

In the Matter of an Arbitration

Between:

Oxford County

(The "Employer")

-and-

Canadian Union of Public Employees, Local 1146

(The "Union")

Re: Grievance of Joyce Rendle (25-02-2022)

Arbitrator: Brian Sheehan

Appearances:

For the Employer: Glenn Christie – Counsel

For the Union: Samuel Oort – National Representative

Hearings were conducted via Zoom on February 1, 2023, January 26, and April 22,
2024

This Award relates to a grievance filed by the Union on behalf of Joyce Rendle (the Grievor) regarding the Employer's decision to terminate her employment on January 24, 2022.

The Grievor was terminated for alleged non-compliance with the Employer's COVID-19 Workplace Vaccination Policy (the "Policy").

The Union indicated that its argument on behalf of the Grievor would have two branches. Specifically, the Union asserted that the Grievor should have been provided with a religious exemption pursuant to the terms of the Policy, and the decision not to grant her such an exemption constituted discrimination based on creed pursuant to the Ontario Human Rights Code (Code). In the alternative, the Union argued that the Policy was unreasonable in terms of imposing a penalty of termination in relation to non-compliance with the Policy.

The parties decided to bifurcate the hearing; the first issue to be addressed was whether the Union could establish a *prima facie* case of discrimination on the grounds of creed under the Code with respect to the Employer's application of the Policy to the Grievor, as it pertained to the decision to ultimately terminate her employment. If it is determined that a *prima facie* case of discrimination has not been established, the Union would then proceed with the argument challenging the reasonableness of the Policy. It is further understood that if it is determined a *prima facie* case of discrimination exists, the Employer reserves its right to argue that it could not have accommodated the Grievor without causing undue hardship.

Factual Overview

The Grievor started working for the Employer on January 4, 2011. At the time of her termination, her position was that of a Caseworker, primarily interacting with claimants under the Ontario Works Program.

On September 16, 2021, the Employer introduced its COVID-19 Policy. That Policy required employees to provide proof of full vaccination with respect to COVID-19 vaccines approved by Health Canada. The Policy further provided that an employee who did not provide evidence of “full vaccination against COVID-19 shall submit to regular testing for COVID-19 and demonstrate a negative test result at intervals determined by the County”.

The Policy also stated that the Employer was committed to “complying with its Human Rights obligations and accommodating those legally entitled to accommodation. Exemptions will be made for grounds protected by the Ontario Human Rights Code, which include confirmed medical or religious reasons.”

Further, pursuant to the provisions of the Policy, an employee's failure to comply with its terms would lead to possible discipline, up to and including termination of employment.

On September 20, 2021, the Grievor forwarded to representatives of the Employer and the Union an information package dated September 19, 2021. The package was over 30 pages in length. It opened with a Notice of Liability document

sworn before a Notary Public. The essence of that document is captured in the following paragraphs:

Take notice that I, Joyce Rendle, am a private citizen/subject of Queen Elizabeth II/native-born Canadian national. Canada is a Constitutional Nation State/Constitutional Monarchy and English common law country. Section 32 of the Canadian Charter of Rights and Freedoms, 1982, states that you cannot use any government legislation against a private citizen. As a registered organization for public use, the Charter applies to you.

....

Take further notice, there is no legislation that allows an employer, union, business owner, educator, government entity, or any individual in any other capacity, to discriminate against, force, coerce, prescribe, recommend, or mandate that a private citizen submit to a medical procedure, especially under the threat of loss of guaranteed rights such as, but not limited to, employment, education, goods and services, travel, or respect for bodily autonomy.

There is also no legislation that allows an employer to terminate an employee or exercise any form of constructive dismissal (unpaid leave, etc.) for not getting a COVID-19 injection, submitting to COVID-19 testing, disclosing my private medical information or attending training/re-education seminars. If an employer does so, they are inviting a wrongful dismissal claim.

The next part of the information package was a three-page Notice to Produce – Regarding Offer of COVID-19 Injection Product. The document began with the assertion that the onus is not on the employees to do their own research with regards to medical treatment, procedures or interventions, but rather it is the responsibility of the employer to provide all required information of the risks involved with regards to medical treatment to ensure “informed consent in accordance with the Health Care Consent Act”. The document then set out 19 different requests for information from the Employer with respect to providing proof or evidence as to the efficacy and safety of COVID-19 vaccine injections. Toward the end of the document, the Grievor claimed as follows:

Note that I am not accepting or declining your offer of injection at this time. I am giving you an opportunity to provide informed consent as required by law.

