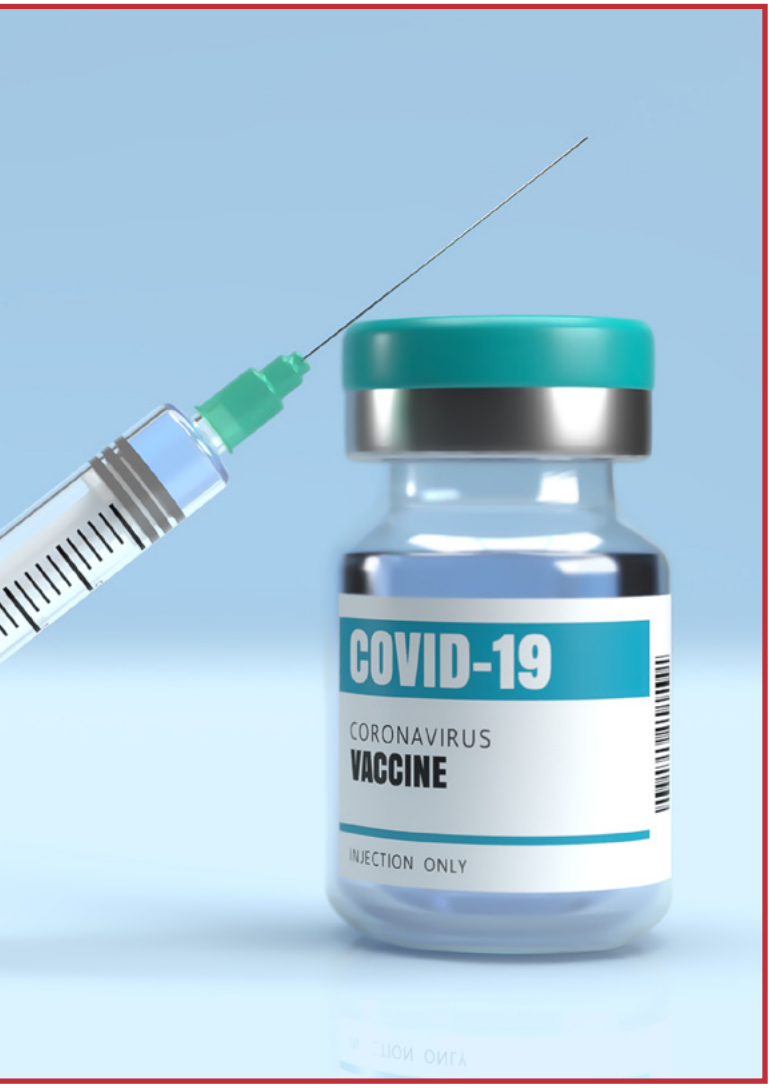
MANAGEMENT
COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers



...despite the repeated argument from the unions and employees that a mandatory vaccination policy *forces* an employee to be vaccinated, the courts unequivocally disagreed, finding that a mandatory policy simply requires an employee to choose between two options: being vaccinated and being put on unpaid leave.

January 2022 Vol. XXI No. 1

A Shot in the Arm for Employers? Courts and Arbitrators Weigh in on Vaccination Policies in the Workplace

On October 6, 2021, the Government of Canada announced a policy requiring all federal public servants in the Core Public Administration and all employees in the air, rail and marine transportation industry to be fully vaccinated against COVID-19.

Many private sector employers across Canada have followed suit and introduced similar vaccination policies, with consequences for non-compliance ranging from having to undergo regular rapid antigen testing to termination.

Zack Lebane
416.217.2252
zlebane@sherrardkuzz.com

Given the personal, medical and privacy issues at play, it is not surprising that some employees and unions have taken the issue of mandatory vaccination to court and arbitration.

So far, employers have enjoyed success at the court level, with courts refusing to grant an injunction to impede the implementation of a mandatory vaccination policy. However, arbitrations on the merits of vaccination policies have produced a mixed bag of results; certain policies have been upheld, while others have been found to be unreasonable.

