controversy, that their vaccine mandate programs are not currently required to meet their health and safety objective.
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> . . .
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> 106. The literature confirms that, at this time, no one can predict with any accuracy whether the COVID-19 virus will become more or less virulent over time, only that it will continue to evolve. Epidemiological study will continue to assess the risks of the disease and the development of and benefits and/or risks of then current vaccines, thus helping to inform the determination of whether a workplace vaccine mandate at any point is reasonable. Those evidence-based assessments will inevitably lag behind the virus' evolution, as will an employer's ability to appropriately assess the ongoing reasonableness of a vaccine mandate.
>
> 107. Having regard to all of the above, I find that the Policy when introduced was reasonable and continued to be reasonable in its application. However, after careful review and not without considerable personal reservation, **I hereby find** that a COVID-19 vaccine mandate defined as requiring two doses (of a two-dose vaccine) is no longer reasonable based on the evidence supporting the waning efficacy of that vaccination status and the failure to establish that there is any notable difference in the degree of risk of transmission of the virus as between the vaccinated (as defined in the Policy) and the unvaccinated. Rather, the 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. There is, under the definition in the Policy, no longer a basis for removing unvaccinated employees from the workplace. While the Union would argue that such a conclusion was available in December 2021, I disagree. More evidence was required of both the waning efficacy of the two-dose regimen against Omicron and the relative risks of transmission before that conclusion could responsibly or reasonably be drawn, given the history of this virus. Where matters of health and safety are involved, it is not unreasonable to err on the side of caution.

178. Local 3888 strongly disputed the City's assertion that discipline and discharge were not automatic in the circumstances of its enforcement of the Policy and that was demonstrated to a large degree by the change in how the policy had been expressed and communicated to the affected

[23] *FCA Canada*, at paras. 39-40.

personnel. Referring to Mr. Milloy's evidence that the enforcement mechanism was unique in that it provided "a compliance off-ramp", Mr. Goldblatt commented: "If you don't have the highway, there is no need of for an off-ramp."

179. More specifically, counsel submitted that the evidence established that the ability of managers to apply recognized principles and considerations was fictional and that the steps and end results of suspension and termination were automatic. It was untenable for Mr. Milloy and the City to suggest that the process contemplated discipline in the normal course given that an employees' seniority and records were not available for consideration in ameliorating any response or discipline with respect to their refusal to be fully vaccinated or to declare their vaccination status.

180. There was said to be no nuance in the advice given to managers. There was no mention of discipline in the ordinary course and no mention of the need to consider or the propriety of considering an employee's seniority or record in responding to non-compliance with the Policy. The only question that the managers were to put to the fire fighters in their interviews was: "Why do you not comply?" If the employee could not offer a "compelling reason" the manager was to issue a letter that, in a pro forma manner, set out the City's view that the employee was guilty of insubordination and of undermining an important health and safety measure.

181. The suggestion that the instruction to determine whether there was a compelling reason for an employee's non-compliance was said to be "absolutely misleading" as Mr. Milloy, the creator of the unique approach to enforcement of the City's mandate, could not think of a scenario for the existence of any reason for an employee's refusal to be vaccinated. Mr. Goldblatt put it in argument that if an employee had a pathological fear of vaccination, the employee would need a medical exemption because nothing he or she could say would avoid a fixed disciplinary response in the absence of medical substantiation.

182. Association counsel also noted that Commander Boisseau testified to the effect that he understood that he could not consider any outcome other than suspension and termination. Given his evidence as the City representative in the disciplinary and termination process, there was no basis identified for the proposition that this enforcement mechanism involved discipline in the normal course. Commander Boisseau's role was to find out whether the employee had complied with the Policy; it was not his role to determine whether there was a credible or compelling reason for an employee's refusal to be vaccinated or to reveal his or her vaccination status. Moreover, it was not for him to consider any alternative action that might be taken. Neither he nor the City engaged in any risk analysis associated with an individual's status, work situation or other personal circumstances. The penalty in response to non-compliance was absolute and fixed without regard for anything further. Commander Boisseau was aware of precautions TFS had in place, but he had no discretion to consider those in reacting to a fire fighter's response to his single question.

183. The Association contended that this unique model was distinct from anything reviewed in the cases that had been submitted by these parties. The Association recognized that breach of a health and safety requirement could constitute culpable misconduct, but none of the cases supported suspension and discharge as invariably prescribed penalties.

184. Mr. Goldblatt referred extensively to the decision of Arbitrator Hayes in *Sault Area Hospital and Ontario Nurses' Association*, 2015 CanLII 55643 (ON LA) ("*Sault Area Hospital*") dealing with the hospital's implementation of a "Vaccinate or Mask" policy that required healthcare workers to wear surgical procedure masks for five to six months throughout the annual flu season if they were not vaccinated for influenza.

185. Amongst others, Mr. Goldblatt referred to the following statements by Arbitrator Hayes as applicable here:

> 314. The VOM Policy was introduced at SAH for the purpose of driving up immunization rates. The Hospital pursued a VOM policy despite concerns raised by senior medical staff including the Chief of Staff and the Chief Nursing Executive. The Hospital failed to consult with infectious prevention and control experts on retainer. CEO Gagnon announced that the Policy would be implemented should an immunization rate of 70% not be achieved. There is no evidence of any medical or scientific rationale for such a condition or for the 70% target rate selected.
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> 315. In short, the laudable goal of preventing hospital-acquired influenza by enhancing vaccination rates was advanced by adoption of a VOM policy, what I see as a colourable means of accomplishing a legitimate objective. From the beginning masks were cast as a "consequence" for failure to vaccinate. They were not advanced at SAH as useful instruments for patient safety in and of themselves.
>
> 338. To review the labour relations implications of the VOM Policy does not disregard or discount the medical expertise. It simply recognizes that the medical expertise has a different focus that is incomplete for the purposes of the legal question at issue. While important in assessing what is reasonable, the medical expertise is not controlling in and of itself because it does not engage the labour/human rights/privacy expertise that balances employee rights with scientific information.
>
> 339. It is surely the case that there are better ways of resolving complex policy issues such as this, in which many stakeholders have an interest, but this does not in any way displace or discredit the legitimate role of labour arbitration. It is very likely that the science will evolve and opinions about the prevention and control of influenza disease may coalesce into more of a consensus than has been achieved to date. But, there are lines to be drawn in the meantime. Where their working lives are directly affected, the interests of employees require consideration, and, typically, their unions have recourse to rights arbitration to test judgments that have been made.
>
> 340. *Irving* balancing demands nuance and it is not sufficient to claim that scant, weak, "some", or imperfect data is better than nothing. While the precautionary principle ("reasonable efforts to reduce risk need not wait for scientific certainty") surely applies in truly exceptional circumstances, one could not live in a society where only 'zero risk' was tolerated. It cannot be right that a labour arbitrator should effectively abdicate by simply applying *Dunsmuir*-type deference to expert opinion planted in shallow soil.

186. Mr. Goldblatt argued that here too the Policy had a decidedly coercive aspect, that it was not an appropriate device, and that it was not necessary for the City to fire TFS bargaining unit employees to achieve the end of reducing transmission of COVID-19.

187. Mr. Goldblatt referred to *Liquor Control Board of Ontario v. Ontario Public Service Employees Union*, 2021 CanLII 15607 (ON LRB) ("*LCBO*") (at para. 32) where the Board quoted from *Hazel Farmer* as a compelling discussion and submitted that a variety of precautions were in place that permitted TFS to significantly reduce transmission while continuing necessary public functions and services. Moreover, he observed that TFS continued to change in reaction to what was learned.

188. Nevertheless, counsel submitted, the City went off base by discharging fire fighters and doing so could not be supported as an application of the precautionary principle under which the Employer might have implemented a vaccination policy with alternatives such as RAT, without relying on termination of employment. Mr. Goldblatt stated: "Firing people is not a means of keeping employees safe". He added that the precautionary principle is not a basis for the justification of suspensions and terminations where desired results can be achieved in other ways.

189. Mr. Goldblatt reviewed Arbitrator Somjen's *BC Hydro* decision for its references to *Elexicon* and to note that some employees there were removed from the application of the BC Hydro policy if they were able to work safely without vaccination by working from home, or if outside workers could be insulated from contact with other workers. He commented: "Termination adds nothing to meeting the objectives of the Policy" and reiterated the Association's submission that the City's disciplinary approach was unreasonable in that it went beyond the aim of the Policy and failed to deal with changes, lacked alternatives, and lacked health and safety concerns. The City's case was deficient given the absence of evidence of operational difficulties necessary to show that the Employer could not carry on without doing as provided by Policy. Moreover, the City's ability to function was not benefitted by terminating employees rather than putting them on an unpaid leave and the terminations produced no reduction in infection or transmission.

190. The Association argued that the City was obliged to consider lesser requirements if those can meet its objectives. In that context, the Association referred to the following in *Elexicon*:

> 114. I agree with the Union that if the objectives of a policy can be accomplished through other lesser intrusive means reasonably, those should be considered, and vaccination should not be imposed unnecessarily on those who do not wish it if there are other reasonable options. I have, however, expressed the view that as things stand, compulsory testing is not at the moment a viable alternative to compulsory vaccination, although it may be required in addition. I have determined, however, that the compulsory vaccination policy will not apply in the following aspects:
>
> > (i) These employees have been working remotely since March 2020 and will continue to do so until at least April 2022. In my view it is unreasonable to require employees who can perform all of their duties from home to become vaccinated when they do not need, at the moment, to return to the office. Whether or not the Employer will require the employees to work in the office at some time in the future, or whether it will require them at that time to be vaccinated is unknown and uncertain.

> The situation is dynamic, and it should not be assumed the situation will remain as it is currently. The issue of the applicability of the policy to these individuals can be renewed subsequently if necessary.
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> (ii) The policy should not apply to employees who work entirely outside or who can be reasonably accommodated to work entirely outside. Working outside does not engage the same risks of transmission of the virus that apply to employees working indoors. This caveat essentially applies to linespersons but not the forepersons of linespeople in the bargaining unit who, as I understand it, must work in an office as well as outdoors. I understand that linespersons currently are required to be in garages at the beginning and end of shifts, but I remit the matter to the parties to discuss whether there can be accommodations of that aspect of the unvaccinated linespersons responsibilities. There are a number of ways that might be addressed, and the parties should explore them such that the unvaccinated linespeople do not have to enter Elexicon's indoor premises including the Belleville garage. If the parties cannot resolve this matter, I will remain seized to do so.
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> . . .
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> 118. The policy states employees not complying with the requirement to be vaccinated will be restricted from entering Elexicon property and worksites and will be placed on an unpaid leave of absence. Depending on the circumstances, the policy states an employee may also be subject to disciplinary action up to and including termination of employment. Any such discipline will remain subject to arbitral review. The Employer made clear it was not rushing to discipline anyone. Further, the Union argued strongly that accommodations and alternatives had to be looked at for individual employees for the policy to be reasonable in its application to them. I have found above examples of how the policy would be unreasonable if it applied in certain circumstances such as to employees who have been working exclusively from home (at this time) or persons who worked exclusively outside. There may be other circumstances where reasonable accommodations can be made prior to persons being disciplined. The Union has indicated that it was more than willing to work with the Employer on that basis and I am sure the parties will conduct themselves reasonably. The arbitral process remains in place where the parties cannot agree.

191. The Association distinguished *Fraser Health Authority and British Columbia General Employees' Union*, 2022 CanLII 25560 (BC LA) cited by the City on the grounds that the employer there did not institute a termination policy, but was responding to a community Order it did not promulgate, could not modify, and had no authority to accommodate any employee. Here, the City made its decision and retained the power to change its Policy as had happened recently with Toronto Police Service's dropping of the mandate.

192. The Association referred to the policy reviewed in *BC Hydro* as one of many instances of employers identifying the possibility of discipline and submitted that the City was obliged — but failed — to establish that discipline and discharge were reasonable. The Association noted that in *BC Hydro* Arbitrator Somjen made the point that the employer had achieved its health and safety

goal by removing those who were not vaccinated and adding discipline to that event or situation would not enhance the goal or its achievement.[24]

193. The Association asserted that *Coca-Cola* stood for the proposition that if an employer puts employees on leaves of absence and then terminates their employment just cause principles would apply. Here, however, employees were discharged without regard to a just cause standard and, accordingly, it could not be concluded that the Policy is *prima facie* reasonable in its enforcement mechanism.

194. Mr. Goldblatt referred to Arbitrator Misra's analyses in *Chartwell*. In paragraph 205, Arbitrator Misra identified the necessity to consider whether it is reasonable to include in a vaccination policy the alternative that an employee may be terminated for non-compliance. She noted that Arbitrator Herman in *Bunge Hamilton* upheld the employer's policy given that it did not indicate that employees were being put on a disciplinary suspension or that their employment would be terminated. Rather it indicated that they were being put on an unpaid leave of absence pending a final determination of their employment status, which might include discipline or termination. Then, in paragraph 209, Arbitrator Misra quoted from *Bunge Hamilton* where Arbitrator Herman stated that it was reasonable if not required for an employer to put employees on notice of potential consequences of non-compliance with a rule or policy. Most significantly for the Association were the statements Arbitrator Misra made in *Chartwell* after her review of *Bunge Hamilton* and Arbitrator Jesin's decision in *Teamsters Local Union 847 and Maple Leaf Sports and Entertainment*, 2022 CanLII 544 (ON LA) ("*MLSE*"):

> 212. What is clear from a review of these decisions is that arbitrators have accepted that a mandatory vaccination policy will likely be found to be reasonable in the current COVID-19 context and having regard to employers' responsibilities to maintain a safe and healthy workplace for all employees. They have also found reasonable those policies that included putting employees on notice that if they remain unvaccinated (or those who fail to disclose their vaccination status or don't have a medical exemption) they will be subject to being placed on an unpaid leave of absence, and may be subject to termination of employment. What these decisions have not stated is that termination is an automatic outcome for failure to get vaccinated, and in none of the cases had the Employer in fact enacted any terminations of employment.

