



Arbitrator Upholds Termination of Unvaccinated Employee

Earlier this year, Arbitrator Robert Herman issued a seminal [decision](#) which considered whether Lakeridge Health could terminate health care workers who refused to be vaccinated for COVID-19 (see our [summary](#) of the case). The arbitrator found that given their unique position as healthcare providers, and the significant staffing challenges faced by hospitals at the time in question, it was reasonable for hospitals to treat non-compliance as a discipline matter and to terminate the employment of unvaccinated employees who refused to comply. In a recent [decision](#), Arbitrator Herman has confirmed his earlier ruling and upheld the termination of a Lakeridge employee who refused to be vaccinated against COVID-19 or submit to Rapid Antigen Testing (RAT).

Background Facts

In accordance with government Directive 6, which was effective September 7, 2021, the Hospital required employees who were not fully vaccinated against COVID-19 to undergo Rapid Antigen Testing, initially once a week, and increasing to twice a week over a five-day period. Employees who did not get tested as required would be subject to discipline, up to and including termination. The grievor was a part-time Phlebotomist, with approximately 10 years of discipline-free service, whose job involved performing blood draws and collecting blood samples directly from patients for lab analysis.

The grievor chose not to get vaccinated or tested, questioning the efficacy of the vaccine and the testing policy. His communications to hospital staff on September 8, 10, and 13, 2021 included the following questions:

- If those who have been fully vaccinated by COVID-19 can still catch and spread the virus, then why is the vaccine mandatory?
- If those who have been fully vaccinated can still catch and spread the virus, then why are only the unvaccinated being subject to testing?
- Why isn't natural immunity being tested for and recognized as many studies have shown that natural immunity to COVID-19 is significantly higher than protection from the vaccine?

The Hospital did not reply to the grievor's communications. On September 28, 2021, the Hospital issued a revised vaccination policy which did not allow employees to get tested as an alternative to vaccination. All employees were required to become fully vaccinated or be subject to being placed on leave and



subsequently terminated. The grievor was placed on an unpaid leave on September 29, 2021, for failure to provide proof of full vaccination or undergo antigen testing at least once a week; he was terminated from his employment on October 12, 2021. At no time prior to or after his termination did the grievor make a claim for a medical or religious exemption.

Legal Arguments

The union filed two grievances objecting to the unpaid leave and termination. While the union did not dispute the reasonableness of the Hospital's policy, it argued that the Hospital did not consider the grievor's individual circumstances (10 years of service, good work record and no prior discipline) in deciding whether to place him on unpaid leave or terminate him, nor did it consider whether there were alternatives to getting tested or vaccinated. The grievor had serious concerns about the safety of the vaccines and the antigen tests and raised these issues with the Hospital, which the Hospital ignored.

The Hospital argued that as determined by Arbitrator Herman's April 2023 decision between the Hospital and CUPE, the Hospital's policy, including its testing requirement was reasonable. The Hospital further argued that it was not required to consider individual circumstances of non-compliant employees in deciding to suspend or terminate them, that the grievor had made no claim for a medical exemption, and in fact, never had any intention of getting tested or vaccinated.

Decision

Arbitrator Herman found that the Hospital's policy requiring all unvaccinated employees be tested, was reasonable and consistent with Directive 6. Placing unvaccinated employees who did not test on an unpaid leave of absence and terminating them was also reasonable as determined in the April 2023 award. The grievor knowingly failed to comply with the Hospital's policies and made no claim on religious or medical grounds. The reasons for the grievor's non-compliance were not justified. While the grievor raised several concerns to the Hospital in the form of questions set out in emails, the hospital was under no obligation to provide answers as a condition of his compliance:

Those policies were reasonable, and the grievor could not reasonably insist on answers to his questions as requirements before he would decide whether to comply with them. While he was entitled to decide



whether to comply with the requirements of the policies if he wished to continue to work for the Hospital, he was not entitled to treat his consent to the policies as necessary before they could be applied to him (at para 27).

Further, the Hospital had no obligation to consider the grievor's individual circumstances before deciding to suspend and terminate him. The grievor had an opportunity through the arbitration process to present facts or circumstances supporting his belief that his leave and termination were unjust but failed to raise any such evidence that would justify mitigating the penalty. There was also no evidence that any alternative methods of allowing the grievor to continue to work would have been consistent with the Hospital's needs and health and safety issues. The grievor was required to get tested if he wanted to work – he chose not to do so, and the Hospital was entitled to suspend him and to terminate his employment for noncompliance. The grievances were dismissed.

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