While the courts have so far been unanimous in injunction decisions, arbitrators have taken varying approaches.

Interlocutory injunction decisions

In a trio of decisions,[1] the Ontario Superior Court of Justice and Federal Court refused to enjoin employers from instituting mandatory vaccination policies by which employees must either be fully vaccinated or be placed on unpaid leave.

An interlocutory injunction is an order of the court that commands or prohibits a certain action until such time as the issue(s) at stake can be fully litigated. In order for a court to grant an interlocutory injunction, a threefold test must be met:

continued inside...

...continued from front

1. There must be a serious issue to be tried
2. If the injunction is not granted, the party seeking the interlocutory injunction must suffer irreparable harm (i.e., harm that cannot be compensated by damages)
3. The balance of convenience must favour the party seeking the injunction

In all three recent court decisions, the applicants failed the second stage of the test because the vaccination policies would not cause irreparable harm to employees. Specifically, loss of employment, or unpaid leave, could be compensated by a payment of damages, no different than in any other case in which monetary damages is a potential remedy.

Importantly, despite the repeated argument from the unions and employees that a mandatory vaccination policy forces an employee to be vaccinated, the courts unequivocally disagreed, finding that a mandatory policy simply requires an employee to choose between two options: being vaccinated and being put on unpaid leave. An employee may not like either option, but the first option is not required and the second does not result in irreparable harm.

Additionally, in the two Superior Court decisions, the court refused to issue an interlocutory injunction against a unionized employer because remedies were available through grievance arbitration.

Arbitration decisions

While the courts have so far been unanimous in injunction decisions, arbitrators have taken varying approaches. Generally speaking, a vaccination-or-test policy has been found to be permissible, whereas the reasonableness of a vaccination-or-discipline policy will depend on the situation.

In *UFCW, Local 333 v Paragon Protection Ltd*,[2] Arbitrator von Veh upheld a mandatory vaccination policy for a security company. The arbitrator found the policy was reasonable and had an adequate exemption clause which allowed an employee with a valid medical or religious exemption to be accommodated. Surprisingly ahead of its time, the collective agreement (entered into long before the COVID-19 pandemic) had a clause that required all employees to be vaccinated if assigned to a site where vaccination was required.

By contrast, in *Electrical Safety Authority v Power Workers' Union*,[3] Arbitrator Stout found the employer's vaccination policy was unreasonable to the extent that an employee may be disciplined or discharged for failing to get fully vaccinated. The employer moved from a vaccination-or-test policy to a vaccination-or-discipline policy. The arbitrator found the employer had not shown there was a specific problem with COVID-19 in the workplace that could not be adequately addressed with the previous vaccination-or-test policy. As such, the vaccination-or-discipline policy was unreasonable. However, the arbitrator did acknowledge that in a workplace setting where the risk of COVID-19 is high and there is a vulnerable population, a mandatory vaccination policy may be reasonable.

In *Ontario Power Generation v Power Workers' Union*,[4] Arbitrator Murray found it was reasonable for an employer to institute a policy placing any employee on unpaid leave if they refused to be vaccinated or tested on a regular basis. The arbitrator also held that the employer must pay for rapid antigen tests for any unvaccinated employees, but need not compensate employees for time spent outside normal working hours self-administering the test.

Takeaways for employers

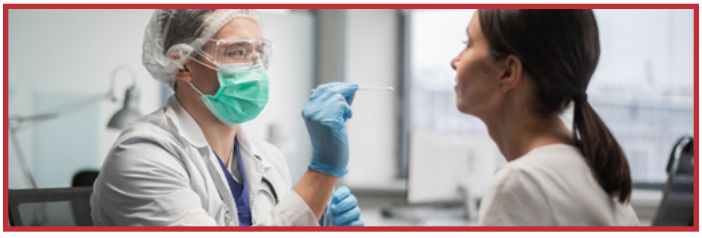
The battle over mandatory vaccination in the workplace is just beginning. While some employers, employees and unions are fully in favour of a vaccination-or-discipline approach, others prefer vaccination-or-test, and still others favour no vaccination requirements at all.