It is in that context that counsel for the Association submitted that the City's position is to be distinguished from those cases in which vaccination policies have been upheld.

195. Counsel also referred to the fact that Chartwell had terminated the employment of a number of employees in the affected homes and had requested a ruling explained by Arbitrator Misra as follows:

> 219. The Employer's letters to the fourteen employees who were terminated in December 2021 stated that in Chartwell's view it had just cause to terminate simply based on each employee's non-compliance with the Policy. Based on the evidence

[24] *BC Hydro,* at para. 82.

> regarding the steps that the Employer had taken in giving employees vaccine education, time to consider their situation and to get vaccinated during the leaves of absence after October 12, 2021, along with the various letters advising of deadlines and access to vaccine education, the Employer requested that I provide the parties with a "generic just cause" ruling, to provide guidance to the parties on the "broad based application" of the policy to the fourteen individuals who were terminated from employment. It was seeking some direction about whether, through these actions, it had met the just cause standard. Thus, it is clear that in the Employer's view, non-compliance with the policy along with the various steps it had taken should be sufficient to ground a finding of just cause.

196. Arbitrator Misra's interpretation of the request for a "generic just cause" ruling — that Chartwell had reached the view that non-compliance with its policy along with the various steps it had taken should be sufficient to ground a finding of just cause — reflected the situation that Mr. Milloy put forward in the City's "very unique" solution.

197. Mr. Goldblatt noted Arbitrator Misra's comments of there being "no actual evidence before [her] of the necessity for termination in the circumstances as they stood in mid-December 2021"[25] and contended that the same obtained here as the City presented no evidence of the necessity of termination. Arbitrator Misra's observation that employees had been on administrative leaves of absence with the result that "there were clearly no imminent health and safety issues associated with having unvaccinated workers in the LTC homes"[26] presented the possibility of another parallel.

198. The Association referred to *TDSB* for Arbitrator Kaplan's comments that distinguished the School Board's policy from the City's:

> The Policy was not overbroad. In fact, it was tailored and nuanced. The best evidence of this, paradoxically, is in the exemptions and the process for arriving at them. Instead of a blanket rule uniformly enforced, the TDSB . . . considered individual circumstances, both to allow it to employ essential workers, and to safeguard the interests of employees asserting a human rights claim. This process demonstrates the Policy only went as far as necessary to achieve its objectives. The Policy did not lead to impacts that had nothing to do with its objectives. It led to safer schools — again both experts agree that full vaccination was the best way to keep schools and the people in them safe — and it did so in a manner that acknowledged that in achieving this objective some compromise was necessary. RATs would have been a less restrictive means, but they do not, on the evidence achieve the overriding objective. RATs can hardly be said to be an alternative to full vaccination. That is the evidence.[27]

199. Mr. Goldblatt submitted that it is important to acknowledge that *Alectra* was not a discharge case and that adversely affected employees retained their employment status on unpaid

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[25] *Chartwell,* at para. 221.

[26] *Chartwell,* at para. 222

[27] *TDSB*, at pp. 33-34.

leaves with benefits.[28] Moreover, Arbitrator Stewart observed the presence of a feature absent from the City's Policy:

> 24. A very important aspect of the Employer's Policy, and in my view, one of the hallmarks of its reasonableness, is that it specifically contemplates amendment, as relevant circumstances change. From the perspective of the Employer's interests, a disruption to the services of its trained and valuable workforce is not in its business interests. In this regard, the Employer's interests align completely with those of the employees who have made the difficult personal decision not to become vaccinated, but who have invested in and deeply value their jobs and who wish to return to the workplace. It was clear to me from the Employer's submissions that it welcomes the prospect of their reintegration into its workforce in due course. However, in the current circumstances, it is my view that the Union's challenge to the Employer's Policy cannot prevail, and the grievance is therefore dismissed.

While the Alectra policy contemplated amendments, Mr. Goldblatt observed that there was no indication that the City had looked at or contemplated any change in the Policy.

200. The Association also pointed out that Arbitrator Stewart made reference to factors that ought to be applied in this instance, including recognition of the importance of bodily integrity and the need for a balanced approach.[29] In that, counsel submitted that Arbitrator Stewart did not have the benefit of evidence of all of the protective measures TFS had put in place before the City introduced the Policy.

201. The Association concluded that I should allow the grievance, find the Policy to be unreasonable to the extent that it required terminations, direct recission of the discharges, and remain seized.

The City's Reply

202. The City responded to the Association's assertions concerning the inadequacy of the data presented to establish the need for the Policy's mandate noting that Local 3888 had called no expert evidence to contest the bases upon which the City had introduced the Policy. Counsel submitted that the Policy was supported fully by Dr. Juni's evidence and that his report was not shaken in the least on cross examination. In sum, it was the City's position that the data represented spoke convincingly to the reasonableness of the mandate it had introduced.

203. Mr. Solomon referred to the evidence of Dr. Juni as to the inferiority of RAT and other measures, and the superiority of available vaccines. The evidence was that vaccination was the most effective measure available on the hierarchy of controls in relation to ongoing operations such as TFS where the vast majority of employees are obliged to attend at their work sites rather than to execute responsibilities remotely. There was no evidence that rapid antigen testing reduced

[28] *Alectra*, at para. 23.

[29] *Alectra*, at paras. 20-21.

the risk of transmission in any degree comparable to vaccines. The City maintained that the evidence clearly established that vaccination was the best available measure.

204. The City reiterated its position that the recommendation by Mr. Milloy for the disciplinary approach was not arbitrary given that the process did not go straight to termination but was marked by a number of milestones, opportunities for an employee to comply and avoid discipline or discharge. Up to October 30, 2021, the City had underscored positive encouragement and education. Meetings for the non-compliant were conducted in the first week of November and again employees were not directed straight to a termination outcome. The documented evidence of those discussions was necessarily brief simply because the answers provided by the non-compliant firefighters were themselves brief. Moreover, while those individuals were suspended, their suspensions were not stated to be for a specific time as the duration of a suspension would reflect the employee's decision to comply with the Policy or to continue to remain unvaccinated.

205. The City maintained that the case law requiring the adoption of the least intrusive options was satisfied as Ms. Anderson had explained why each of the proposed responses were regarded to be inferior to insisting upon vaccination.

206. Noting that the matter for my determination was the reasonableness or otherwise of the Policy rather than the substitution of my judgment for what might have worked, the City took the position that the grievance and the particulars provided by the Association — advocating alternative measures such as testing, redeployment, and the non-application of the Policy to certain positions — constituted an attack on the mandate itself and not simply on whether it was reasonable. I was urged to recognize that the need to respect the judgment of the Employer and to decline to substitute my views of what other approaches might have been attempted.

207. The City persisted in the view that the disciplinary process for the enforcement of the mandate was not automatic as the Association had asserted. In that context, counsel for the City pointed out that the November strategic communication had again used the word "may" with reference to the possibility of suspension. Mr. Solomon maintained that the City's representatives conducted a deliberative process in which they would hear and respond accordingly to employees.

208. The City argued was that an employee's failure to comply with a health and safety policy in a crisis invited a disciplinary response. Counsel asserted that the Association had identified no principled distinction between this and other instances in which employees of the City and other employers have been disciplined for failing to comply with health and safety policies. Mr. Solomon concluded that there was no reason why a breach of the Policy should not result in an individual's being discharged. I was urged to determine that the disciplinary framework adopted by the City was reasonable in all of the circumstances and that there was no reason to find otherwise than that failure to comply with the policy was culpable misconduct.

209. Mr. Solomon contended that the hierarchy of controls was key to the analysis that I ought to adopt and apply in these circumstances. He added that the precautionary principle supported the mandatory vaccination policy as a reasonable requirement in the context of the pandemic and that was particularly the case given that all thirteen of the terminated fire fighters were operational fire fighters.

210. The City, as demonstrated by Ms. Anderson's evidence, had adopted and been guided by the specific recommendation of the SARS Commission that "in any future infectious disease crisis, the precautionary principle guide the development, implementation and monitoring of worker safety procedures, guidelines, processes and systems."

211. Noting the evidence that a number of the discharged fire fighters had refused to disclose their vaccination status, Mr. Solomon referred to *MLSE* in which Arbitrator Jesin concluded that the employer had not violated the collective agreement or any relevant legislation by requiring the grievor to disclose his vaccination status and by placing him on an unpaid leave of absence for refusing to comply.

212. Mr. Solomon addressed the observation by Arbitrator Kaplan in *TDSB* that the policy should only go as far as necessary. He maintained that in this instance that had been done as it was necessary that all fire fighters be protected by vaccination, the most effective protection against workplace transmission and infection.

213. The City addressed the operational impact of the application of the Policy as complained of in the particulars delivered by the Association and maintained that there was no evidence linking the Policy and its compliance mechanism to any adverse effect with regard to service. To the contrary, Commander Boisseau had rejected the proposition and had indicated that TFS had been able to deal with the impact of the application of the Policy without disruption.

214. Mr. Solomon relied on the precautionary principle and section 25 of the *OHSA* for the proposition that the City would be negligent if it did not require fire fighters to be protected through vaccination.

215. As for Arbitrator Nairn's decision in *FCA Canada*, counsel observed that the situation there involved unpaid leave and not a disciplinary response. He commented that there were no experts assisting Arbitrator Nairn and submitted that I should follow Arbitrator Stewart in *Alectra*.

216. Mr. Solomon distinguished Arbitrator Hayes' decision in *Sault Area Hospital* on the grounds that it was not a COVID case but dealt with simple seasonal flus and the protection of patients. That was not an employee health and safety case and not a situation in which clause 25(2)(h) of the *OHSA* applied. Counsel also noted that there was relevant collective agreement language which further distinguished the cases.

217. I was urged to find that the mandate was reasonable and to dismiss the grievance in its entirety.

218. In the alternative, the City contended that if I found that the mandate was reasonable but that the enforcement mechanisms were unreasonable, I should remain seized and remit the matter to the parties so that they could determine how to deal with the fire fighters whose employment had been terminated.

Analysis and Decision

— Preliminary Observations

219. This matter has two distinct aspects recognized throughout the proceedings and necessitated by the terms of the grievance letter's complaint that the "City policy on vaccination and, more specifically, its policy update of October 6, 2021 on enforcement of the vaccination policy . . . is unreasonable, arbitrary and discriminatory and imposes discipline by way of suspensions on employees without just cause as well as improperly threatening the termination of these employees without just cause."

220. The City did not suggest that the Association's "more specific" complaint about the enforcement mechanisms announced on October 6, 2021 was not arbitrable or was not to be decided by me. Rather, the City posed an alternative disposition in its reply submissions and included the following in its statement of particulars:

> 75. In the context of the extraordinary circumstances of the ongoing pandemic, the Policy, as well as the City's disciplinary response for non-compliance, is a reasonable exercise of management's rights, consistent with KVP principles and the parties' collective agreement, and satisfies the City's obligations under the *OHSA*.

Thus, this matter is quite different from that in *Chartwell.* Here, the second question, whether the City's chosen and relied upon enforcement process is reasonable, was raised in the grievance and answered by the Employer. What remains then is a determination of whether both the Policy requiring full vaccination for COVID-19 at the December 2021 levels and the disciplinary consequences visited on all fire fighters who had no valid claim to an exemption and who failed to satisfy the City to forebear were reasonable.

221. Unlike the employees whose unpaid leaves of absence were to be brought to an end by the determination in *FCA Canada* that the employer's policy was no longer reasonable, fire fighters represented by Local 3888 have been and remain segregated into two cohorts: one, populated by the vast majority of fire fighters who established their compliance with the mandatory vaccination requirements or their entitlement to an exemption on medical or human rights grounds, and, another, comprising a small contingent of disciplinarily suspended fire fighters, thirteen of whom were discharged in January 2022 for non-compliance with the Policy. None of the fire fighters of concern here were on an unpaid, non-disciplinary leave.

222. While the pandemic and the introduction of variants and new waves make the situation one of flux with the result that, as Arbitrator Mitchell stated in *Elexicon,* "what constitutes a reasonable mandatory vaccination policy in the course of a pandemic is contextual and highly dynamic"[30], the issues here relate principally to the reasonableness or otherwise of the Policy introduced and enforced in the last months of 2021 reaching into 2022 to the point at which the City terminated the employment of non-compliant employees. Any fire fighters who have joined TFS since the introduction of the Policy were required by its terms to meet the fully vaccinated

[30] *Elexicon,* at para. 4.

criteria as a condition of their hiring. In the result, it should be the case that active fire fighters have met the requirements of the Policy as promulgated, such that it has no ongoing effect for them.

223. As matters stand, however, any fire fighter who might join — or rejoin — TFS would be obliged to comply with the Policy for as long as it remains in place.

224. In that context, the circumstances here are quite different from those Arbitrator Nairn faced in *FCA Canada*. While the expert evidence presented by the City admits or perhaps raises a significant question about the sufficiency of the Policy in that it does not require fire fighters who met its requirements in 2021 to have third or fourth "booster" vaccinations, Dr. Juni was clear in stating that it continues to be the case that a person receiving two doses of a recognized vaccine enjoys significantly greater protection against the virus than those who are unvaccinated.