The next document in the information package forwarded was entitled Notice to Produce Regarding Offer of COVID-19 Testing. This document followed the pattern of the Notice to Produce Regarding Offer of COVID-19 Injection Product document. However, instead of 19 demands for information, there were only the following 12 demands:

1. Please provide your source of authority for the COVID-19 measures, given that Health Canada has stated that they have no evidence of having isolated the virus. Refer to Exhibit 1. Supporting correspondence for the Health Canada FOIA is in Appendix A.
2. Please provide your source of authority to contravene the Genetic Non-Discrimination Act, which protects my biological property. Convictions include fines of up to \$1 million plus jail time. See Exhibit 2.
3. Please advise the manufacturer and type of testing to be used. I will also need to inspect all original packaging, including the swab's primary packaging prior to being opened.
4. Please provide the evidence that the testing can detect COVID-19 and **only** COVID-19, and will not simply verify biological material that could also be identified as Influenza A or Influenza B.
5. Please provide evidence that the testing facility has actual samples of the COVID-19 virus against which these tests will be compared.
6. Please confirm that the testing facility has actual samples of COVID-19 and all of its variants, including the Delta variant. Based on my research, the CDC has stated that there are no tests which can detect or identify ANY of the variants; they can only identify whether or not one has COVID-19, and not which variant one may have. This creates a lack of confidence in me with these tests.
7. Please provide evidence that the testing swabs do NOT contain Ethylene Oxide (EO), which is a very toxic, hazardous material used to sterilize that "may cause cancer and reproductive harm" according to the Canadian Centre of Occupational Health and Safety. Refer to Exhibit 3.

8. For Antigen testing, please provide your rationale for proceeding with this type of testing AND the evidence that these tests are highly accurate, given that that the Ontario Health Minister stated on July 31, 2020, that they were halting the Antigen testing of teachers due to the high level of false positives derived from such tests.
9. For PCR tests, please provide rationale for your decision to use PCR tests despite the CDC's withdrawal from using these tests as reported on July 2021, effective December 31, 2021.
10. For PCR tests, please provide your evidence that the PCR tests are a valid and accurate tool, given that their stated use is **not for diagnosis of infection**, according to its inventor, Kary Mullis.
11. Controversy surrounding PCR tests and their ability to diagnose aside, please provide the cycle threshold (CT) level that will be used for diagnosis. Per Kary Mullis, anything above a CT of 28 cycles should not be used due to the high degree of inaccuracy, whereas Ontario has been using CTs of 35-42 which creates a high degree of false positives, and therefore a "casedemic". The consequences of these false positive tests cause **significant** harm to both those receiving the incorrect results and the general public as a whole (ex. Lockdowns, stay-at-home orders).
12. Please provide confirmation that my used tests will be destroyed immediately upon the results being determined, and will not be used for any purpose other than testing for my employer/academic institution in order to work/attend school.

This document contained the same declaration by the Grievor as was in the Notice to Produce Regarding Offer of COVID-19 Injection Product document that she was "not accepting or declining the offer of testing at this time".

The document package also included a Declaration of the Declination to Offers of Medical Intervention, which sets out the following declarations:

As a living woman, I retain all of my God-given rights, including sole possession and sole use of all my biological materials, which are granted to me by my Creator.

....

I retain the right to decline all attempts to access, influence and/or otherwise after any and all of my God-given biological material and/or biological systems which are unique, flawless and original design and craftsmanship of my Creator and of which my Creator has granted me sole possession, proprietorship and use.

....

I require that any and all product and/or medical procedure offered to me by my employer be both entirely retrievable from and also removable in its entirety from my body, person and womanhood at the conclusion of each and every work period / work shift.

Furthermore, I, being of sound body and mind, do hereby declare that my body, soul, mind and spirit belong to my Creator and that no person shall take possession of, force medicate, treat, inject upon or into my living body without my consent. The Holy Bible says "the life is in the blood" and any interference with the purity of the blood is an offence to my well-being such that anyone injecting any foreign substances into my body, without my consent, accepts liability and responsibility personally for all damages caused to me including, but not limited to, death, and will face prosecution under appropriate Law. Ref. Deuteronomie 6: 1-9, Matthew 22:37, Leviticus 17:11.

Pursuant to the above statements, I decline all offers of medical intervention at Oxford County.

Will Schuurman, a Pastor of Trinity Bible Chapel, a congregation that the Grievor is a member of, signed as a "witness" to this particular document.

The Policy came into effect on Monday, October 4, 2021. On that day, the Grievor was sent home from work by Amy Smith, Director of Human Resources for the Employer, on account of the fact that she had not taken a Rapid Antigen Test. The Grievor, in response to Ms. Smith's directive to leave work, advised that since the Employer had not responded to all the questions she forwarded in her September 19, 2021, information package, she could not make decisions based on informed consent and, therefore, was declining the offer to participate in testing.

The Grievor was placed on an unpaid leave of absence subsequent to October 4, 2021.