As of the writing of this article, only a handful of cases have been decided; yet, there are surely more to follow.

The good news for employers is that a vaccination-or-test policy appears to be reasonable, and it is unlikely a court will order an interlocutory injunction to enjoin a vaccination-or-discipline policy. That said, whether any vaccination-or-discipline policy will ultimately be found to be reasonable will involve a much more nuanced and contextual analysis; in other words, it is likely to depend on the circumstances.

We will continue to follow this issue closely and keep our readers updated.

To learn more, and for assistance, contact the team at Sherrard Kuzz LLP.



[1] *Amalgamated Transit Union, Local 113 et al v Toronto Transit Commission and National Organized Workers Union v Sinai Health System*, 2021 ONSC 7658; *Blake v University Health Network*, 2021 ONSC 7139; *Lavergne-Poitras v Canada (Attorney General)*, 2021 FC 1232.
[2] 2021 CarswellOnt 16048 (Ont Arb) (von Veh).
[3] 2021 CarswellOnt 18219 (Ont Arb) (Stout).
[4] 2021 CarswellOnt 18220 (Ont Arb) (Murray).

DID YOU KNOW?

In November, 2021, 23.5% of Canadians worked from home; the third consecutive month of little change. However, that reflected a drop in the number of Canadians working from home of roughly 400,000 compared with November 2020. Statistics Canada

Employee's Failure to Read Stock Award is Not an Option

Jeremy Ambraska
416.217.2254
jambraska@sherrardkuzz.com

A recent decision of the Court of Appeal for Ontario suggests a more practical approach to the interpretation of employment agreements. In *Battiston v Microsoft Canada Inc.*,[1] the court held an employee cannot avoid the impact of contractual language by neglecting to read it when: (i) the employer brings it to the employee's attention; and (ii) it is clear and unambiguous.

What happened?

Fransic Battiston was an employee of Microsoft for 23 years. As part of his compensation. Battiston was entitled to receive Microsoft stock under Microsoft's Rewards Policy, the allocation of which was discretionary and determined by Microsoft annually. Each year, Microsoft's decision to award stock was communicated via an email which expressly required the employee to read the terms of the award and click "accept". The email stated:

> Congratulations on your recent stock award! To accept this stock award, please go to My Rewards and complete the online acceptance process. **A record will be saved indicating that you have read, understood and accepted the stock award agreement and the accompanying Plan documents. Please note that failure to read and accept the stock award and the Plan documents may prevent you from receiving shares from this stock award in the future.**
>
> Questions? Please find additional information about stock awards on HRWeb.
>
> **[emphasis added]**

The Stock Award Agreement stated all unvested stock was cancelled once employment was terminated and that stock would not vest during an employee's notice period.

For 16 years, Battiston received Microsoft's email regarding the stock award, and for 16 years he clicked "accept" indicating he had read, understood and accepted the stock award agreement.

In 2018, following a series of poor performance reviews, Battiston's employment was terminated without cause. Microsoft offered 23 ½ months' notice which Battiston rejected. Instead, he sued for wrongful dismissal seeking, among other things, damages in *lieu* of 1,057 unvested shares he had received as of his termination and which would have vested had he remained employed throughout his notice period.

The trial decision

At trial, Microsoft argued Battiston was not entitled to any stock which remained unvested at the time of his termination. To this end, the Stock Award Agreement was clear and unambiguous and had been repeatedly accepted by Battiston.

Battiston conceded he had received and 'accepted' Microsoft's email each and every year, but maintained his practice was to "not read the Stock Award Agreements". He said he was under the impression he would be able to cash out any stock awarded but unvested should he be terminated without cause. He further argued the termination provisions were onerous and unenforceable because Microsoft did not bring them to his attention.