225. In light of the evidence I received, it would be perverse and wrong to find here, as Arbitrator Nairn did, that "a COVID-19 vaccine mandate defined as requiring two doses (of a two-dose vaccine) is no longer reasonable based on the evidence supporting the waning efficacy of that vaccine status and the failure to establish that there is any notable difference in the degree of risk of transmission of the virus as between the vaccinated . . . and the unvaccinated" or that "the evidence supports the 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".[31]

226. Those conclusions might well have been necessary and appropriate on the evidence Arbitrator Nairn had, but are contradicted here by the unchallenged evidence of Dr. Juni and Dr. Dubey.[32] On the evidence I received, a recruit or returning fire fighter vaccinated with two doses of a COVID-19 vaccine would be decidedly less likely to become infected than if he or she were unvaccinated. Furthermore, a fire fighter who received two doses before the Policy deadline is better protected than an unvaccinated individual. Simply put, there is nothing before me to support an argument that a person having received two doses of a two-dose regimen is not substantially better protected and less likely to present a risk to others than an unvaccinated colleague.

227. Accordingly, the principal focus in addressing the first question for decision is whether the Policy was reasonable upon introduction as all potentially affected bargaining unit employees were affected, if at all, before the first witness testified in this matter.

228. The Policy established requirements for the members of TFS and of the Local 3888 bargaining unit that had to be met by a date now long past. Those bargaining unit members who failed to do so and were discharged now have no right to claim employment under the terms of the Policy, but currently must rely upon the grievance and arbitration process in order to seek relief.

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[31] *FCA Canada*, at para. 107.

[32] Dr. Juni, for example, testified to a "marked difference" measured at "a 33.4% reduction in risk of infection [with Omicron] with vaccination with at least two doses" (at para. 13) and added (at para. 18): "At least two doses of a COVID-19 vaccine continued to be effective in reducing the risk of hospital admission, ICU admission and death also after Omicron became dominant in Ontario and globally. . . The reduction in the risk of hospital admission, ICU admission and death is high after two doses, and is even more pronounced after three doses of a COVID-19 vaccine."

229. I have given careful consideration to all of the evidence submitted by the parties and referred to in the hearing. I have reviewed their submissions and the numerous authorities[33] to which counsel referred in making those submissions. I have not addressed all of those cases as some, in my view, added little to the process. Others have made considerable contributions to the jurisprudence touching on the pandemic and the issues created for employers, employees, and bargaining agents. Those decisions have been excerpted at length in what has preceded and what will follow these introductory comments.

230. In sum, the weight of authority strongly favours the upholding of the Policy insofar as it required fire fighters to be fully vaccinated to the then current standard by January 2, 2022. However, the authorities submitted in support of the Policy stop well short of establishing the inevitability of a disciplinary suspension and discharge for cause as acceptable responses to all who refuse to comply with a mandatory vaccination policy.

231. This decision will not alter the scorecard trend on either issue.

232. As the history of the pandemic and its effects are familiar to anyone with sufficient interest in the issue to have read this far, I have not attempted another summary description of its global or local circumstances. No one would sensibly argue that the City ought to have ignored COVID-19 and to have done nothing. The Association has not challenged the expert evidence as to the safety and efficacy of the vaccines the City required its workforce to accept. Indeed, the Association does not question the desirability of its members being fully vaccinated to currently approved levels.

233. Unlike other arbitrators I have neither been obliged to proceed without the benefit of expert testimony nor confronted with divergent expert opinions. I have set out the statements of Dr. Juni and Dr. Dubey at length as both express the case for the adoption of the mandate eloquently and convincingly.

The Policy was Reasonable as Adopted to Require Vaccination

234. The City's justification for the mandate relies on the risks, exposures and responses presented by or consistent with:

> (i) the pandemic — in circumstances that are commonly regarded as being unprecedented in recent history;
>
> (ii) the application of the precautionary principle — identified as the primary guiding concept applicable in these circumstances; and
>
> (iii) consistent with the hierarchy of hazard controls, the recognition of vaccination as the most effective of various means by which the risk of workplace transmission and indeed all transmission might be reduced.

[33] The list is set out in the appendix to this decision.

235. Here, all of that enjoyed the support of the uncontradicted evidence of Dr. Juni and Dr. Dubey. Their opinions — and the evidence of Ms. Anderson — as to the insufficiency of other measures, principally rapid antigen testing as a supplement to an established body of preventative measures, complete the picture from the medical, epidemiological, and health and safety perspectives.

236. I accept without reservation the position of the Association that other measures taken by TFS had a positive effect in controlling workplace transmission for members of the service for a significant time prior to the introduction of the Policy and thereafter. Indeed, common sense — informed by shared experience since March 2020 — would teach us that all of those had contributed to the history of TFS and its employees in reducing workplace transmission and infections generally, and not only in the one discrete period Dr. Juni found to be exceptional. Moreover, given the evidence about the waning effect — for the previously vaccinated — of two-doses of the vaccines in the absence of infection or timely boosters, those continuing practices are likely to be as important to the wellbeing of staff now as they were for unvaccinated fire fighters before their conforming to the Policy. Nevertheless, there can be no doubt, on my view of the evidence, that vaccination as testified to by the doctors has been a most significant contributor to the success enjoyed in the ranks of Local 3888'3 members in controlling workplace transmission and infections.

237. I am mindful that the workplace environment for fire fighters is unpredictable, but predictably diverse. It and their responsibilities necessitate their close contact not only with colleagues in their congregate living arrangements and travelling in confined quarters on duty, but also with the unidentified and uncontrolled public. Fire fighters can encounter infected individuals without warning and in circumstances that do not permit social distancing. In that context, the hierarchy of hazard controls — relied upon here by Ms. Anderson and the City and recognized by the OLRB in *Hazel Farmer*[34]— argues, with strong reinforcement by the precautionary principle

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[34] In *Hazel Farmer*, the Board noted (at para. 20) the recognition of the concept in materials from Public Health Ontario and the Ministry of Health and Long Term Care as follows:

> *Application of the Hierarchy of Hazard Controls*
>
> According to the U.S. Centers for Disease Control and Prevention's National Institute for Occupational Safety and Health (NIOSH), **the fundamental method for protecting workers is through the application of the hierarchy of hazard controls. The levels of control range from the highest levels considered most effective at reducing the risk of exposure (i.e., elimination and substitution) to the lowest or last level of control between the worker and the hazard (i.e., PPE).**
>
> The application of the hierarchy of hazard controls is a recognized approach to containment of hazards and is fundamental to an occupational health and safety framework. An understanding of the strengths and limitations of each of the controls enables health care organizations to determine how the health care environment (e.g., infrastructure, equipment, processes and practices) increases or decreases a HCWs risk of infection from exposure to a pathogen within the health care setting. (emphasis added by the Board)

and the imperative of clause 25(2)(h) of the *OHSA*, for the approach that best addresses the elimination of the risk. The Association observed, with justification, that the precautionary principle did not demand perfection; however, vaccination was not presented on the evidence of the City, particularly that of the two doctors, as a perfect solution to the elimination of risk in the workplace. It was identified as the best of the alternatives.

238. Notwithstanding references to collective agreement provisions in the particulars it delivered, the Association did not expand its submissions on *KVP* principles beyond the consideration of the requirement that the City's unilaterally imposed mandatory vaccination rule be objectively reasonable.

239. In that context and as noted, counsel for the Association reviewed much of the evidence with respect to employee exposures, lost time, and other incidents involving workplace transmission or anticipated workplace transmission of COVID-19, particularly in TFS, with a view to challenging the need for the Policy. He noted Dr. Juni's considering the fact of there being only one lost time claim in the TFS in the Local 3888 bargaining unit in a period of five months in 2021 to be "tremendous". Mr. Goldblatt also pointed out that the number of lost time incidents after the removal of unvaccinated fire fighters starting in November 2021 was greater than in the prior period. However, all of the data were presented with no evidence of the extent to which fire fighters were already fully vaccinated prior to the institution of the suspensions.

240. Furthermore, in my view, the incidence of workplace transmission after the removal of the unvaccinated from the workplace is not evidence of arguable unreasonableness of a mandatory vaccination policy. Those statistics speak to neither causation nor correlation; they more likely point to the seriousness of the challenge confronting the City and TFS. Again, none of the expert evidence cited vaccination for the elimination of all risk of infection or transmission and one can only speculate as to whether the number of incidents after October 2021 would have been greater had the City not instituted its mandatory vaccination policy. Given that, as the Association argued, TFS had a robust and evolving approach to the protection of fire fighters and that the Employer did not "ease up" on those protocols with the introduction of the Policy, I do not conclude that any negative shifts in infection and workplace transmission data after the introduction of the Policy can be viewed as evidence of the mandate's being unnecessary or unreasonable.

241. There was no expert evidence in support of the proposition implicit in the Association's position on the mandate that the protocols the City and TFS had in place before the introduction of the Policy were sufficient to best position the Employer and its employees to meet the challenges that COVID-19 presented in 2021 and since.

242. Similarly, there was no evidence that rapid antigen testing reduced the risk of transmission to the extent that vaccines were an unnecessary measure. On the evidence received, it is illogical to suggest otherwise. Dr. Juni explained the lesser value and unreliability of RATs as a means of decreasing the risk of infection and transmission. Most tellingly, in my view, he allowed that rapid antigen testing helps with detection but is likely to be insufficient — both because of individuals' failing to follow proper procedures and the findings that RATs provide a high incidence of false positives. It was also noted that RATs could lead to operational challenges contributing to staff shortages with employees required to isolate in response to false positives.

243. Given the degree of certainty and clarity in the expert evidence I had on the point, I repeat and adopt Arbitrator Kaplan's comment in *TDSB*:

> 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 are RATs in reducing the risk of becoming infected and spreading COVID-19.[35]

244. Indeed, I would go further, given the unchallenged evidence, and accept that vaccination was the most effective course for the City to have followed in considering options and deciding on the mandate in August 2021, and subsequently. The evidence established that vaccination was the best available measure.

245. Following the *KVP* analysis as endorsed in *Irving Pulp & Paper* and by a legion of arbitrators, acknowledging the acceptance of the precautionary principle, and recognizing the significance of the broad obligations established for Ontario employers by clause 25(2)(h) of the *OHSA*, I am satisfied that the imposition of the mandate was a reasonable exercise of the City's management rights.

246. The Court made the following points in *Irving Pulp & Paper*:

> [24] The scope of management's unilateral rule-making authority under a collective agreement is persuasively set out in *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1965), 16 L.A.C. 73 (Robinson). The heart of the "*KVP* test", which is generally applied by arbitrators, is that any rule or policy unilaterally imposed by an employer and not subsequently agreed to by the union, must be consistent with the collective agreement and be reasonable (Donald J. M. Brown and David M. Beatty, *Canadian Labour Arbitration* (4th ed. (loose-leaf)), vol. 1, at topic 4:1520).
>
> [25] The *KVP* test has also been applied by the courts. Tarnopolsky J.A. launched the judicial endorsement of *KVP* in *Metropolitan Toronto (Municipality) v.C.U.PE.*, (1990) 74 O.R. (2d) 239 (C.A.), leave to appeal refused, [1990] 2 S.C.R. ix, concluding that the "weight of authority and common sense" supported the principle that "*all* company rules with disciplinary consequences must be reasonable" (pp. 257-58 (emphasis in original)). In other words:
>
> > The Employer cannot, by exercising its management functions, issue unreasonable rules and then discipline employees for failure to follow them. Such discipline would simply be without reasonable cause. To

[35] *TDSB*, at pp. 29-30.

> permit such action would be to invite subversion of the reasonable cause clause. [p. 257]
>
> [26] Subsequent appellate decisions have accepted that rules unilaterally made in the exercise of management discretion under a collective agreement must not only be consistent with the agreement, but must also be reasonable if the breach of the rule results in disciplinary action (*Charlottetown (City) v. Charlottetown Police Association* (1997), 151 Nfld. & P.E.I.R. 69 (P.E.I.S.C. (App. Div.)), at para. 17; see also *N.A.P.E. v. Western Avalon Roman Catholic School Board*, 2000 NFCA 39, 190 D.L.R. (4th) at para. 34; *St. James-Assiniboia Teachers' Assn. No. 2 v. St. James-Assiniboia School Division No. 2*, 2002 MBCA 158, 222 D.L.R. (4th) 636, at paras. 19-28).
>
> [27] In assessing *KVP* reasonableness in the case of unilaterally imposed employer rules or policies affecting employee privacy, arbitrators have used a "balancing of interests" approach. As the intervener the Alberta Federation of Labour noted:
>
> > Determining reasonableness requires labour arbitrators to apply their labour relations expertise, consider all of the surrounding circumstances, and determine whether the employer's policy strikes a reasonable balance. Assessing the reasonableness of an employer's policy can include assessing such things as the nature of the employer's interests, any less intrusive means available to address the employer's concerns, and the policy's impact on employees. [I.F., at para. 4]

247. Adopting the last as an appropriate template, I note, by way of summary, that I am satisfied: first, that the City's interests — both as a major employer responsible for the management of a complex municipality and as the entity looked to for the protection and advancement of the wellbeing of millions — justify its recourse to the mandatory vaccination policy across its many divisions and operations; secondly, that it has not been established that there are less intrusive means to best achieve the City's objectives, particularly as those are informed both by the precautionary principle and the Employer's statutory responsibilities; and, thirdly, that the impact of the mandate on employees — as distinct from the impact of the City's chosen enforcement mechanisms on unwilling fire fighters — is rational and proportional in the balancing of interests and obligations.

248. The Court of Appeal commented on clause 25(2)(h) of the *OHSA* as follows in *Ontario (Ministry of Labour) v. Quinton Steel (Wellington) Ltd.*, [2017] O.J. No. 6652:

> 24. Section 25(2)(h) establishes a duty that this court has described as "even more sweeping" than s. 25(1): *R. v. Wyssen*, (1992) O.R. (3d) 193 (C.A.), at p. 198. It is more sweeping because it does not depend on the existence of a specific regulation prescribing or proscribing particular conduct. Section 25(2)(h) is necessary because, as the Crown submits, the regulations cannot reasonably

> anticipate and provide for all of the needs and circumstances of the many and varied workplaces across the province.