On October 20, 2021, Ms. Smith wrote to the Grievor advising that she was receiving a written warning for failing to comply with the Policy by continuing to refuse to participate in Rapid Antigen Testing. Ms. Smith further advised the Grievor that the form of Rapid Antigen Testing utilized by the Employer involved a clean Q-tip type of swab that did not contain any chemical or reagent on the swab itself. On that same day, Ms. Smith also wrote to the Grievor in response to her September 19, 2021, information package, indicating that the Employer was of the view that the forwarded information did not provide a basis for a religious exemption under the Code. In relation to this point, Ms. Smith advised she had reviewed the Trinity Bible Chapel website, which indicated that “Trinity Bible Chapel cannot say that it is religiously opposed to vaccinations wholesale” and that with respect to vaccinations, “individuals must obey their consciences on vaccinations”.

On October 29, 2021, the Grievor forwarded to Ms. Smith and other representatives of the Employer another information package. In the cover letter accompanying the package, the Grievor indicated that although she had immense respect for the management team of the Employer, in terms of the delivery model that it utilizes to support the people of Oxford County, she was not in a position at that time to comply with the Policy on the basis that she had not been provided sufficient information so that she could provide informed consent. The Grievor, in

closing that letter, requested that the documentation she had previously forwarded be disregarded.

That revised package of documents included a Request for Accommodation declaration as well as a Spiritual Declaration. In the Spiritual Declaration, the Grievor declared as follows:

As a living woman, I retain all of my God-given inalienable rights, including sole possession and sole use of all my biological materials which are granted to me by my Creator, who created me in His own image and likeness (Ref. KJV 1611Genesis 1: 26-28). My soul belongs to my Creator, in entirety and eternity.

My spirituality is a deeply private and personal matter, and no man or woman will come between me and my Creator. My beliefs are unquestionable, profound, and binding to my soul.

No man or woman other than I has authority over my body. No man or woman shall take possession of, force medicate, treat, inject upon or into my living body without my consent. I require any man or woman making such a claim to show evidence of their authority.

Every man and woman has the right to independently decide whether they wish to consent to a medical intervention, particularly if those interventions are experimental or knowingly harmful in nature and can pose the risk of serious injury, disability, or death. These medical mandates violate the sanctity of my conscience. They are morally reprehensible and Godless. To make them a condition of earning one's livelihood is immoral and repugnant.

These medical interventions interfere with the blood at some level. The Holy Bible says "the life is in the blood" (Ref. KJV 1611Leviticus 17:11) and any interference with the purity of the blood is an offence to my wellbeing. (Ref. KJV 1611Deuteronomie 6: 1-9, Matthew 22:37).

The revised information package also included updates to the previously forwarded Notice to Produce Regarding Offer of Covid-19 Testing. The request for answers under that document now expanded to 22 subject areas. All the questions

outlined pertained to the efficacy and safety associated with COVID-19 vaccines and testing. At the conclusion of the document, there was the following statement from the Grievor:

Once I have received and reviewed the above information in full and I am satisfied that there is no threat to my health or current quality of life, I will be happy to accept your offer to receive the testing, but with certain conditions - namely that:

- 1) You confirm that I will suffer no harm from the testing in any way, shape or form. To this end, I will take blood screens and all appropriate tests, at my expense, prior to receiving the first test to create a benchmark against which any changes may be objectively measured, and
- 2) Following acceptance of the testing, the offer must be signed by a fully qualified doctor or authorized representative who will assume all legal and financial liability for any injuries occurring to myself, up to and including death, and
- 3) In the event that I decline the offer of testing, you confirm that it will not compromise my position and that I will not suffer any negative recourse whatsoever in any way, shape or form with respect to this matter.

(emphasis added)

The Grievor submitted to the Employer another document dated November 10, 2021, entitled Statement of Religious Belief and Conscience Affidavit, which accompanied a formal request by the Grievor to be exempted from the Policy based on her religious beliefs. The relevant part of that document is as follows:

The requirements for disclosure of private medical information, testing, and immunization against COVID-19 and/or any variant thereof with a vaccine, or injection or insertion into my body of any substance, conflict with my sincerely held religious belief integral to my faith and with my conscience. I do not consent to share my private medical information nor to receive any such medical interventions, and I invoke my *Canadian Charter of Rights and Freedoms*

constitutional protections prohibiting any demand or coercion to cause my compliance with any COVID-related vaccine mandate, policy, or protocol.

Furthermore, I hereby request accommodation of my sincerely held religious belief and conscience under your duty to accommodate to the point of undue hardship, in keeping with the *Canadian Charter of Rights and Freedoms* and the *Canadian Human Rights Act*.