The trial judge agreed with Microsoft that the Stock Award Agreement was clear and unambiguous. Nevertheless, the judge held that Battiston was entitled to damages equivalent to the value of the stock which would have vested during the period of reasonable notice. Relying on *Tilden Rent-A-Car Co. v Clendenning*,[2] the judge ruled that it was not enough that Battiston accepted the Stock Award Agreement; it was also necessary for Microsoft to have specifically drawn to Battiston's attention the termination provisions in it. The judge also found the Stock Award Agreement to be "harsh and oppressive" because it precluded unvested stock from vesting during the period of reasonable notice:

> I find that the termination provisions found in the Stock Award Agreements were harsh and oppressive as they precluded Battiston's right to have unvested stock awards vest if he had been terminated without cause. I also accept Battiston's evidence that he was unaware of these termination provisions and that these provisions were not brought to his attention by Microsoft. Microsoft's email communication that accompanied the notice of the stock award each year does not amount to reasonable measures to draw the termination provisions to Battiston's attention. Accordingly, the termination provisions in the Stock Award Agreements cannot be enforced against Battiston. Battiston is entitled to damages in lieu of the 1,057 shares awarded that remain unvested.

The Court of Appeal overturns the trial decision

Microsoft successfully appealed to the Court of Appeal, which held the trial judge erred in finding Battiston had not received sufficient notice of the termination provisions under the Stock Award Agreement. Specifically, the court held the trial judge's decision failed to address three key facts:

1. For 16 years Battiston expressly agreed to the terms of the Stock Award Agreement.
2. Battiston made a conscious decision not to read the Stock Award Agreement despite indicating he did read it and agree by clicking "accept".
3. By misrepresenting his agreement, Battiston put himself in a better position than an employee who did not misrepresent, thereby taking advantage of his own wrong.

Lessons for employers

The Court of Appeal decision is welcome news for employers for at least two reasons. First, it confirms that, with careful drafting and planning, it is possible to design an incentive plan that ensures no further benefits accrue post-termination. Second, it gives comfort to employers, such as Microsoft, that use an online process to collect employee consent to contractual terms, including the vesting provisions of a stock or other incentive plan. In both cases, the court will consider whether the plan language is clear and unambiguous, as well as the manner in which it is presented to the employee.

To learn more and for assistance, contact your Sherrard Kuzz LLP lawyer, or our firm at info@sherrardkuzz.com.

[1] 2021 ONCA 727

[2] (1976), 1978 CanLII 1446 (ON CA) (Note: the decision stands for the proposition a party can only be bound to a signed standard form contract when it is reasonable to believe that they consented to the terms)

HReview
Seminar Series

Please join us at our next HReview Breakfast Seminar:

COVID-19 Vaccination and the Workplace - Where Do We Stand?

A Cross-Canada Review

As COVID-19 vaccinations became widely available to Canadians, many employers introduced policies to require employee vaccination. We also saw governments mandate COVID-19 vaccination policies in higher risk workplaces.

Not surprisingly, some unions and individual employees have opposed mandatory vaccination and taken their opposition to courts and arbitrators. The decisions of these adjudicators will determine how employers can apply COVID-19 vaccination policies to protect the health and safety of workers and the public, going forward.

1. **COVID-19 Case Law Update**
   - Recent case law on the reasonableness and enforceability of COVID-19 vaccination policies.
   - How have human rights tribunals and commissions responded to COVID-19 complaints?
2. **COVID-19 Legislative Update**
3. **The impact of case law and legislation on an employer's COVID-19 vaccination policy.**

DATE: **March 2, 2022; 9:00 a.m. – 10:30 a.m.**
WEBINAR: **Via Zoom** (registrants will receive a link the day before the webinar)
COST: Complimentary
REGISTER: **Here by Friday February 25, 2022**

To subscribe to or unsubscribe from *Management Counsel* and/or invitations to our *HR*eview Seminar Series visit our website at www.sherrardkuzz.com

SHERRARD KUZZ LLP
Employment & Labour Lawyers

250 Yonge Street, Suite 3300
Toronto, Ontario, Canada M5B 2L7
Tel 416.603.0700
Fax 416.603.6035
24 HOUR 416.420.0738
www.sherrardkuzz.com
@SherrardKuzz