249. The evidence is clear that the Policy protects employees against workplace infection to a high degree by having employees vaccinated. TFS would obviously be protected to a certainty against the possibility of unvaccinated employees infecting others or transmitting infections in the workplace by excluding them from the workplace without more.

250. I have found the following to be most apposite to a determination of the reasonableness of the Policy in mandating vaccination: *Bunge Hamilton*, *Elexicon, Coca Cola*, *BC Hydro*, *TDSB,* and *Alectra*. I have not included *Chartwell* given that Arbitrator Misra — while finding that arbitrators were holding mandatory vaccination policies to be reasonable — was able to say there that the mandatory nature of the employer's policy was not a live issue because of the Ministerial Directive requiring vaccination of staff working in the long-term care homes.

251. In *Bunge Hamilton*, Arbitrator Herman found the requirements to disclose vaccine status and to be fully vaccinated to be reasonable. He explained:

> 25. Any privacy rights in this context are considerably outweighed by the minimal intrusion on such rights and the enormous public health and safety interests at issue. In the result, I am satisfied that the attestation requirement in the Vaccine Policy is reasonable.
>
> 26. I turn now to consider whether the requirement to be fully vaccinated (i.e. one dose of a single dose vaccine or two doses of a two-dose vaccine) by January 24, 2022 or to be put on unpaid leave is reasonable.
>
> 27. The Vaccine Policy requires all employees to be fully vaccinated, and to provide proof of that status, by January 24, 2022, or they "will not be allowed on site and put on unpaid leave pending a final determination of their employment status (up to and including termination of employment)". The Vaccine Policy does not stipulate that employees who do not meet these requirements by January 24, 2022 will be suspended (i.e. receive a disciplinary suspension) or will be terminated, only that a final determination will subsequently be made as to their employment status, and that may include discipline or termination. The Vaccine Policy issued by Bunge complies with the requirements of the HOPA Policy, although it also provides for additional exemptions to the mandatory vaccination requirement for reasons of religious belief or creed.
>
> 28. . . . In these circumstances, and given the public safety and health risks unvaccinated persons create for both vaccinated and unvaccinated persons who come in contact with them, the Vaccine Policy issued by the Employer is reasonable in its requirement that a condition of working at either facility and coming on site after January 24, 2022 is that employees have to be fully vaccinated, and if they are not, they will be placed on unpaid leave.
>
> . . .
>
> 30. With respect to the references in the Vaccine Policy to discipline and termination, as the Vaccine Policy states, at this stage discipline or termination are

> only possibilities. It is reasonable, if not required, for an employer to put employees on notice of potential consequences of non-compliance with a rule or policy, and the Vaccine Policy does this. When or if discipline is meted out or an employee is discharged, a grievance can be filed. Any resulting arbitration would provide opportunity to consider whether the Employer can establish just cause for the suspension or termination, as the case may be, and that determination is likely to involve consideration of the circumstances at hand at the time of the suspension or termination, circumstances that cannot be known at the present time.
>
> 31. It is therefore reasonable for the Vaccine Policy to include a statement that employees who are not fully vaccinated by January 24, 2022 "will not be allowed on the site and put on unpaid leave pending a final determination on their employment status (up to and including termination of employment)".

252. The analysis by Arbitrator Mitchell in *Elexicon* rewards a careful reading and applies with at least equal force to the City in its responsibilities for the provision of essential services such as those of TFS and Local 3888 members. I adopt Arbitrator Mitchell's analysis and all of the following from that decision:

> 92. Whatever may constitute irreparable harm in an application for injunctive or interim relief, in the context of an assessment of the reasonableness of a mandatory vaccination policy, it would be inaccurate and disrespectful to the legitimate interests of employees in maintaining their income and their employment in my view, to ignore the genuinely coercive nature of a policy which threatens the loss of income and possible termination of employment if it is not complied with. Employees everywhere rely on their employment whatever their skill levels, but it must also be recognized that in an industry like electrical power transmission there are skilled trades and other occupations and professions where the employees may not easily find another employer in the same geographic area to work for. Even if they could do so, they would have to give up their seniority and other benefits of long service which they earned in the course of their employment. The coercive impact of the threat of loss of income, benefits, and employment and the impact on stability and careers is very real. In my view, of course employees have a choice, but just saying that the choices are hard is insufficient when it comes to determining the reasonableness of the policy. In my view, arbitrators should take into account in the balancing exercise the deep dilemma of employees who strongly do not wish to be vaccinated whatever their motives, and who may have few or no other realistic choices to work elsewhere or who will have to give up a significant amount of earned benefits and stability if they choose not to get vaccinated. Just because there are hard choices, as opposed to no choice at all, does not make the policy not coercive, or render it more reasonable. Of course, the policy may be reasonable notwithstanding the potential consequences to the individual employees, but in my view, there is little legitimacy in a decision that finds the policy to be reasonable while denying the lived reality of employees faced with the coercive impact of these policies.
>
> 93. On the other hand, just as the Employer's interests may be deserving of less weight when they are not sufficiently significant as was found in *ESA,* so too I consider that in the balancing of interests it matters what the basis is for the objection of the employees. In my view, neither the interests of the employees nor the employer are absolute, and if the employer interests in a healthy and safe workplace

for all the employees, the maintenance of critical infrastructure and the efficiency of operations can be seen to be less important in some cases like *ESA* because there was said to be little evidence to justify it, or there are less intrusive methods to achieve the same objectives, so too the employee interests can be of less significance and weight if there is a lack of objective reasonableness behind the objection. If the vaccine, for example, had dangerous potential side effects of considerable significance to the health and safety of the employees or was not sufficiently tested, that could weigh heavily in the balancing. In this case, the Union had very little to say about the reasonableness of the employee objection to or fear of vaccination beyond the importance of preserving the right to bodily integrity and privacy *per se* (it did mention the risks, effects, and discomfort of possible side effects). Besides criticizing the introduction of the mandatory policy as radical and invasive, the reasonableness of the basis for employees objecting to the vaccine was not seriously put forward by the Union as a justification to weigh in the balance, except to the small extent that it referred to the unpleasant potential side effects and very small risks of serious illness or death. Indeed, the Union made it abundantly clear throughout the proceeding that it considers vaccination to be eminently reasonable and that it fully supported and encouraged it on a voluntary basis. In my view, the lack of a compelling objective basis for declining to be vaccinated makes the employee interest less significant in weighing the balance of interests. . .

94. I should add that if I am wrong that in weighing the interests of the employees, a lack of objectively reasonable grounds for the refusal is a proper factor to consider, but only the employee interest *per se* in bodily integrity and privacy can be taken into account, I would not decide this case differently. As will be clear below, I consider the risks to the health and safety of other employees in the workplace to be sufficiently important to justify the policy. I also find that the necessity of maintaining critical electrical supply and infrastructure with a workforce sufficient to carry out Elexicon's essential responsibilities weighs heavily in favour of compulsory vaccination in the particular circumstances of this case.

. . .

96. . . . The law has been clear for decades that an employer can make reasonable rules in the exercise of its management rights subject to the other requirements as set out in the *KVP* case. Leaving aside for the moment that the issue is a red herring, in my view, there is nothing fundamentally undemocratic about an employer making health and safety rules for its workplace, especially in the context of a dangerous pandemic. OHSA places a positive duty on an employer under section 25(2)(h) to "take every precaution reasonable in the circumstances for the protection of a worker". It is not a defence open to an employer for that failure to take action to protect employees in the workplace from the spread of the virus that while some measures such as testing are necessary and permissible, other equally or more important measures that impinge upon an employee's right to bodily integrity and privacy, such as vaccination, cannot be contemplated under the legislation because that is within the sole purview of the Government of Ontario. It is no answer to the claim that a workplace is unsafe that this is a public health matter within the purview of government alone. Indeed, in response to the Union argument that these are decisions that must be left to the Government in order to be democratic, it is my view that in Ontario, aside from long term care, the Government has explicitly left it to individual employers to determine in the context of their individual workplaces

whether mandatory vaccination should be implemented. The Government has not in any way prohibited or discouraged that process and knows it is taking place. The policy of the Ontario Government to leave the matter largely to individual employers to determine in the circumstances of their individual workplaces is consistent with democratic principles and the Government of Ontario is accountable to the electorate for that policy. The Government of Canada took a different view which is also democratic. There is no inherent limitation (leaving aside an explicit provision to the contrary in a collective agreement) on an employer in a unionized workplace in Ontario subject to provincial jurisdiction introducing a rule that mandatory vaccination is required in its workplace, except for the limitation that the rule must be reasonable and comply with the KVP criteria.

97. I agree with Arbitrator Stout that the reasonableness test in KVP "fits neatly" with the requirements for reasonable measures to be taken under section 25(2)(h) of OHSA. In *Hazel Farmer,* 2020 CanLII 104942 (ON LRB), I described the substance of the obligation under section 25(2) (h) as distilled from the decisions of the Courts and the Ontario Labour Relations Board in the following terms:

> 36. I have distilled the scope of section 25(2)(h) from the jurisprudence of the Courts and the Board to be that the Act is public welfare legislation and is to be broadly interpreted in accordance with its purposes. Section 25(2)(h), in particular, is sweeping in its scope and potentially goes beyond and in addition to any specific regulation because it is not possible to anticipate every circumstance in the wide variety of workplaces through Ontario. The purpose of the section is not to eliminate hazards but to take reasonable precautions to protect workers from them. A generous approach to interpretation of the Act in line with its purposes does not, however, justify a limitless interpretation of the provision. There cannot be a complete absence of risk and danger and the Act is not aimed at achieving an impossible standard of a risk-free workplace. Ultimately, what the Act requires is a balance between the risk of harm, and the ability to carry out necessary public and private functions. It is not every precaution that must be taken but every reasonable one. This involves balancing what is to be gained in light of all the factors and circumstances including potentially the cost, the effect on efficiency, the severity and magnitude of the risk and the likelihood or frequency of its occurrence. And while it is not possible for all risk to be eliminated, it does not follow that the obligation of employers is to the minimum required in a regulation as there may be specific safety measures particular to a specific workplace that are required in addition to specific regulations: *R. v. Timminco Ltd./Timminco Ltée*, 2001 CanLII 3494 (ON CA), 54 O.R. (3d) 21; *Ontario (Ministry of Labour) v. Sheehan's Truck Centre Inc.*, 2011 ONCA 645 (CanLII), 107 O.R. (3d) 763; *Blue Mountain Resorts Ltd. v. Ontario (Ministry of Labour)*, 2013 ONCA 75 (CanLII), 114 O.R. (3d) 321; *Ontario (Labour) v. Quinton Steel (Wellington) Limited*, 2017 ONCA 1006 (CanLII); *Ontario Public Service Employees' Union v. Ontario (Ministry of Transportation)*, 2006 CanLII 10956 (ON LRB); *Glencore Canada Corporation*, 2015

> CanLII 85298 (ON LRB); *Sgt. Mark Radke v. Ontario Provincial Police*, 2017 CanLII 56938 (ON LRB).
>
> 37. In the specific context of the COVID-19 pandemic, section 25(2)(h) gives effect to the precautionary principle that there is an obligation to take all reasonable measures in the circumstances to protect the health and safety of workers. In the context of an epidemic caused by a new and previously unknown virus, the precautionary principle was given voice to by Mr. Justice Campbell following the SARS crisis in Ontario and was as described by Justice Morgan in *Ontario Nurses Association v. Eatonville/Henley Place*, 2020 ONSC 2467 (CanLII) as follows:
>
> An important recommendation of the Commission of Inquiry chaired by Justice Archie Campbell in the wake of the SARS outbreak of 2003 – an outbreak of a virus related to COVID-19 - is that the precautionary principle is to be put into action in order to prevent unnecessary illness and death. As explained by Justice Campbell, this principle applies where health and safety are threatened even if it cannot be established with scientific certainty that there is a cause and effect relationship between the activity and the harm. The entire point is to take precautions against the as yet unknown.
>
> See also: *Inovata Foods Corp. supra; Ste Anne's Country Inn and Spa*, *supra*.

98. In my view, this Employer is justified in introducing the compulsory vaccination rule because it has a duty to take every reasonable precaution in the circumstances under Section 25(2) (h) of OHSA. The Union strongly resists this conclusion and argues that there is no scientific evidence that vaccination, in addition to masks, physical distancing, and other measures will make any difference to health and safety in the workplace. It says there is nothing before me that shows that if masking protocols, social distancing, and working from home together with other appropriate hygiene practices and protocols are properly enforced, the unvaccinated present any greater risk to others than the vaccinated. It says the vaccinated clearly can get and transmit the virus as well and likely asymptomatic people transmit it more than they did previously.

99. While there may be no scientific study showing that masking, distancing, and other measures are not as effective as vaccination, or no study that shows vaccination adds significantly to the protection those measures alone bring, in my view the Union's argument does not take account of the fact that it has been shown that vaccinated individuals can reduce their risk of acquiring COVID-19 infection by 60% compared to those who are unvaccinated. The protection is greater for people with two doses in respect of the other variants, some of which may still circulate, and the effectiveness of the vaccine with more than two doses to reduce severe disease is even greater.

> . . .
>
> 101. What arbitrators should do when faced with the lack of studies proving a scientific relationship between cause and effect is addressed by the precautionary principle as stated above by Justices Campbell and Morgan. When there is no scientific certainty as to cause and effect, the precautionary principle applies generally to prevent unnecessary illness and death. As they said: "The entire point is to take precautions against the as yet unknown".
>
> . . .
>
> 103. Section 25(2) (h) of OHSA explicitly recognizes that there is an interest all the employees in the workplace have in the safety of the workplace, although that interest is obvious even without the statutory duty. Any consideration of the reasonableness of the mandatory vaccination rule must take into account as a fundamental consideration the duty owed by the Employer to all the employees, vaccinated and unvaccinated, to take every precaution reasonable in the circumstances to keep everyone safe. The Employer can legitimately draw on that interest of the employees in a safe workplace in advancing that the rule is reasonable. . . Unvaccinated employees have a right to privacy and bodily integrity, but those rights are not absolute, and they also share with their colleagues an obligation to keep the workplace safe and not to risk harming their colleagues. . . .
>
> 105. Another important factor that justifies a mandatory vaccination rule as reasonable in these particular circumstances is the fact that Elexicon is providing a critical essential service and it must take steps to ensure it can provide that service during a pandemic when there are real threats to the health and availability of its workforce.

