HUNTER-LIBERATORE-LAW

Healthcare Update – April 2023

COVID-19 Related Cases of Interest

a) *Mandatory Vaccinations: The Hospital's decision to treat non-compliance with its vaccination policy as disciplinable misconduct and to terminate unvaccinated employees was reasonable, however employees needed to be given meaningful time to consider vaccination.*

- *Lakeridge Health v CUPE*, (Herman, April 26, 2023)

The Hospital implemented a mandatory vaccination policy in September 2021. The policy required all employees to receive two doses of a COVID-19 vaccine as a condition of employment, after which unvaccinated employees would be placed on an unpaid leave of absence and eventually terminated. 47 members of the union were terminated for failing to comply with the policy. Though the length of time between being placed on unpaid leave and being terminated varied for these employees, by and large, employees were terminated within days of going on unpaid leave. Four grievors challenged their terminations and the union argued that placing remote employees on unpaid leave was unreasonable. The union further argued that terminating unvaccinated employees rather than allowing them to stay on unpaid leave indefinitely was also unreasonable.

Arbitrator Herman found that based on the medical evidence available in September 2021, requiring unpaid leaves for all unvaccinated employees was a reasonable step implemented to protect the health and safety of employees as required by the *Occupational Health and Safety Act*, and by the Local Agreement between the Hospital and the Union. Employees working remotely were not exempt as they could be redeployed at any time and were vulnerable to infection in the community that could impact Hospital staffing. He further found the Hospital's decision to terminate unvaccinated employees, rather than placing them on indefinite leave, was reasonable. The importance of the subject matter of the policy (i.e., preventing transmission and increasing staff retention and recruitment) justified the Hospital's treatment of non-compliance with the policy as disciplinable misconduct. Other than a medical or religious exemption, there were no individual circumstances that would mitigate against termination for non-compliance with the policy.

Arbitrator Herman did find that the Hospital's practice of terminating employees at different intervals was not reasonable and that the actual intervals between being placed on leave and being terminated were too short. He concluded that the terminations would have been reasonable if they had taken place at least four (4) weeks after the grievors were placed on unpaid leave. He did not opine on the appropriate remedy for employees who were not given this time.

See our full analysis of this decision here.

Healthcare Related Cases of Interest

a) *Short Term Disability: the onus rests with the union and the grievor to establish that the grievor's absence is legitimate and meets the definition of total disability.*

- *Ottawa Hospital v Ontario Nurses' Association* (Johnston, March 28, 2023)

The grievor was a full-time nurse who worked as a weekend worker before being moved to a schedule in January 2020. He had previously been diagnosed with attention deficit hyperactive disorder ("ADHD") and retinopathy, a recurring eye condition. The grievor was off work from October 23, 2021, until January 31, 2022, and claimed that hospital staff had harassed him because of his refusal to vaccinate against COVID-19; this led to increased stress, exacerbating his health conditions. The grievor was paid for only the first two days of his absence. The union filed a grievance challenging the denial of short-term disability benefits to the grievor. The hospital argued that they had cause to question the grievor's illness, given that his leave coincided with the COVID-19 vaccination deadline. Furthermore, comments made by the grievor's doctors did not support the grievor's claim of total disability.

Arbitrator Johnston agreed with the employer's position that it had cause to question the grievor's absence given that his sick leave began two days after he received final notice that he would be placed on unpaid leave for refusing to comply with the hospital's vaccine mandate. When questioned by hospital staff, the grievor's doctors further advised the hospital that the grievor's retinopathy was not a disabling condition and that the symptoms surrounding his ADHD and stress may have been exaggerated. Based on this information, the grievor had failed to establish that he was legitimately ill and unable to work over the relevant period. The grievance was dismissed.

b) Overtime: employees on scheduled vacation are not included in group of "available" employees to whom overtime work under Article K.8 must be offered.

- *Trillium Health Partners v Canadian Union Of Public Employees, Local 5180* (Parmar, March 29, 2023)

The union filed a policy grievance seeking a ruling on the proper interpretation of Article K.8 which read as follows:

K.8 Distribution of Overtime

Overtime will be offered in rotating order of seniority within the classification, among those available who normally perform the work. It is understood that overtime will be offered to full time employees prior to being offered to part time employees.

The union argued that full-time employees on scheduled vacation were "available", and the hospital was therefore required to include them when offering overtime shifts in rotating order of seniority before considering part-time employees; Article K.8 obligated the hospital to offer the shift, but it was up to the employee to indicate if they were available in response. The hospital argued that employees on vacation were not "available" and were not required to be included when offering overtime shifts. Arbitrator Parmar found that the plain and ordinary meaning of the word "available" excluded employees on scheduled vacation:

In fact, in requesting and being granted a vacation, the employee is requesting and being granted the right to not be considered available during the vacation period. It is only on that basis that the employee can be assured that he or she will not be scheduled for work at that time, enabling the employee to make whatever plans he or she wishes for that period (para 24).

There was also nothing in Article K.8 to suggest that the term "available" must be interpreted based on whether the employee agreed to the offer of work. The grievance was dismissed.