On November 18, 2021, Ms. Smith sent an email to the Grievor concerning information regarding the Rapid Antigen Testing form utilized by the Employer. In response to an issue being raised by the Grievor regarding an option of saliva collection, Ms. Smith advised that the Employer's Paramedic Services had advised such testing had a lower level of accuracy. Ms. Smith further reconfirmed that the Paramedic Services had indicated that there was no chemical or reagent on the swab that the Employer used for Rapid Antigen Testing. On December 10, 2021, Ms. Smith forwarded a follow-up email to the Grievor setting out the following information pertaining to the option of saliva testing and swabs that were utilized in the Employer's Rapid Antigen Testing program:

Hi Joyce, I was able to gather more information from our Paramedic Chief on the safety of the swabs used in the testing completed by our paramedics, which may assist with your request for informed consent.
Amy

The link below is the Health Canada direction on COVID testing devices including the requirements for swabs. Under the sterility and labeling sections you will see the description of the sterilization methods, the Class of medical device (level 1 or 2 considered very low risk), and the package labelling for type of sterilization.

<https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/medica1-devices/testing/test-swabs.html>
Attached are pictures of the swabs we use for our testing here. In the first pie showing both packages, the white package is the swabs provided by SWPH for lab/PCR testing and the blue package are the

swabs from our rapid antigen testing kits. In the close up photos you will see the white lab swabs are marked Sterile EO (ethylene oxide) and the blue rapid antigen swabs are marked Sterile R (gamma irradiation). **Both methods of sterilization are considered extremely effective and safe by all standards.**

The Grievor received a one-day suspension (October 26, 2021) and a three-day suspension (November 3, 2021) for not complying with the Policy. Grievances were filed with respect to that discipline.

By way of a letter from Ms. Smith dated January 24, 2022, the Grievor's employment with the Employer was terminated for failing to comply with the employer's Covid-19 Policy, specifically the testing requirements for unvaccinated staff.

The Grievor's Oral Evidence

The Grievor, who was the only individual who gave evidence in the proceeding, testified that she was raised as a Catholic with parents who were observant in their faith.

She indicated as of February 4, 1993, she became a Born-Again Christian and has since that date accepted Jesus Christ as her saviour, and that he has been the centre of her life for the last 31 years. She advised that her faith enabled her to deal with the severe adversity associated with providing care for and advocating on behalf of her son with respect to significant brain injuries that plagued him throughout his life.

Since becoming a Born-Again Christian, she and her husband have been members of various Christian churches, but relatively recently, they have joined the Trinity Bible Chapel congregation.

She testified that being compelled to take part in Rapid Antigen Testing as mandated by the Employer's COVID-19 Policy was fundamentally contrary to her religious beliefs on two grounds: First, that God created her body, and she would be judged by the manner in which she respected his creation. Related to this point, she believed that inserting a swab into her nose as is the case with Rapid Antigen Testing could possibly alter her DNA and thereby alter what God had created. Secondly, she asserted that the mandatory testing regime mandated by the Policy was, in her view, a form of false idolatry based on teachings of the Bible. Specific reference was made to Revelations 13:18 of the New Testament, which, in her view, warned against taking the "Mark of the Beast", as it could potentially lead to an evil and satanic "new world order".

In cross-examination, the Grievor agreed that, ultimately, it was her conscience that dictated her actions, and she accepted that the members of the Trinity Bible Chapel congregation, based on their individual consciences, may have different views as to whether being vaccinated or tested for COVID-19 would be contrary to their personal religious beliefs. She further indicated that she would not sit in judgment on those members of her church who decided to be vaccinated or participate in testing.

She also conceded that many of the points she raised in the various submissions that she made to the Employer regarding the COVID-19 policy were unrelated to her religious beliefs. She further acknowledged that some of the documents forwarded to the Employer were template documents of “our group” that she had customized.

Submissions of the Union

The Union asserted that the Employer mishandled the religious exemption request of the Grievor by ostensibly treating it as a disciplinary matter.

Mr. Oort, on behalf of the Union, further noted that the Grievor repeatedly attempted to keep the Employer informed of her objections to a vaccination mandate and her decision not to undergo Rapid Antigen Testing on the basis of her creed. It was suggested that the fact that the Grievor gave up 12 years of pensionable employment was a testament to the sincerity of her religious beliefs and her honest belief that having to undergo Rapid Antigen Testing was contrary to those beliefs. With respect to her views on Rapid Antigen Testing, it was suggested that the Grievor had received contradictory information from the Employer regarding the chemicals that may be on the swabs used for testing.

From the Union’s perspective, there could be no denial as to the sincerity of the Grievor’s religious beliefs and her view that undergoing Rapid Antigen Testing would be acting in a manner inconsistent with those beliefs. Mr. Oort noted that the Grievor testified as to her belief that her body was created by God, and that she

should refrain from taking any substance or being exposed to any matter that would in some way alter her body composition. In this regard, it was noted that the Grievor affirmed that she generally did not consume pharmaceutical drugs or receive other vaccines. Additionally, the Grievor testified as to her belief that taking part in such testing was contrary to the warning in the Biblical Scriptures of being exposed to the Mark of the Beast, which could lead to an evil plan associated with a “new world order”.