253. Arbitrator Mitchell's comments in paragraph 93 regarding the absence of evidence of the employees' reasons for non-compliance are particularly telling here given the lack of comprehensive and informed evidence as to the "objective reasonableness" of the expressed bases for employees' objections as noted earlier in my review of the evidence. The employees' interests in preserving their rights to bodily integrity and privacy are recognized and respected; however, merely invoking those is insufficient to balance the scales against the overall interests and responsibilities of the City in taking all reasonable precautions for the protection of employees and the public they will encounter in the performance of their duties. Some of the interviewed fire fighters referred to doubts and risks they associated with the vaccines and their concerns are to be acknowledged. Nevertheless, on this platform, their observations and fears are entirely inadequate to displace the effect of the expert evidence presented by the City and the overwhelming arbitral opinion as to the reasonableness of employer policies requiring attestation and vaccination.

254. In *Coca-Cola*, Arbitrator Wright found the employer's mandatory vaccination policy to have established a reasonable balance between an employee's interest in privacy and bodily integrity and the employer's interest in maintaining the health and safety of the workplace.

Moreover, he held the employer to have acted reasonably in adding that unvaccinated employees would be put on an unpaid leave of absence.[36] He continued:

> 36. The Union also expresses concern that an employee's decision to not get vaccinated is not made lightly; nobody gives up their regular salary unless they have a strongly held view about COVID-19 vaccines that may reflect political perspectives or lifestyle choices. There is no doubt that this is true, but it cannot, in my view, undermine the reasonableness of the Policy. Under the terms of this Policy, employees who can establish that they are unable to take any of the COVID-19 vaccines for a reason protected by the Ontario *Human Rights Code*, including on the basis of creed, are entitled to seek individual accommodation. Short of that, an employee's personal belief—however strongly held—must give way to the health and safety concerns that animate the Policy. COVID-19 can lead to serious illness and death. Two employees at the Company died from the disease. In that context, an employee's personal beliefs cannot override the Employer's interest in doing everything possible to maintain the health and safety of the workplace.
>
> . . .
>
> 38. . . . In the present case, none of the employees in the bargaining unit work remotely and none work entirely outside. Consistent with Arbitrator Mitchell's conclusion [in *Elexicon*], the Employer's interest in this case in maintaining the health and safety of the workplace—in taking "every precaution reasonable for the protection of a worker"— justifies the Policy notwithstanding the difficulty of the choice for some employees.
>
> . . .
>
> 40. In *Bunge Hamilton* . . . Arbitrator Herman dismissed a union policy grievance challenging the reasonableness of a COVID-19 vaccination policy on a variety of grounds, including that it contemplated the possibility of employees being disciplined or terminated if they failed to comply with the policy. . .
>
> 41. The facts in *Bunge Hamilton* are somewhat different from the present case, as Bunge was required to enact a vaccination policy to comply with lease requirements established by its landlord, the Hamilton Oshawa Port Authority. However, in my view that factual difference does not take away from the generality of Arbitrator Herman's analysis with respect to whether a vaccination policy is unreasonable if it contemplates the possibility of discipline or termination for non-compliant employees. I agree with Arbitrator Herman, and find his analysis is directly applicable to the present case where discipline or termination is a possible but not inevitable outcome of non-compliance. To the extent that any employee is disciplined or discharged under the terms of the present Policy, that outcome can be challenged with an individual grievance requiring the Company to establish just cause for its decision. A just cause analysis is broader and more rigorous than is the determination of whether a workplace policy is reasonable. Moreover, as Arbitrator Herman points out, an individual grievance alleging that an employer's decision to

[36] *Coca Cola, supra,* at para. 35.

discipline or terminate "is likely to involve consideration of the circumstances at hand at the time of the suspension or termination, circumstances that cannot be known at the present time."

42. In the *Chartwell Housing Reit* award, Arbitrator Misra concluded, among other things, that a mandatory vaccination policy was unreasonable because she found a breach of the policy resulted in automatic discharge. She made clear that it was only that aspect of the policy that was unreasonable:

> 243. Despite my findings above, it is important to state that this decision should not be taken by those employees who choose not to get fully vaccinated as indicating that the Employer would never be able to terminate their employment for noncompliance with the policy in question, or indeed any reasonable policy. It is only the automatic application of this policy as it respects discharge that has been found to be unreasonable.

43. The Policy before me contemplates discipline or termination as being a possibility, rather than being an inevitable consequence of a failure to comply with its terms, and so is distinguishable from the *Chartwell Housing Reit* award. After a careful review of the caselaw, Arbitrator Misra herself concludes that arbitrators are likely to find vaccination policies like the one before me to be reasonable:

> 212. What is clear from a review of these decisions is that arbitrators have accepted that a mandatory vaccination policy will likely be found to be reasonable in the current COVID-19 context and having regard to employers' responsibilities to maintain a safe and healthy workplace for all employees. They have also found reasonable those policies that included putting employees on notice that if they remain unvaccinated (or those who fail to disclose their vaccination status or don't have a medical exemption) they will be subject to being placed on an unpaid leave of absence, and may be subject to termination of employment. What these decisions have not stated is that termination is an automatic outcome for failure to get vaccinated, and in none of the cases had the Employer in fact enacted any terminations of employment.

44. For all the foregoing reasons, I find the Company's mandatory vaccination Policy to be reasonable. It strikes a reasonable balance between an employee's right to privacy and to bodily integrity and the Employer's right and statutory obligation to protect the health and safety of the workforce. It was therefore reasonable for the Company to put non-compliant employees on unpaid administrative leave effective January 31st, 2022.

255. As here, the issues to be determined in the *BC Hydro* situation were first whether the policy was reasonable and, secondly, if the policy were found to be reasonable, whether the aspect of it relating to discipline was also reasonable. Arbitrator Somjen stated:

> 25. Employer policies may have different degrees of effect on employees. In this case the effect on the 44 unvaccinated employees is very significant. To be vaccinated, an employee must allow a significant intrusion on their privacy and imposition on their freedom to regulate medical treatments and injections into their body.

At paragraph 27 and following, Arbitrator Somjen addressed the interests that the employer sought to protect with the policy and recognized that those were to be balanced against the significant interests of the forty-four employees. Primary in those were the requirement that the employer "maintain a safe and healthy workforce so that it can carry out its significant obligations as an essential service provider of power to the residents and businesses of the province" and "also protect the interests of their other employees who must be kept safe in the workplace, as well as contractors, customers and other persons who come into contact with BC Hydro employees". Those considerations apply with equal force to TFS and its obligations to staff and Torontonians.

256. Arbitrator Somjen's conclusions, as noted above, were as follows

> 69. Having considered the interests of the 44 employees, BC Hydro, its employees, customers, contractors in the public, I conclude that the Policy is reasonable. The interests that led to the Policy outweigh the significant intrusion on the interests of the 44 employees. . .
>
> 70. This case is similar to the *Elexicon* decision for various reasons but particularly because BC Hydro is an essential service provider and the employees in the bargaining unit cannot generally work remotely, with little contact with others as was the case in *ESA*.

257. Arbitrator Kaplan's decision in *Toronto District School Board* dealt with a policy that provided for non-disciplinary leaves of absence without pay. Much of his analysis in determining the policy to be a reasonable exercise of management rights applies readily to the facts of this matter. He wrote as follows: [37]

> The starting point, of course, is the *Occupational Health and Safety Act.* It requires an employer to take every precaution reasonable in the circumstances for the protection of the worker. Obviously, what is reasonable is open to general debate, but in this specific case that assessment must be made in light of the expert evidence. And that expert evidence is that vaccination was the number one and best method of reducing the contraction and spread of COVID-19. *In these circumstances it is impossible to conclude that requiring employees to be fully vaccinated is not a precaution reasonable in the circumstances.* The attestation requirement, albeit mandated by law, was a necessary corollary of this and, as earlier noted no complaint has been raised that personal information has been anything but properly safeguarded and protected. This part of the case could be decided on the basis of the TDSB having appropriately complied with the *Occupational Health and Safety Act.*
>
> The same conclusion, however, also results from an application of the principles in *KVP*. The TDSB is allowed to promulgate rules and policies. There is nothing in

[37] *TDSB,* at p. 36-37

> any of the applicable collective agreements that fetters this management right. The union pointed to leave and seniority provisions, but respectfully, they have nothing to do with the issues at hand and with the employer's urgent need to introduce a policy to protect employees and students in the midst of this worldwide pandemic, one that was causing so much havoc in the education system and preventing the stable introduction of in-person learning. . .
>
> The Policy was clear and unequivocal. The TDSB explained it to employees and so too did the union. There is no evidence that anyone was under any misunderstanding about what the Policy required in terms of vaccine attestation and becoming fully vaccinated. The TDSB and the union also made it perfectly clear what would happen to employees who chose not to become fully vaccinated. . . (emphasis added)

258. In *Alectra*, Arbitrator Stewart considered a policy that required employees to provide confirmation of vaccination status and proof of full vaccination, as well as the employee's adherence to "any future additional vaccination recommendations made by governmental and/or healthcare authorities". The policy provided that non-compliance *might* give rise to disciplinary action, up to and including termination of employment. Twenty-two or twenty-three employees in a bargaining unit of over 800 employees were unvaccinated and they were on unpaid leave at the time of the arbitration.

259. As Mr. Solomon noted in the City's submissions, Arbitrator Stewart addressed the balancing of interests and, while recognizing the effects on employees placed on unpaid leave, found that their interests were necessarily subordinated to the employer's interests and obligations in protecting the health of those in the workplace. Moreover, Arbitrator Stewart rejected the proposition that Alectra's position was to be faulted because other employers had not taken the same approach and employers in other sectors had rescinded their mandatory policies.

260. I adopt the following from Arbitrator Stewart's decision:

> 21. There can be no doubt that the interest of employees in maintaining an ability to support themselves and their families is a very significant matter. As noted in paragraph 91 of Electrical Safety Authority, supra, the Supreme Court of Canada in Matchinger v. HOJ Industries Ltd. [1992] 1 SCR 986, has recognized that work is fundamental to a person's identity, as well as providing a means of support and a way of contributing to society. A disruption of employment has not only economic effects, it also has effects on relationships as well as psychological effects. These effects may be long lasting and may be personally devastating. To be deprived of an opportunity to work in the context of a personal decision about a medical procedure, a personal decision that is unquestionably an individual decision to make, and is a matter of bodily integrity, is a matter that properly commands careful consideration and respect. I entirely agree with [counsel for the union's] forceful submissions in this regard. Yet balanced against this interest, there is the issue of the risk to the health of others in the workplace that is presented by the unvaccinated. An individual's health is an extraordinarily significant matter, perhaps the most significant personal interest that exists, and it simply must be given the utmost consideration. In my view, *this interest in protecting the health of those in the workplace properly prevails over the interests of the unvaccinated in maintaining their livelihood.* . . . While individuals can take measures to restrict their activities

and exposures outside of the workplace, in the workplace they are, for the most part, unable to individually manage their environment and must depend on the employer taking reasonable precautions to protect their health. *The Policy does that by removing the risks associated with the potential for transmission associated with the presence of unvaccinated employees in the workplace*. This is not an example of paternalism, as [counsel for the union] suggested, but, in my view, is an instance of protection, in accordance with the Employer's important statutory obligation to take every precaution reasonable in the circumstances to protect the health of those in its workplaces. Indeed, with the rise in the highly transmissible Omicron variant, *there can be no real doubt that the Policy was a reasonable initiative to provide protection from transmission in the workplace.* While, as [counsel for the union] emphasized, there are many other employers in the sector who have not taken the same approach that this Employer has, I agree with Arbitrator Mitchell's conclusion at paragraph 110 of his decision [in *Elexicon*] where he states:

> … I do not agree with the Union that the fact that most other electrical power utilities have not introduced mandatory vaccination policies demonstrates that Elexicon's policy is unreasonable or unnecessary. Each of these institutions has its own operations, experience, culture and relationship with its employees and the Union, and different governance structures. The public health questions and the balancing of interests are difficult ones and different employers with different resources and varied interests will weigh the balance differently.

22. With respect to the matter of other employers in other sectors who have now rescinded their mandatory policies, along with other developments that reflect a relaxation of public health standards, I reach the same conclusion. The pandemic remains an ongoing matter of concern and notwithstanding the high level of vaccination in the workplace I am unable to conclude that Alectra's decision to maintain its vaccination requirement can properly be characterized as unreasonable at this point in the pandemic.

