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Arbitrator Upholds Termination of Employment for Failure to Comply with Mandatory COVID-19 Vaccination Policy

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A recent [arbitration decision](#), successfully argued by our own Erin Kuzz and Zack Lebane, upheld the dismissal of hospital employees for continued refusal to comply with a mandatory COVID-19 vaccination policy.

The arbitrator's finding, that the employer was justified in requiring employees to be vaccinated and that it was reasonable to place unvaccinated employees on unpaid leave of absence, is consistent with the rulings in many earlier COVID-19 vaccination arbitration decisions. However, no prior Ontario arbitration decision had upheld **dismissal** as a consequence of failure to vaccinate (in other words, just cause to terminate). As such, this decision will have significant implications for other health care employers who may have terminated employees under a mandatory COVID-19 vaccination policy.

The vaccination policy

On September 28, 2021, Lakeridge Health (the "Hospital") implemented a mandatory vaccination policy (the "Policy"), requiring all employees to be fully vaccinated against COVID-19 as a condition of continued employment. The Hospital implemented the Policy only after it engaged in a variety of less intrusive measures designed to encourage vaccination, and exempted those who could not be vaccinated for a reason protected under the Ontario *Human Rights Code*.

The Hospital did not take lightly the decision to terminate employees for continued refusal to vaccinate. However, as a health care employer, Hospital administrators recognized the serious health and safety risks unvaccinated employees posed both to other staff and the public. As well, faced with continued staff shortages, Hospital administrators believed it would be extremely difficult to fill

vacancies with temporary positions, which would be necessary if unvaccinated staff were placed on unpaid leave and did not have their employment permanently end.

The Policy gave unvaccinated employees until October 22, 2021 to submit proof of having received a first COVID-19 vaccination dose and until November 12, 2021 to provide proof of a second dose. Failure to comply initially resulted in an employee being placed on an unpaid leave. Thereafter, if an employee remained unvaccinated, their employment was terminated.

The length of time on unpaid leave prior to termination varied based on an employee's individual circumstances - from several days to three weeks. The Hospital was flexible in its application of the Policy and extended the timeline for those who expressed a willingness to become vaccinated. Of the 326 Hospital employees not fully vaccinated and placed on leave, 80 were terminated under the Policy. Within the CUPE bargaining unit, 104 members were initially placed on a leave of absence and 47 were terminated.

The grievances

CUPE filed two policy grievances and four individual grievances. Initially, CUPE asserted the Policy was unreasonable for placing unvaccinated employees on an unpaid leave of absence, and dismissing any employee who remaining unvaccinated. In final submissions at the arbitration hearing, CUPE changed its position, acknowledging it was reasonable to place unvaccinated employees who did not work remotely on unpaid leave, but asserting these employees should have been returned to work in June 2022.

The arbitrator's decision

Arbitrator Robert Herman confirmed the Hospital was justified in requiring employees to be vaccinated, and that it was reasonable to place unvaccinated employees on unpaid leave of absence. This was consistent with the conclusion reached in many earlier COVID-19 vaccination arbitration cases.

However, no prior Ontario arbitration decision had upheld termination for cause as a consequence of failure to vaccinate. On this contentious issue, whether a failure to vaccinate was **disciplinary misconduct** that could result in dismissal, the arbitrator stated:

The importance of the subject matter of the Policy and its purposes justified requiring employees to comply with the terms of the Policy, and justified the Hospital's treatment of non-compliance as disciplinable misconduct. As noted, the Policy did not serve to protect only the employees who got vaccinated, but also vaccinated employees and patients and their families who might be exposed to unvaccinated employees. Cases that stand for the principle that employees who refuse or decline to take medicine do not engage in disciplinable conduct have limited application in this context. This is particularly so where the [Occupational Health and Safety] Act requires that employers take reasonable steps to protect the health and safety of employees and where the Local Agreement stipulates that employees have the right to a safe and healthy work

environment and directs the Hospital not to wait until there is scientific certainty before taking reasonable actions to reduce the risks to employees.

It is a legitimate response to a breach of the Policy to discipline employees who refused to comply with the reasonable requirement that they be vaccinated in order to protect other employees, patients and Hospital visitors. **Employees were not forced to get vaccinated, they were required to get vaccinated only if they wished to continue to work for the Hospital. (emphasis added)**

And further:

Again, the reasonableness of terminating unvaccinated employees, as with the overall Policy, must be assessed in context, a large hospital that provided essential health care services to the community, including acute care, ambulatory care, and long-term care services, at a time when the communities it served were experiencing severe COVID-19 infections and consequences and the need for the Hospital to maximize the services it could provide was absolutely critical. The Hospital was already having serious challenges in continuing to provide these services because of the numbers of infected patients, or patients with other issues, and because of understaffing. On any given day, the Hospital had 100's of vacancies. COVID-19 infections continued to have a serious impact upon employees and patients, with the likelihood of getting infected and the impact of becoming infected likely to be considerably more significant if an employee was not vaccinated. Employees were already required to be vaccinated against a number of diseases, so they understood that getting vaccinated might be required of them. **A failure of all active employees to get vaccinated against COVID-19 was highly likely to negatively affect the Hospital's ability to provide its health care services to the public. (emphasis added)**

CUPE objected to the application of the Policy to remote workers, arguing they pose little health and safety risk to others given they worked at home. However, the arbitrator held it was reasonable to include remote workers in the Policy's application:

... Employees who generally or typically worked remotely still might have to come into a Hospital site from time to time, for workshops, training, meetings, or other purposes. Even if some of these interactions could also have been done through remote connection, the Hospital needed to be able to redeploy employees to other work locations and assignments, as needs demanded. Preserving an exception from application of the Policy for employees who worked remotely, or could perform most of their duties remotely, would reduce the employee complement available to the Hospital for redeployment to onsite work, at a time when the Hospital was already struggling to be able to continue to provide service or to avoid further reductions in service. Allowing unvaccinated employees to continue to work remotely would also materially increase the likelihood that they would get infected from community or household transmission or exposure, and if they did, that they would suffer more severe symptoms, and therefore be unable to work for longer periods, matters other than transmission risk that were also of concern to the Hospital.

With respect to the length of time an employee ought to have been placed on an unpaid leave of absence prior to termination, the arbitrator concluded that number was four weeks. However, although some employees were provided with less, none were vaccinated during this period, as such there was no reason for the arbitrator to substitute a lesser penalty than the discharge imposed.

Key takeaways

While other decisions have suggested that termination of employment *may* be an appropriate response after a period of time on unpaid leave of absence, this is the first decision to confirm that, in certain circumstances, continued refusal to be vaccinated may be treated as **disciplinary** misconduct and justify termination of employment. We expect this decision will have significant implications for other health care employers responding to similar grievances under COVID-19 vaccination policies.

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