It was further suggested that the Employer misapplied the duty to accommodate under the Code by adopting the view that the Grievor had already been accommodated since the Employer allowed for a Rapid Antigen Testing alternative under its COVID-19 Policy. Moreover, rather than meeting with the Grievor to honestly inquire as to the sincerity of her religious beliefs, the Employer adopted the approach of disciplining her and ultimately terminating her employment.

It was further asserted that the Employer cherry-picked the one aspect in the Trinity Bible Chapel blog suggesting the Church did not have an absolute rule suggesting mandated vaccinations and testing was contrary to the tenets of the Church’s faith— it was, ultimately, a matter of an individual’s conscience whether to comply with such mandates. It was suggested that focusing on whether the Grievor’s beliefs were mandated by the tenets of her church was an approach that was expressly rejected by the Supreme Court of Canada in Syndicat Northcrest v Amselem 2004 SCC 47 (CanLII), the seminal decision regarding religious freedom.

The Union did not dispute that the Grievor advanced several challenges and objections to the appropriateness of the Employer's COVID-19 Policy. It was noted, however, that Arbitrator Herman in Public Health Sudbury & Districts and Ontario Nurses' Association 2022 CanLII 48440 (ON LA) (Herman) held that "there can be multiple reasons for objecting to getting vaccinated, but as long as one of the reasons is sincerely and legitimately based upon one's creed, the individual is entitled to a religious exemption".

In support of its submissions the Union relied upon the following additional authorities: 407 ETR Concession Company Limited and National Automobile, Aerospace, Transportation and General Workers Union of Canada, CAW-Canada and Its Local 414 2007 CanLII 1857 (ONLA) (Albertyn); Nova Scotia Nurses' Association v. IWK Health Centre 2022 CanLII 57410 (NS LA) (Hollett); Human Rights Code R.S.O. 1990, CHAPTER H.19; Canadian Charter of Rights and Freedoms.

The Submissions of the Employer

From the perspective of the Employer, the Union and the Grievor fell well short of establishing that the Grievor's refusal to be tested was based on the protected ground of creed.

Mr. Christie, on behalf of the Employer, submitted that the Grievor's decision-making was not related to a matter pertaining to creed but was ultimately related to her own individual/personal choice. It was suggested for the purpose of the protection provided by the Code that a rule, directive, or policy of an employer

should not put an undue burden on an employee, whereby compliance with the directive or policy would result in the employee running afoul of his/her religious beliefs. In this case, it was asserted that the Grievor's burden arises out of a personal choice, and she has full agency to comply with the policy directive in question without violating her creed or religious beliefs. It was suggested that clothing a decision of personal choice as constituting a creed-based decision would create havoc in the employment setting, as an employee could object to any employer rule, policy, or directive on the basis that the employee's conscience argued for non-compliance.

Mr. Christie asserted that the Ontario Human Rights Commission and the Ontario Human Rights Tribunal, in a series of decisions confirmed that an individual's personal choice to not comply with employer mandatory COVID-19 vaccination policies was not protected under the Code, even when there were trappings of religion associated with the claim.

Turning to the evidence, Mr. Christie asserted that the Grievor initially raised a number of issues associated with her justification for not complying with the Policy, but none were creed-based or related to her religious beliefs. In this regard, it was submitted that in the September 19, 2021, information package the Grievor forwarded to the Employer, there was a litany of questions and demands for information related to the efficacy and safety associated with the Employer's authority to enforce COVID-19 vaccines and COVID-19 testing. In the Employer's mind, a reveal of the true mindset of the Grievor was that she repeatedly raised

challenges to the Employer's right to impose a mandatory vaccine requirement when she knew that she did not, in fact, have to be vaccinated to comply with the Policy. It was submitted that it was only later in the information package in the Declaration of Declination to Offers of Medical Intervention was there any sort of assertion that could be connected to a religious belief. The extent of that assertion was a claim by the Grievor that her body is a creation of God, and there could be no medical intervention with respect to her body without her consent.

In terms of the decision of the Supreme Court of Canada in Amselem, *supra*, Mr. Christie accepted that the decision stands that the focus should be on the sincerity of the subjective belief of the individual rather than objectively assessing whether the individual's beliefs and/or actions were in accord with the tenets of the religion in question. That point noted, it was asserted that central to the decision of the Court is the need for a nexus with religion and the claim that the policy, rule or directive in question should not be enforced due to an individual's religious beliefs. It was opined that absent from the facts in this case was any connection between the Grievor's religious beliefs and the requirement to be tested for COVID-19; ultimately, her decision not to be tested was entirely a matter of personal choice.

In support of its submissions, the Employer relied upon the following authorities: Syndicat Northcrest v. Amselem [2004] 2 R.C.S. 551; Oulds v. Bluewater Health 2023 HRTO 1134 (CanLII); Lee v. Dollarama Inc. 2023 HRTO 1429 (CanLII); Splitt v. Nature's Corner Bakery and Café 2023 HRTO 1692 (CanLII); Roberts v. Alpa Stairs Railing 2023 HRTO 1772 (CanLII); R.W. v.