23. The Employer's decision in October 2021, to implement a policy that prevented unvaccinated employees from attending the workplace was, in the face of a pandemic and the scientific and public health information available and its duty of care, entirely reasonable, as well as a legitimate exercise of management rights. *Those employees who have been unable to work remotely have retained their employment status, along with benefits.* Any disciplinary action that the Employer may take remains subject to the just cause standard in the Collective Agreement. In the current circumstances, as previously indicated, it is my view that the Policy remains reasonable, although the circumstances are certainly evolving. While, as [counsel for the union] emphasized, any risks associated with unvaccinated employees are decreased if they work outside, the evidence established that not all of their work is conducted outside, and there will soon be more employees in the various workplaces. These changing circumstances undermine the Union's suggestion that the standard of reasonableness requires an assessment and accommodation of individual unvaccinated employees that would allow them to return to the workplace at this time. Accordingly, those unvaccinated employees on unpaid leave will need to maintain this status, at least for the time being. With respect to [counsel for the union's] submission that the Employer could and should continue to have employees work remotely, I note that *an employer's assessment as to how*

> *work is most efficiently and effectively conducted is a critical management prerogative*. Alectra's decision to implement a gradual and careful return of employees to the workplace is understandable and entirely accords with the practices of responsible employers across the province, as they adapt to the changed and evolving circumstances that the pandemic has brought. This may mean, for those unvaccinated employees who are currently working from home, that they will be subject to the prospect of an unpaid leave in accordance with the Policy. (emphasis added)

261. Toronto Fire Service is not an operation that can be conducted remotely, in isolation from the public, or as a solitary pursuit for its employees. In the circumstances, and recognizing both the precautionary principle and the requirements of *OHSA*, it is my view, supported by the evidence and by the decisions reviewed above, that the City had an obligation to adopt an approach that promised the most effective protections for its employees and, of course, the public they serve.

262. Accordingly, I declare that the Policy requiring fully vaccinated status to the level set for the end of 2021 as a condition precedent for a fire fighter's continuing to report for work in TFS was and continues to be reasonable.

The Policy was not Reasonable as it was Enforced

263. The enforcement mechanism, however, is a different matter. The Association challenged the City to identify any case in which the employer had taken the approach adopted here. Rather than take issue with the Association's point, the City maintained that its approach was "very unique". The City mentioned in its particulars that there were four other municipalities that had mandatory vaccine policies; however, as suggested by the Association's argument, none were identified as providing for what I find, in reality, to be automatic termination for non-compliance.

264. While I am convinced that the City acted appropriately in accordance with well-recognized principles in enacting the mandate, nothing in the evidence persuades me that I should defer to the City in its chosen enforcement mechanisms. The reasonable objective of the mandate would be met by the removal of non-compliant employees from active employment — a consequence that has widespread support in the arbitral jurisprudence. Apart from the views expressed by Mr. Milloy, nothing in the evidence supports the necessity or inevitability of discipline and discharge. The opinions expressed by Dr. Juni and by Dr. Dubey were as to the efficacy of vaccines and related issues. Neither addressed the need for or the appropriateness or value of the City's imposing penalties of disciplinary suspension and discharge in response to a fire fighter's failure to comply with the requirement to be vaccinated

265. In plain language, the apparent function and intended consequence of the City's chosen enforcement mechanism were its coercive effect in persuading reluctant employees to accept vaccination as an alternative to suspension, termination and the prospect of unemployment. There was no room for doubting the clarity and conclusiveness of the City's message to all unvaccinated fire fighters: Become fully vaccinated or be suspended and then terminated for cause if you do not comply.

266. Having found the mandate to be reasonable, in conformity with the precautionary principle and the *OHSA,* because of the City's need to protect employees against COVID-19 infection, the necessity of hospitalization, possibly in intensive care, Long COVID and death, I join Arbitrator Somjen in *BC Hydro*,[38] to ask: "Since I have upheld the Policy as reasonable, what does the possibility — [here, the inevitability] — of discipline [for the unvaccinated] add to resolving the employer's health and safety concerns?" My answer is that the Employer has not made out the invariable need for discipline or the establishment of a disciplinary record in the exceptional circumstances present here. An unpaid leave or other non-disciplinary exclusion, while coercive, is less so than a disciplinary suspension and discharge for cause. In my view, such response would reflect, as well as can be done collectively, the balancing of interests recognized by virtually all arbitrators who have been considered policies that provide for the possibility of disciplinary action and, as an interim if not final measure, provide for the removal of the individual from the workplace without compensation.

267. Disciplinarily suspending and then terminating the employment of unvaccinated fire fighters for cause did not add to the protection afforded other employees or persons who might come into contact with members of the service.

268. In my view, the milestones referred to by counsel for the City do not assist in the defence of its enforcement mechanism. Those milestones addressed deadlines for action, the conduct of interviews, and, ultimately, the timing of discipline and discharge for unvaccinated employees or for employees who refused to disclose their vaccination status. The escape lane or "off ramp" was not the City's identification and acceptance of a compromise or an alternative such as redeployment or an unpaid leave, but was available only to those who complied fully with the Policy rather than be suspended and discharged.

269. There was no question that fire fighters had ample notice of the policy and of the consequences for those who would not comply. Sufficient time was provided for vaccination and for careful consideration of that course and of the consequences of failing to comply. However, I am not persuaded that the assessment of the City's enforcement mechanism is to be concluded more favourably because employees had opportunities to change their minds on several occasions or over several months before being discharged. The penalties of disciplinary suspension and discharge do not become reasonable and appropriate by virtue of their being threatened ten times rather than once or over a period of ten weeks rather than one prior to their imposition.

270. Mr. Solomon reminded me that I was not dealing with an assessment of the presence or absence of just cause for the discharge of any of the affected fire fighters, but with the reasonableness of the Policy and of the mechanisms chosen for its enforcement. The City would have me agree that non-compliant fire fighters were guilty of insubordination (as well as undermining an important health and safety directive) and properly exposed to discharge for cause without reference to any exceptions or answers to the offence of insubordination recognized in the arbitral jurisprudence or to any circumstances — including, for example, the possibility of an individual's having lengthy, faithful service and a record of unfailing compliance with all other

[38] *BC Hydro* at para. 77 *et seq*.

City policies and procedures — that might militate against an arbitrator's upholding the discharge decision.

271. The City's position pushed a step further. It would, in effect, have me ignore the commonplace that arbitrators look to employers not only to establish the facts relied upon for proof of the employee's allegedly unacceptable conduct and that those facts support a disciplinary response, but also, and most importantly, to convince the adjudicator that the disciplinary response selected by the employer was appropriate in all of the circumstances, including all that might or should lead to a decision against the necessity or justness of the suspension or discharge.

272. I agree with Arbitrator Stewart in *Alectra* and others that the rights and interests of the group are to be accorded greater recognition than those of a non-compliant individual; however, the City has not made the case that the protection of the group — virtually all of its fire fighters, as well as other City employees, and the citizens of Toronto — requires anything more than the removal of recalcitrant employees from the active workforce. Vaccinated fire fighters do not need the protection of the unvaccinated fire fighters being discharged for cause. They derive no benefit from the Employer's taking disciplinary action and that final step. Neither Ms. Anderson nor Mr. Milloy attempted in their evidence to establish that any requirement or principle of health and safety law or practice required the discharge of any non-compliant employee as opposed, at most, to the removal of the employee from the workplace.

273. The City argued that the obligations under the *Occupational Health and Safety Act* were non-delegable. That is accepted. However, the City needed to delegate nothing to anyone. The Employer was not forced to accept an employee's non-compliance without more. In my view, the furthest along the spectrum that the precautionary principle and the authorities cited by the parties take the analysis is to the point of removing a non-compliant employee from the active workforce and the workplace, with disciplinary consequences and discharge for cause as *possibilities rather than certainties*. Depending on all of the pertinent considerations, an individual employee's discharge for cause might be shown to be a sustainable outcome in the employment law or labour relations law context, but I find nothing in the City's position to establish discharge as an appropriate mechanism under health and safety legislation or principles. The characterization of clause 25(2)(h) of the *OHSA* as the basis for considering the City to be the "insurer of health and safety in the workplace" would not oblige the Employer to terminate the employment of an individual who ceased to present any workplace health and safety risk by reason of his or her exclusion from the workplace for an indefinite period. Most assuredly, none of the applicable principles, authorities, and legislation obliged the City to terminate the employment of all non-compliant employees regardless of any other considerations.

274. In this context, many of Arbitrator Kaplan's observations in *TDSB* aptly respond to what I have concluded to be the excesses of the Policy's enforcement mechanisms. Arbitrator Kaplan, at pages 33-34, characterized the TDSB's policy as being "not overbroad", but in fact, "tailored and nuanced" in that it "only went as far as necessary to achieve its objects" and "did not lead to impacts that had nothing to do with its objectives." In my view, it is appropriate in considering any rule — such as the mandate — that impinges to any degree on an employee's privacy and bodily integrity to ask whether the policy or any of its enforcement mechanisms should be supported or sustained to the extent that they go beyond what is strictly necessary to accomplish its aims.

Enforcement mechanisms that do go beyond what is strictly necessary to accomplish the aims of the policy and in doing so invariably add disciplinary consequences that have nothing to do with the policy's objectives should not be found to be reasonable. Here, the Employer did not attempt to establish that it could not accommodate objecting employees by placing them on an unpaid leave of absence as other employers have done. Rather, the City decided that the appropriate course of action was to take disciplinary steps and chose to announce what is a most coercive process on October 6, 2021. It would not suffice, it seems, that fire fighters incur the losses and difficulties arbitrators reasonably and realistically associate with unpaid leaves; these employees were to suffer the additional penalty of a significant disciplinary entry on their employment records followed by discharge.

275. The City pointed out that a number of fire fighters agreed to vaccination after being confronted with the reality of their disciplinary suspensions and imminent dismissals. The threat of discharge for cause would be expected to persuade some to comply, but discharge is not a necessity to protect employees and the public from the risk of transmission of COVID by fire fighters or any individual fire fighter and, in my view, cannot be justified as an enforcement mechanism on the grounds of its being objectively successful in bending reluctant or lethargic employees to conform.

276. Notwithstanding the October 6, 2021 statements by the City Manager that employees who failed to comply with the Policy "will be suspended for six weeks without pay" and "their employment will be terminated for cause" if they did not provide proof of being fully vaccinated, the City insisted that the disciplinary process for the enforcement of the mandate was not automatic as asserted by the Association. In that context, Mr. Solomon pointed out that the November strategic communication had again used the word "may" — "staff who are not compliant . . . may be suspended for up to six weeks without pay" — disregarding perhaps that the same document repeated to employees who continued to be unvaccinated that "their employment will be terminated for cause as they will have chosen not to comply with the mandatory vaccination policy."

277. The reference to the Policy's providing that an individual "may be suspended for up to six weeks" did not alter the fact that a disciplinary suspension was assured for a non-compliant fire fighter with no valid claim to an exemption. On my reading, the reference was conditional in terms of duration, not status. The employee would be suspended, and the suspension might be for fewer than six weeks — but that reduction followed only if the employee succeeded in establishing entitlement to an exemption or decided to comply and met Policy conditions for a return to work.

278. As the City had noted in its particulars, other municipalities had adopted mandatory vaccination policies. Counsel for the Association put to Mr. Milloy that those municipalities had stated that non-compliance "may" — rather than "will" — result in discipline and discharge. Mr. Milloy asserted that the Policy was that which went into effect on September 7, 2021 pursuant to the City's August 2021 communication. There, he noted, the reference was that employees who did not comply "may be subject to discipline, up to an including dismissal" Mr. Milloy asserted that the October 6th communications did not constitute the Policy.

279. The proposition that the enforcement mechanism applied to fire fighters was as identified in the August 2021 message to City employees is contrary to the evidence.

280. The Policy requiring mandatory vaccination was announced in August to be effective September 7, 2021. However, the enforcement mechanism was not settled before or announced for September 7th. The slide deck used in the internal presentation on August 17, 2021 included this: "The focus will be on education but, we also need to indicate that we are not taking the possibility of discipline/dismissal off the table". Thus, the possibility, in August 2021, of discipline and dismissal being on the table was transformed, more than six weeks later, to discipline and discharge being the only course followed by the City in addressing non-compliance.

281. Ms. Anderson's evidence was that she "was not involved in the City's disciplinary response announced to staff on October 6, 2021". That is, the disciplinary response was not a matter for the health and safety professionals and was not made known until early October. Having indicated in his will say[39] that he had undertaken on September 29th to communicate the City's approach to address non-compliance, Mr. Milloy's evidence was that, by the end of September, the "City turned its mind to enforcement of the Policy", that he recommended a disciplinary response, and on October 6, 2021 the City Manager announced that non-compliant employees "would be placed on an unpaid disciplinary suspension until they achieved compliance, failing which they would be terminated for cause". Thus, there was no doubt that the enforcement response that had been recommended to, adopted by, and announced by the City Manager was that discipline and discharge would in fact flow from continued non-compliance.

282. The City's changing from "may be suspended" and "may be terminated" to "will be" was clearly a conscious decision. If City officials turned to and were pursuing the issue of enforcement late in September as Mr. Milloy testified, to suggest that the change in language was immaterial or inadvertent would not be credible. When considering the enforcement piece of the Policy, the City could not have seen "may be suspended/terminated" and "will be suspended/terminated" to be equivalents.

283. Moreover, the enforcement mechanism could not be considered to be "very unique" if it had remained as stated in August because there are several other examples of policies — including those of the four municipalities cited by the City — that include language indicating that non-compliance "may result in discipline up to and including termination of employment". Accordingly, the characterization of the policy as being "very unique" stands up to scrutiny only to the extent that there was in fact substance to the City's progressing from the possible ("may be") to the definite ("will be") in describing the consequences for non-compliant fire fighters.

When the Policy or a statement about the Policy advised the reader that an employee might be disciplined — "may be subject to discipline, up to and including dismissal" — the implication and the Employer's undertaking were that all relevant circumstances would be considered. That is, a

[39] At para. 16: "I shared another update on September 29, 2021 with the City's Union and Association partners, reaffirming that the City was taking an exclusively non-disciplinary approach to Policy violations prior to October 30, 2021. I also reassured them that I would be in touch once the City had decided on an approach to address non-compliance with the October 30, 2021 Policy deadline for full vaccination."

decision would be reached as to the appropriate response based on all of those circumstances. The City maintained that the evidence substantiated that it had provided a framework for a corporate approach but allowed for individual circumstances to be considered. I do not find support for that proposition in the evidence. Mr. Solomon argued that the City's representatives conducted a deliberative process in which they would hear and respond accordingly to employees. Again, I cannot agree. The approach taken by the City evolved into one that did not admit consideration of all relevant circumstances. The disciplinary response was automatic and was based on an employee's answer to a single question.

284. In my view, it would be unrealistic to suggest that Commander Boisseau and his colleagues might go against the advice of Mr. Milloy and the directive of the City Manager by failing to suspend and terminate a fire fighter for what the City characterized as insubordination for which there could be no mitigating circumstances. In the absence of any reference to consideration of the usual factors, Commander Boisseau and others conducting the interviews were left with no room for doubt. The City Manager had announced that employees would be terminated if they failed to expunge their insubordination and Commander Boisseau and his fellows would have reason to give careful thought to whether they too would be guilty of insubordination if they ignored the directive and failed to issue a suspension letter followed by a termination letter.

285. The November 1, 2021 instructions to managers identified "an outstanding accommodation request" as the only acceptable reason for not taking disciplinary action after the interview. The scripts supplied to instruct management interviewers identified only one question to be put to the interviewee: "Why have you failed to comply?" If no exemption were claimed or available, the employee was to be suspended and subsequently terminated. There was nothing in the scripts to suggest that ordinary disciplinary principles were to apply and that the process was an investigation that might lead to "discipline in the normal course". The scripts were detailed to the point no one following them in conducting an interview would sensibly conclude that, although not mentioned or alluded to, the analysis arbitrators would expect an employer to undertake in determining whether and how to discipline an employee in the normal course was relevant. Indeed, the City made it clear that there were no exceptions.

286. Just as Commander Boisseau was not told to consider an employee's seniority and record as he should if dealing with "discipline in the normal course", he was not told to consider whether a disciplinary suspension followed by discharge for cause were the appropriate disciplinary responses. I learned nothing that encouraged me to believe Commander Boisseau thought that he was to engage in an inquiry such as an employer might ordinarily undertake when attempting to determine an appropriate response to perceived insubordination. That assessment was not part of his function as those disciplinary responses had been predetermined to apply uniformly across TFS and other divisions and sections of the City. Neither the Policy nor the other instructions to managers educated anyone about any "compelling reason" that might allow an unvaccinated and non-exempt fire fighter to escape disciplinary consequences and dismissal for cause. All of the documentary evidence attested to the absence of reasons the City would consider to be compelling. That is not surprising as Mr. Milloy testified without hesitation to his inability to contemplate the existence of any reason for an employee's failure to comply by accepting vaccination — a disciplinary suspension was the exclusive and inevitable effect of the enforcement

mechanism. Accordingly, the City's reference to the possibility of a fire fighter offering a "compelling reason" or a "credible reason" for non-compliance was illusory and without meaning.

287. I consider it to be significant — but unsurprising — that there was no evidence of any fire fighter's being exempted from the mandate on the basis of his or her having a "compelling reason" for failing to comply unless the reason engaged medical proscriptions or *Code* issues. When Commander Boisseau was asked if he had leeway to make a decision, he said: "That's for Staff Services". There was no evidence of any referral to or any consideration of these individuals by Staff Services. Accordingly, there was nothing in the evidence that would lead me to conclude that an individual who sought to excuse non-compliance based, for example, on a pathological fear of vaccination would have fared differently than an individual who simply took the position that the City had no right to require vaccination of its employees.

288. The Policy's imposition of discipline was indeed automatic and that there was nothing in its process that amounted to discipline in the normal course as I understand the processes. I conclude that there was no intention to ameliorate the response to non-compliance for those who were not entitled to a medical or other exemption consistent with the *Human Rights Code*.

289. There have to be consequences for an employee's refusal to comply with a health and safety policy found to be reasonable – but the consequences must also be reasonable and, if disciplinary, must meet the just cause standard preserved by the collective agreement between these parties. As the City and Local 3888 fully understand, when discharge cases are arbitrated, the sole issue is not limited to proof of the impugned conduct. Even if the employer announces its "zero tolerance" approach to specified wrongdoing, the employer is yet put to the proof of the appropriateness of the disciplinary response it has associated with the employee's fault or default. Moreover, mitigating factors — all of which could neither be have been known nor eliminated in respect of all City employees when the Employer announced the disciplinary enforcement protocols in early October 2021— are also within the purview of the grievance arbitrator and cannot be assumed away on the considerations relied on here by the City.

290. Vaccine hesitancy is not unheard of. Indeed, the City had educational programs, one objective of which would have been to help participants overcome such fears. Without mentioning the phenomenon, Mr. Milloy's statement and the City's instructions to managers say, in effect, that an admission of vaccine hesitancy would not be good enough to preserve an individual's employment status. That would apply as well to the pathological fear that Mr. Goldblatt posited in the course of his submissions on behalf of the Association. If a fire fighter had a pathological fear of vaccination, he or she would need a medical exemption because there was nothing the individual could say that would avoid the fixed disciplinary response. Nothing in Commander Boisseau's evidence suggested that he would have paused the process for a fire fighter asserting an overwhelming fear of vaccination. Mr. Milloy's inability to contemplate any reason for refusing vaccination suffices to establish that he would not have counselled Commander Boisseau or any of the managers to forbear from disciplining a fire fighter expressing such fears.

291. The fact that there were milestones, as Mr. Solomon noted, was, in my view, immaterial in respect of the certainty of the outcome awaiting a fire fighter who failed to comply with the Policy and who had no valid claim to an exemption. An individual with a pathological fear of

vaccination is not likely to benefit from the effluxion of time unless the consequences of being suspended without compensation brings the individual to accept vaccination. If the employee's fear of vaccination is not overcome by a greater fear of possible penury or by the training made available by the City, its continuing would, in my view, suffice to demonstrate that the invariably uniform approach to the enforcement of the Policy was unreasonable.

292. That is not to say that the City is precluded from pursuing an enforcement regime in which due and appropriate consideration is given to all relevant factors affecting or informing an individual's non-compliance as well as the needs of the Employer. The City's doing so was raised in the initial announcement of the Policy and enjoys the support of most arbitrators who have dealt with the possibility of "discipline up to and including dismissal" in response to non-compliance with mandatory vaccination and other policies found to be reasonable.

293. The City could not have failed to anticipate that some employees would refuse to be vaccinated due to vaccine hesitancy or other arguably relevant concerns. The existence of that difficulty is obviously known to the City as its educational process was designed, in part at least, to assist employees in overcoming vaccine hesitancy and addressing doubts some might have had about the safety of the vaccines. Just as surely the City must have recognized that the educational process would not be successful in overcoming employees' objections in every instance. How then does the City excuse its assuming, without exception, that every individual's refusal to be vaccinated reflects nothing more than insubordination for which the only reasonable responses are a disciplinary suspension followed by termination of employment for cause?

294. The typical justifications for discipline in response to some forms of insubordination — a workplace is not a debating society, work cannot be made to await the exhaustion of the grievance procedure, and an employee should obey now and grieve later unless the employer's order involves illegality or compromises the employee's safety — do not fit well with this circumstance in which the intrusion on a fire fighter's privacy and bodily integrity associated with Policy compliance is irreversible. Obeying now and grieving later would offer no comfort or benefit to an employee such as the hypothetical individual with a pathological fear of vaccination.

295. The City quoted from *Hunter Rose* for the identification of the factual tests to be met to establish the fact of an employee's engaging in insubordination. That review, however, is merely the first step in a possible disciplinary process. What must follow from that is a determination of an appropriate response to the employee's behaviour and that is not, in my view, to be settled simply on the basis that the employee is not likely to conform at any time in the future.

296. In some cases of discipline or discharge for insubordination, arbitrators consider the availability of issues of safety or legality as a justification for the grievor's refusal to comply with a direction, any other explanation given by the employee, and, as in all discipline and discharge for cause case, whether the disciplinary response was appropriate in all of the circumstances, including those pre-emptively excluded here by the City in its disregard for normative factors such as the employee's seniority and employment record. In *Hunter Rose*, the arbitration panel determined that the situation complained of did not "amount at law to insubordination".[40] The

[40] *Hunter Rose*, at para. 28.

decision also recognized that on the third element of the offence of insubordination — "the order must be disobeyed" — "generally arbitrators have looked for an intention to undermine authority as an element of the offence"; "a refusal to carry out an order could be a refusal to obey particularly if it is connected with a manner of speaking or acting which flouts authority or demonstrates defiance of authority or rebelliousness"; and "what is important is the attitude of the employee".[41]

297. In my view, it is not possible to construct an enforcement mechanism based in part on insubordination that relies on the presumption implicit in the City's approach that there can be no exculpatory explanations — even though Mr. Milloy could conceive of none — and all non-compliant employees to the last will have the requisite intention identified in *Hunter Rose*, or a manner of flouting or demonstrating defiance of authority, or an attitude that supports the City's presumptions. The enforcement mechanism was set on or shortly before October 6, 2022, weeks in advance of the first fire fighter interviews, yet the City presumed insubordination with no basis for an assessment of any individual's intention, manner, or attitude. These are fundamental flaws in the approach taken.

298. The City also relied on the proposition that the non-compliant fire fighters were subject to suspensions and discharge because they were undermining an important health and safety initiative. The decisions cited in support of that element of the City's case do not lead me to agree.

299. I note that the unions accepted the appropriateness of discipline in each of *Canadian Airlines*, *Island Tug*, *City of Calgary* and *Imperial Tobacco*. More importantly, the rule breaches in those cases — the inanity of smoking while a fuel barge was unloading, the stupidity of stowing away in the lavatory of the employer's aircraft, and the foolishness of refusing to wear safety boots when going into the City of Calgary Waste & Recycling Services Department yard or intentionally discharging an air gun nailer held against a colleague — bear no relationship to the seriousness of the intrusion on a person's privacy and bodily dignity arising with the directive to accept a vaccination.

300. Arbitrator Lanyon found the grievors in *Canadian Airlines* and *Island Tug* guilty of a "gross safety violation". Nevertheless, in *Canadian Airlines*, he substituted a suspension of nine months for discharge, citing the grievor's long service, good employment record, the fact that his misconduct was "both isolated and uncharacteristic", and "his genuine remorse".[42] Arbitrator Lanyon also mitigated the penalty of discharge in *Island Tug*, even though he expressed the view that the employer was "presumptively correct" in discharging the grievor. His explanation for the resultant reinstatement of the grievor was "his past employment record".[43]

301. In *City of Calgary*, the arbitrator referred to his conclusion that the grievor's "rehabilitative potential is very low if he was to be reinstated" and his further conclusion that his

[41] *Hunter Rose*, at para. 27.

[42] *Canadian Airlines*, at para. 46.

[43] *Island Tug*, at para. 79.

"long service did not outweigh the factors" supporting his discharge.[44] That is to say, this decision was reached against the grievor, but not without consideration of factors other than his immediate misconduct. Similarly, in concluding *Imperial Tobacco* Arbitrator Lynk confirmed his consideration of factors raised in mitigation, the fact that the grievor did not have a lengthy service record, and the evidence that the incident was "neither an isolated safety infraction nor an isolated failure-to-report incident" with the result that "there [were] insufficient attributes on the positive side of Mr. Lambert's employment ledger to offset the compelling concerns that his worrisome safety record displays".[45]

302. The message, of course, is that proof of a safety violation or of failure to comply with a health and safety policy does not establish justification for discharge for cause as a necessary and irreversible penalty. Instituting an enforcement mechanism that purports to exclude consideration of mitigating factors addressed by those arbitrators ignores a foundational element of our labour relations principles and arbitral jurisprudence and cannot be upheld as reasonable.

303. *Aylmer* was relied on by the City as an example of a court's upholding the termination of an employee in part for his persistent refusal to comply with the requirement that he shave his beard so as to be able to use respiratory equipment in compliance with CSA safety standards. In my view, the decision is pertinent here only to the extent that the litigation involved an employee's objection to a direction that would require him to make what for him might have been a significant change in his self-image. The judgment mentioned the plaintiff's "obsession with his beard"[46] and the court noted that he had stated "the beard was important to him as an identifying characteristic or trademark and it did not cover any disfigurement or scars".[47] In dismissing the wrongful dismissal action, the court concluded:

> 53. Considering the safety issues at stake for the plaintiff and others, I conclude that the defendant's conduct in requiring the plaintiff to shave his beard was reasonable and that the requirement was so important that the plaintiff's refusal to comply justified his termination.
>
> 54. The plaintiff was quite prepared, on his own whim, to remain bearded whether it be because of personal pride or stubbornness or both and was not prepared to accept that his beard rendered respiratory equipment less effective thereby affecting his safety and creating a situation with potentially tragic results for himself and others. The plaintiff wanted to continue doing things as he had done for 24 1/2 years without acknowledging or accepting or even dealing with the report of the Occupational Health and Safety Committee, and the CSA standards which were which are clearly applicable and appropriate. . .

[44] *City of Calgary*, at para. 106.

[45] *Imperial Tobacco,* at para. 34.

[46] *Aylmer,* at para. 48

[47] *Aylmer,* at para. 52.

304. Arbitrators, of course, take other factors into account and, while the judgment of the court might be unassailable in the context of civil litigation, it is not helpful here. *Aylmer* was the only case relied on by the City that was in any measure arguably comparable in that it addressed an employee's dismissal due to a personal choice in conflict with a rule adopted for valid health and safety reasons.

305. I regard the absence of arbitration awards addressing such tensions to be tellingly indicative of the uniqueness of the City's approach to enforcement that I find to be unreasonable. Given the normative backdrop, the City would have it that even a fire fighter who has no disciplinary history and who has followed every other rule and policy identified by the City over the course of a lengthy career was required to be disciplinarily suspended and discharged as the only acceptable reaction to his or her objecting to the Policy — even if the objection were informed solely, for example, by the individual's pathological fear of vaccination. That extreme underscores how unfortunate and unreasonable the City's chosen and mandatory enforcement mechanism was.