Lambton (County) 2024 HRTO 151 (CanLII); Clarke v. Toronto (City) 2024 HRTO 282 (CanLII); N. R. v. Dufferin Peel Catholic District School Board 2024 HRTO 326 (CanLII) DiRenzo V. Toronto (City) 2024 HRTO 395 (CanLII); Corporation of the City of Vaughan v. Canadian Union of Public Employees, Locals 905-20 2024 CanLII 8991 (ON LA) (Herman); Nova Scotia Union of Public & Private Employees Local 13 v. Halifax Regional Municipality 2022 CanLII 129860 (NS LA) (Poirier); United Steel Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Internation Union Local 5319 v. Securitas Transport Aviation Security Ltd. 2023 CanLII 91854 (NS LA) (Ashley); Covid-19 Vaccine: Religion, Trust and Vaccine Acceptance; Non-Medical Exemptions for COVID-19 Vaccines pose challenges for Canada’s Human Rights Commissions.

Analysis and Findings

As suggested in the submissions of both parties, the appropriate departure point for any analysis regarding the discrimination associated with religious freedom is the decision of the Supreme Court of Canada in Amselem, *supra*. As recognized by the Employer, the decision of the majority in that case related to freedom of religion under the Canadian Charter of Rights and Freedom, as it held that the analysis should focus on the sincerity of the subjective beliefs of the individual claiming infringement upon religious freedom, as opposed to an analysis focusing on assessing whether, from an objective point of view, the religious beliefs and practices of the individual are in accord with or mandated by the tenets of faith or

the customary obligations of the particular noted religion. Specifically, the Court noted:

To summarize up to this point, our Court's past decisions and the basic principles underlying freedom of religion support the view that freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.

However, even though the focus is on the subjective belief of the individual, there must be a nexus between the individual's religious beliefs and the rule/policy or directive that the individual has asserted interferes with or infringes upon his/her religious beliefs. As the Court noted:

Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered.

In terms of assessing the sincerity of the individual's belief, the Court suggested that the review be limited in nature:

Indeed, the court's role in assessing sincerity is intended only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice. Otherwise, nothing short of a religious inquisition would be required to decipher the innermost beliefs of human beings.

The evidence in this matter generally leaves little doubt as to the sincerity of the Grievor's religious beliefs; it is accepted that her Christian faith is deep and profound. Further to this point, it is acknowledged that she generally endeavours to live her life in accord with her understanding of biblical scriptures and her view that Jesus Christ is her saviour.

Notwithstanding those points, it is my view that the Union and the Grievor failed to establish that the requirement mandating that the Grievor had to undergo Rapid Antigen Testing in order to be in compliance with the Employer's COVID-19 policy gave rise to a *prima facie* violation of the Code.

In making that determination, it is noted that under the Code the relied upon protected ground is "creed" as opposed to "religion". The term creed has been seen as dictating that to warrant protection, the religious belief of the individual must relate to something more than a personal belief of the individual and be connected to a shared belief of a community or organization. On this point, reference is made to the decision of the Human Rights Tribunal of Ontario in Oulds v. Bluewater Health, *supra*. The Tribunal provided the following analysis of "creed":

Various tribunals and Courts have struggled to define creed over the years. Notwithstanding that, the Ontario Superior Court of Justice has found in *Jazairi v. Ontario (Human Rights Commission)*, 1997 ONSC 12455 that "religious belief is a component of the term creed" (para 38) and that "it is significant the s. 5(1) of the Code does not enumerate 'religion' as a prohibited ground of discrimination".

The Tribunal then adopted the Ontario Human Rights Commission's definition of creed:

The Code itself does not define creed. Creed may also include non-religious belief systems that, like religion, substantially influence a person's identity, worldview and way of life. In an effort to assist with an understanding of what creed refers to, the Ontario Human Rights Commission enacted a policy recommending that the following characteristics are relevant when determining if a belief system is a creed under the *Code*. A creed:

- Is sincerely, freely and deeply held.
- Is integrally linked to a person's identity, self-definition and fulfilment.
- Is a particular and comprehensive, overarching system of belief that governs one's conduct and practices.
- Addresses ultimate questions of human existence, including ideas about life, purpose, death, and the existence or non-existence of a Creator and/or a higher or different order of existence.
- Has some nexus or connection to an organization or community that professes a shared system of belief.

The claimant in that case asserted that the decision not to be vaccinated pursuant to an employer mandated COVID-19 policy was related to the fact that it was believed that vaccination might in some manner result in an alteration of the DNA of the claimant, much in the same manner as the Grievor has asserted in this case with respect to testing. The Tribunal rejected that assertion, even if it was sincere in nature, as not being a sufficient basis to establish discrimination based on creed:

....