306. The City submitted that it was reasonable for it to adopt a consistent enforcement framework. In my view, consistency does not trump reasonableness and being consistent in one's approach to an issue will not render an unreasonable approach — the inevitable disciplinary suspension followed by the equally inevitable discharge for cause of still non-compliant fire fighters — reasonable.

307. I cannot agree that the City's consistency in applying precisely the same penalties to each non-compliant individual in its employ was necessary in order that the enforcement process be fair or reasonable. The City submitted that it would be unfair to leave decisions regarding enforcement of the Policy to individual managers and that the scripted approach and instructions the Employer provided for interviewers evidenced a serious and deliberate effort to be fair and consistent in the enforcement while ensuring that individual cases were addressed. As noted, the evidence before me is that individual circumstances were not addressed; a fire fighter's seniority, service, and record — along with the necessity of discipline as a response — were considerations to be ignored and they were ignored. In this, the City took too much from the *KVP* requirement that a rule be consistently applied in that there is nothing in *KVP* to support the notion that each breach of a rule is to carry the same penalty regardless of all of the factors and circumstances that arbitrators consider in determining the outcome of discipline and discharge cases.

308. Mr. Solomon pointed out that the circumstances before me were entirely different from those in *BC Hydro* and *Chartwell* in that the City has been consistent from the outset. It has always contemplated discipline and had never wavered. The City's approach did not have the failing of the procedures followed by BC Hydro — having first declared a non-disciplinary response, and then relied on the same facts for a disciplinary discharge. Being different from *BC Hydro* and *Chartwell* in that respect is noteworthy, but that does not validate the disciplinary suspension relied upon as a justified element of the enforcement protocols. Moreover, neither arbitrator suggested that an inevitable dismissal for cause of all — or any — non-compliant employees would have been appropriate. To the contrary, Arbitrator Misra stated: "In the absence of evidence of any necessity or operational effect on the homes it is difficult to find that the termination provision of

the policy is reasonable"[48] and, further, "It appears the Employer is abrogating its duty to prove just cause for termination by relying solely on its inclusion of the optional penalty of termination in the policy".[49] There, as here, Arbitrator Misra observed that the employer's enforcement approach "apparently precludes an employee relying on any mitigating factors, such as length of service, a clean disciplinary record, or any other factor that may be considered in an employee's particular circumstances."[50]

309. The City's foundational submission regarding the need to show deference to the management carries no weight in this context. The board of arbitration made that clear in *KVP*[51] writing about rules introduced unilaterally by employers and not agreed to by the union:

> Effect of Such Rule re Discharge
>
> 1. If the breach of the rule is the foundation for the discharge of an employee such rule is not binding upon the board of arbitration dealing with the grievance, except to the extent that the action of the company in discharging the grievor, finds acceptance in the view of the arbitration board as to what is reasonable or just cause.
>
> 2. In other words, the rule itself cannot determine the issue facing an arbitration board dealing with the question as to whether or not the discharge was for just cause because the very issue before such a board may require it to pass upon the reasonableness of the rule or upon other factors which may affect the validity of the rule itself.
>
> 3. The rights of the employees under the collective agreement cannot be impaired or diminished by such a rule but only by agreement of the parties.

310. The *Labour Relations Act, 1995* recognizes in subsection 48(17) that a fixed response to a breach or misconduct can be established by the agreement of the parties. That has not happened here, and the question raised by the Association's grievance and throughout was whether the City has persuaded me that its rule with respect to enforcement of the Policy is reasonable notwithstanding the absence of agreement and in the face of Local 3888's express objection. In my view, a policy enforcement mechanism that said that an individual *might* be terminated for failure to comply could be reasonable, but predetermining in advance of any application of the policy that an individual will be terminated unless he or she persuades the employer not to be resort to termination is unreasonable — particularly where, as is the case here, the only acceptable excuse is an exemption to which the employee might be entitled at law regardless of the Employer's views.

311. The enforcement mechanism adopted by the City has the effect of creating a rule without the Association's agreement that an employee will be terminated for non-compliance. Therefore, the enforcement mechanism is not consistent with the collective agreement as it has the effects of

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[48] *Chartwell*, at para. 233.

[49] *Chartwell*, at para. 235.

[50] *Chartwell*, at para. 239.

[51] *KVP*, at para. 34.

both overriding the requirement to desist from disciplining and discharging fire fighters without just cause and also effecting a unilateral amending of the collective agreement to render non-compliance subject to a fixed penalty or outcome. Those are consequences that *KVP* blocks[52]

312. The *Irving Pulp & Paper* analysis is fundamental to the approach one must take to this dispute. The Court accepted that, in determining reasonableness, labour arbitrators would "assess such things as the nature of the employer's interests, any less intrusive means available to address the employer's concerns, and the policy's impact on employees." In my view, the City fares badly on all counts on the enforcement side of the ledger.

313. The City has not established the necessity of discharge as an interest that deserves to be balanced against an individual's interests, even though those might be unexplained, might be inadequately explained, and might require speculation. An individual who says "I don't think you have a right to ask and therefore I will not answer" might be treated very differently in the arbitration of his or her discharge grievance than a colleague who was not vaccinated because of the pathological fear referred to in the Association's submissions even if the individual had been unable to steel himself or herself to admit that to Commander Boisseau in the interview. Here, the Employer's interests could have been addressed by the removal of non-compliant fire fighters from the workplace without disciplinary suspensions. That approach would be less intrusive on the employee — near term and long term — than fixing his or her record with a significant discipline. Although the financial impact on the employee and the attendant difficulties would be comparable in an unpaid leave of indefinite duration, that would be less than the ultimate impact of an overlaying suspension and eventual discharge.

314. Having declined Chartwell Housing REIT's request that she make findings that its course of conduct leading to its terminating employees in December 2021 established its obligation to meet the just cause standard and in concluding her decision in *Chartwell*, Arbitrator Misra noted:

> 242. . . . I find that the policy is both unreasonable and inconsistent with the collective agreement to the extent that it includes the termination provision as a consequence of non-compliance.
>
> 243. Despite my findings above, it is important to state that this decision should not be taken by those employees who choose not to get fully vaccinated as indicating that the Employer would never be able to terminate their employment for non-compliance with the policy in question, or indeed any reasonable policy. *It is only the automatic application of this policy as it respects discharge that has been found to be unreasonable*. (emphasis added)

315. Here too I have concluded that the enforcement mechanisms adopted and implemented by the City are flawed by reason of their unavoidable and therefore automatic application to those fire fighters who persisted in failing to comply with the Policy.

316. Accordingly, I declare that the enforcement mechanisms of disciplinary suspensions and discharge for non-compliance applied by the City were unreasonable and remit to the parties

[52] *KVP*, at paras. 23-27.

the opportunity to determine the further disposition of matters arising from those disciplinary suspensions and discharges pursuant to the City's application of the Policy, the mandate of which I have found to have been and to remain reasonable.

317. As requested by the parties, I shall remain seized to address any issues arising out of this decision and congruent with the scope of the Association's grievance.

Decision released this 26th day of August 2022.

Derek L. Rogers
Arbitrator

Appendix — Authorities

The Association referred to the following:

BC Hydro and Power Authority and International Brotherhood of Electrical Workers, Local 258, 2022 CanLII 25764 (BC LA) (Somjen)

FCA Canada v. Unifor, Locals 195, 444, 1285, 2022 CanLII 52913 (ON LA) (Nairn)

Sault Area Hospital v. Ontario Nurses' Association, 2015 CanLII 55643 (ON LA) (Hayes)

SARS Commission Report Executive Summary-Precautionary Principle

The City cited the *Occupational Health and Safety Act,* R.S.O. 1990, c. O.1 and the following under captions as set out below:

MANAGEMENT DISCRETION AND DEFERENCE

KVP Co. v. Lumber & Sawmill Workers' Union, Local 2537 (Veronneau Grievance) [1965] O.L.A.A. No. 2

Metropolitan Toronto (Municipality) v. C.U.P.E. (C.A.), 74 O.R. (2d) 239

Western Avalon Roman Catholic School Board v. Newfoundland Assn. of Public Employees, [2000] N.J. No. 206

Newfoundland and Labrador Teachers' Assn. v. Western School District (Travel Allowances Grievance) [2011] N.L.A.A. No. 8

United Food and Commercial Workers, Local 1400 v. Extra Foods, a Division of Loblaws Inc., [2012] S.J. No. 125

Communication, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd. [2013] 2 S.C.R. 458

Canadian Blood Services v. United Nurses of Alberta, Locals 155 and 411 (Grievance 150422 and 150457, Shared Accommodations), [2019] A.G.A.A. No. 9

Canada Post Corporation and Canadian Union of Postal Workers, 2020 CanLII 86105 (CA LA)

EMPLOYER DUTY UNDER OHSA

R. v. Wyssen 10 O.R. (3d) 193, [1992] O.J. No. 1917

R. v. Greater Sudbury (City), [2021] O.J. No. 2113

EVERY PRECAUTION REASONABLE

Lanxess Inc. (Sarnia) V. Communications, Energy and Paperworkers Union of Canada, Local 914 (Job Posting Grievance) [2009] O.L.A.A. No. 252

Toronto (City) v. Canadian Union of Public Employees, Local 79 (Charles Grievance) [2014] O.L.A.A. No. 34

Ontario (Ministry of Labour) v. Quinton Steel (Wellington) Ltd. [2017] O.J. No. 6652

SAFETY VIOLATIONS AND DISCIPLINE

Canadian Airlines International Ltd. v. C.U.P.E., Local 4045, 2000 CarswellBC 3152, [2000] C.L.A.D. No. 381

Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 364T v. Imperial Tobacco Canada Ltd. (Lambert Grievance) [2001] O.L.A.A. No. 565

Canadian General Tower Ltd. and U.S.W.A., Local 862 (Schramm) (Re). [2003] O.L.A.A. No. 801

Island Tug and Barge Ltd. and CMSG (Reid), Re, 2012 CarswellNat 5503

Coca-Cola Refreshments Canada Co., Brampton Plant v. Unifor Local 973 (Troisi Grievance) [2016] O.L.A.A. No. 328

City of Calgary and CUPE, Local 709, 2021 CanLII 134634 (AB GAA)

Hodgkin v. Aylmer (Town), 1996 CarswellOnt 4343

Hunter Rose Co. v. G.A.U., Local 28B, 27 LAC (2d) 338

PRECAUTIONARY PRINCIPLE

Ontario Nurses' Assn. v. Eatonville Care Centre Facility Inc. 2020 ONSC 2467 (CanLII);

Ste. Anne's Country Inn and Spa v A Director under the Occupational Health and Safety Act, 2020 CanLII 64749 (ON LRB)

United Food and Commercial Workers Canada, Local 175 v Hazel Farmer, 2020 CanLII 104942 (ON LRB)

Liquor Control Board of Ontario v Ontario Public Service Employees Union, 2021 CanLII 15607 (ON LRB)

VACCINE POLICY ARBITRATION CASES

Participating Nursing Homes and Ontario Nurses' Association, 2020 CanLII 32055 (ON LA)

United Steel Workers Local 2251 and Algoma Steel Inc. 2020 CanLII 48250 (ON LA)

Caressant Care Nursing & Retirement Homes and CLAC (Covid Testing), Re, 2020 (Randall)

Chatham-Kent and CUPE, Local 12.1 (Moynahan), Re, 2021 (Johnston)

Ellisdon Construction Ltd. v. Labourers' International Union of North America, Local 183 (Rapid Testing Grievance) [2021] O.L.A.A. No. 333

United Food and Commercial Workers Union, Canada Local 333 and Paragon Protection Ltd., 2021 (von Veh)

Electrical Safety Authority and Power Workers' Union, 2021 (Stout)

Ontario Power Generation and The Power Workers Union, 2021 (Murray)

Bunge Hamilton Canada, Hamilton, Ontario and United Food and Commercial Workers Canada, Local 175, 2021 (Herman)

Teamsters Local Union 847 and Maple Leaf Sports and Entertainment, 2022 CanLII 544 (ON LA) (Jesin)

Hydro One Inc. and Power Workers' Union, 2022 (Stout)

Power Workers' Union and Elexicon Energy Inc., 2022 CanLII 7228 (ON LA) (Mitchell)

Chartwell Housing REIT v. Healthcare, Office and Professional Employees Union, Local 2220, UBCJA (Mandatory Vaccination Policy Grievance) [2022] O.L.A.A. No. 53 (Misra)

Algoma Steel Inc. and The United Steelworkers Local 2251 (Collins) 2022 (Murray)

Unifor Local 973 and Coca-Cola Canada Bottling Limited, 2022 (Wright)

BC Hydro and Power Authority and International Brotherhood of Electrical Workers, Local 258, 2022 CanLII 25764 (BC LA) (Somjen)

The Toronto District School Board and CUPE, Local 4400, 2022 (Kaplan)

Extendicare Lynde Creek Retirement Residence and United Food & Commercial Workers Canada, Local 175, 2022 (Raymond)

Fraser Healthy Authority and British Columbia General Employees' Union 2022 CanLII 25560 (BC LA) (Kandola)

Canada Post Corporation and Canadian Union of Postal Workers, (Joliffe), April 27, 2022

*Alectra Utilities Corporation and Power Workers' Union***,** 2022 CanLII 50548 (ON LA) (Stewart)

COVID INJUNCTION CASES

Amalgamated Transit Union, Local 113 et al v. Toronto Transit Commission and National Organized Workers Union v. Sinai Health System, 2021 ONSC 7658

Canada Post Corporation and Canadian Union of Postal Workers, 2021 (Burkett)

REPRISAL AND ss. 63(2) OF THE *OHSA*

Kevin Francis et al. v. City of Toronto 2021 (ON LRB)

Kevin Francis et al. v. City of Toronto 2022 (ON LRB)