Applying the above jurisprudence to these facts, the concept of autonomy and individual choice (and its application, in this case, to choose not to receive this specific Covid-19 vaccination) does not meet the definition of creed. Accepting that the applicant's belief may be sincerely, freely, and deeply held and accepting that it may even be linked to the applicant's identity and self-definition, there is no

additional basis on which I could determine that it meets the other criteria required to be considered a creed.

I note that the applicant's creed lacks an overarching systemic component. While the applicant refers to a "Creator" which is evocative of the being's believed influence over life, the submissions do not specifically address the question of human existence, nor contemplate life and death. The applicant asserts that their dialogue with the Creator through prayer/meditation is generally life-guiding. They say that their spiritual beliefs "govern my conduct day to day" and that these beliefs are arrived at "through prayer and meditation." If the submissions had included some examples about other life-guiding beliefs arrived at through dialogue with the Creator, or about other 'alterations' to the body that they similarly reject on the same grounds, then perhaps there could be connection to a particular and comprehensive, overarching system of belief. However, the submissions are devoid of these kinds of details.

I further note that this creed does not form a nexus to any organization or community with a shared system of belief. What is left seems focused on a singular belief around the lack of efficacy of the Covid-19 vaccine and some perception that the vaccine could alter DNA, and the need for autonomy to make this specific vaccine choice.

(emphasis added)

It is my view that in the case at hand, the Grievor has likewise failed to connect her beliefs regarding testing to a shared belief of a community or organization.

Further to the above, reference is made to the decision in Halifax Regional Municipality, supra. That case involved a claim for a religious exemption under a mandatory employer COVID-19 policy. In that case, the essence of the employee's religious beliefs was relatively similar to those of the Grievor in the case at hand, as she was a born-again Christian who viewed her body as a temple created by God, and she would be protected by her "God-given immunity system". The employee acknowledged that the position of her church was that being vaccinated for COVID-

19 was a matter of personal choice for the individual. In reaching the determination that there was an insufficient basis to find the necessary nexus between the employee's religious beliefs and her refusal to be vaccinated, Arbitrator Lynne Poirier observed:

I considered whether the grievor has a practice or belief, that has a nexus with her religion, that calls for a particular line of conduct, here the decision to not get vaccinated. The evidence before me is that there is no custom or obligation, objectively speaking, that prevents the grievor from being vaccinated. Indeed, it was not argued that her church requires all members to refuse the vaccine, or that it is customary for them to refuse it. In fact, the minister's testimony was that any member of their church could decide to take the vaccine, if they were at peace with it.

I considered whether the grievor meets the alternative condition of having a belief or practice that subjectively engenders a personal connection with the divine that prevents her from being vaccinated. To meet the requirement, she must establish a link between the conduct in question and her religion, and a "subjectively engendered" personal connection with the divine or one's spiritual faith is sufficient (*Public Health Sudbury*, paragraph 44).

The essence of the grievor's belief which is linked to her refusal to take the vaccine is that once she makes a decision, on whatever basis she makes it, if she is at peace with the decision, it would be a sin to act contrary to it, because a decision that brings her peace was made in consultation with the Holy Spirit or her Lord. She also believes that her God gives her everlasting life, a complex immune system, and is her healer, so that she would not need to take vaccines to be safe, although she is permitted to take them if she believes they would be effective. These are her subjective beliefs. There is no other obligatory or customary religious belief that applies to her refusal.

I do not accept that the objection to the vaccine based on the failure of it to give the grievor peace of mind is a protected belief. The manner in which she made decisions regarding her health does not support a conclusion that the Policy interfered with her beliefs and infringed on her religious freedom. I find this because even though her beliefs concerning the spiritual nature of her body, her God-given everlasting life and immune system, and her belief that God and the Holy Spirit

guide her decision making, may be the types of religious beliefs that the Supreme Court of Canada in *Amselem* intended to protect, it is still necessary to carefully examine any subjective obligations arising from such beliefs and how these may be impacted by the Policy. A review of the grievor's testimony about her decision-making about her health can be summarized this way: the grievor avoids taking medication or vaccines that she considers unsafe, ineffective, or experimental, based on the available science, because she would not be at peace taking such medications or vaccines. Once she has made up her mind about such decisions, it becomes a sin to act against them. Because she believes that she has a complex immune system which is protected by the Holy Spirit, she also believes that the vaccine would be unnecessary to protect her from COVID 19. This evidence does not convince me that her beliefs mean that she cannot take the vaccine as required by the Policy.

I have likewise come to the conclusion that there is no obligatory or customary religious belief that even subjectively can be applied to the Grievor's refusal to be tested.

Additionally, I have serious concerns with the respect to the sincerity of the Grievor's claim that her religious beliefs prevented her from complying with the requirement of testing under the Employer's COVID-19 policy. On this point, no issue is taken with the view expressed by Arbitrator Herman in Public Health Sudbury & Districts, *supra*, that an individual seeking protection under the Code on the grounds of creed is not necessarily precluded from setting out a number of reasons for seeking not to be compelled to comply with a COVID-19 mandatory vaccination or testing policy. It is noted, however, that Arbitrator Herman in The Corporation of the City of Vaughan, *supra*, held that the religious beliefs of the employee must, at a minimum, be a motivating factor for the refusal to comply.

In my view, the Grievor's efforts to establish the necessary nexus between her religious beliefs and the requirement to undergo Covid-19 testing were strained and unconvincing. The only tenable connection between her religious beliefs and testing that she declared in discussions with the Employer was that her DNA would be altered in some manner as result of testing, and that any such potential alteration of her DNA would be contrary to her belief that she should preserve what God had created. Faced with the evidence that the testing method utilized by the Employer would not involve any substance which would result in a change to her DNA, the Grievor failed to provide the Employer with any other basis to connect her religious beliefs with her continued refusal to take part in testing.

More importantly, a review of the evidence suggests that the Grievor's religious concerns were far removed from the main focus of her attack on the Employer's COVID-19 policy. Specifically, the litany of questions raised, the requests for information, and the arguments outlined against vaccination and testing in the information packages forwarded to the Employer were tied to secular/political/safety concerns and arguments. Further to this point, the Grievor attached a seven-page submission to her termination grievance. That submission included detailed references to: (1) The Canadian Bill of Rights; (2) The Statutory Instruments Act; (3) The Emergencies Act; (4) The Criminal Code; (5) The Genetic Non-Discrimination Act; (6) The Privacy Act; (7) The Food and Drugs Act; (8) The Healthcare Consent Act; (9) The Occupational Health and Safety Act; (10) The Nuremberg Code; (11) The Universal Declaration of Bioethics and Human Rights;

(12) The Universal Declaration of Human Rights; and (13) The WMA Declaration of Helsinki. However, tellingly, in that seven-page submission there was only a single line claiming that she had been discriminated against on account of her religious beliefs.

Arguably of more significance— not only was the Grievor’s claim of discrimination on the basis of her religious beliefs not front and centre in terms of her critique of the Policy, she, in fact, went a step further and indicated that she was not refusing to take part in being vaccinated/tested, and that if the Employer would satisfy her secular and safety concerns, she would be willing to be tested. Given that her religious beliefs were integral to her sense of being, if she honestly thought that vaccination and testing were fundamentally contrary to her religious beliefs, any possibility that she was willing to potentially take part in such vaccination/testing would have been a non-starter, and she would have loudly and consistently proclaimed such without qualification or hesitation.

Related to this point, the Grievor’s reliance on the “Mark of the Beast” rationale ostensibly arose for the first time during her examination-in-chief, and in my view, constituted an attempt to latch onto a system of belief that formed the basis in at least a couple of arbitration decisions: (407 ETR Concession Company Limited, *supra*, and IWK Health Centre, *supra*) where it was found that an employee’s refusal to be vaccinated was protected under the Code on the basis of creed. Further to this point, it would be an understatement to suggest it was not

clearly outlined in any evidentiary fulsome manner that her life has been, in any way, particularly guided by that specific belief.

In conclusion on this point, no issue is taken as to the overall sincerity of the Grievor's Christian faith or her claim as to the importance of her faith in her life. It has been found, however, that it has not been established that her religious beliefs were a motivating reason for her opposition to being vaccinated or tested under the Employer's COVID-19 Policy, or that she sincerely believed that being vaccinated or tested were fundamentally contrary to her religious beliefs.

In terms of the authorities relied upon by the Union, they are all factually distinguishable. In Public Health Sudbury & Districts, *supra*, there was a clear nexus between the grievor's refusal to be vaccinated and the religious beliefs of the Latin Mass sect of the Catholic Church, which the grievor was a member of. In terms of 407 ETR Concession Company Limited, *supra*, there was extensive evidence with respect to the grievors' belief in the Mark of the Beast biblical prophecy. In particular, there was evidence from the pastor of two of the three grievors that central to the beliefs of the congregation was the acceptance of the Mark of the Beast prophecy. The pastor further testified that to endeavour to refrain from being exposed to the Mark of the Beast was an absolute tenet of faith of the members of the congregation. As to the decision in IWK Health Centre, *supra*, as was noted by Arbitrator Herman in the City of Vaughan, *supra*, that was a case involving an exemption based on religious grounds as opposed to creed.

Additionally, the grievor in that case gave extensive evidence as to the significance of the Mark of the Beast prophecy in terms of her life choices.

In conclusion, it has been determined that the Union failed to establish that the Employer's actions mandating that the Grievor undergo Rapid Antigen Testing pursuant to the provisions of its COVID-19 policy gave rise to a *prima facie* breach of the Code on the grounds of creed. The matter is referred back to the parties to address the next steps with respect to the adjudication of the grievance.

This Award is issued on this 22nd day of August 2024.



Brian Sheehan