



Lakeridge v CUPE: Terminating Unvaccinated Hospital Employees

On April 26, 2023, Arbitrator Robert Herman issued his much-anticipated decision regarding mandatory vaccinations and hospital employees. This is the first Ontario case that considers whether termination is reasonable where health care workers refuse to be vaccinated for COVID-19. Arbitrator Herman's conclusion is yes, terminating such employees can be reasonable.

We have been following the arbitration case law regarding mandatory vaccination policies as it unfolded. To date, the trend has been to uphold unpaid suspensions as a reasonable consequence for non-compliance with a mandatory vaccination policy. However, arbitrators have been reluctant to find that non-compliance is just cause for termination. Arbitrators have been careful to limit their rulings to the facts before them and some have made comments that suggested healthcare may be treated differently. Some arbitrators also commented that just cause would need to be assessed on a case-by-case basis, taking into account the individual circumstances of the employee. Arbitrator Herman's decision confirms that there are different considerations in healthcare. The following are the key takeaways from the decision:

- 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.
- Other than a medical or religious exemption, there are no individual circumstances that would mitigate against termination for non-compliance with the policy.
- Employees need to be given meaningful time to consider vaccination. In this case, arbitrator Herman found that four (4) weeks on unpaid suspension was the minimum amount of time that employees needed before their terminations were justified.
- Employees working remotely were not exempt as they could be redeployed at any time and were vulnerable to infection in the community and that would impact staffing.
- Not enforcing a booster requirement under the policy was not a reason to conclude that the policy was unreasonable at the time the terminations took place.



- The decision does not address the ongoing reasonableness of the policy after June 2022.

Background

Arbitrator Herman's decision in [Lakeridge v CUPE](#) considered the Hospital's mandatory vaccination policy from September 2021 (the "September Policy"). CUPE's claim argued that while it was reasonable to keep unvaccinated employees out of the Hospital in October 2021, those employees should not have been terminated, and should have been returned to active work in June 2022. There were four individual grievances also considered by Arbitrator Herman.

Prior to the pandemic, the Hospital required its employees to have certain vaccinations against Measles, Mumps, Rubella, Diphtheria, Pertussis, Tetanus, Hepatitis B, and Varicella.

The COVID-19 pandemic was a difficult time for hospital employees and administrators. The Hospital was having unprecedented difficulties in recruiting and retaining personnel. This problem was not unique to Lakeridge; with significant rates of staff burnout, all the Hospitals in the region faced severe understaffing and struggled to meet the ever-increasing care needs of the community.

The Hospital's staffing problems, along with the prevalence of COVID infections within the Hospital's staff, affected the Hospital's ability to provide health care services. The Hospital had to cancel or postpone a number of services. Per O-Reg 74/20, passed in January 2021, the Hospital was permitted to take any reasonably necessary measure with respect to work deployment and staffing to respond to, to prevent, and to alleviate the outbreak of COVID-19.

In June 2021, the Hospital implemented its first policy regarding vaccination (the "June Policy"). In the policy, the Hospital recommended vaccination to all of its employees and required employees to disclose their vaccination status. Unvaccinated employees were required to take alternative precautions as required by public health guidance and could be placed on unpaid leave during COVID outbreaks.

In August 2021, the Chief Medical Officer of Health released Directive #6. This directive mandated all hospitals to implement and enforce vaccination



policies. Under these mandatory policies, all hospital workers (including employees, staff, contractors, volunteers, and students) were to provide proof of full vaccination, a documented medical reason for not being vaccinated, or proof of completion of a hospital-approved educational session about the benefits of COVID-19 vaccination. Directive #6 gave hospitals the option of making full vaccination mandatory for workers. Under Directive #6, all unvaccinated employees were required to undergo Rapid Antigen Testing (RAT) at least once a week.

In August and September of 2021, the Hospital assessed its need for a mandatory vaccination policy. At that point, 70% of Hospital staff had been vaccinated. There were about 602 unvaccinated employees at the end of September 2021. Following its assessment, on September 28, 2021, the Hospital implemented the September Policy. This policy stated that full COVID vaccination was a condition of employment. Every employee was given three months to get both doses. Employees who had not received their first dose by October 22, 2021, would be placed on unpaid leave. Employees who were still unvaccinated by October 29, 2021, could be terminated. Employees who needed more time to get vaccinated or to get medical documentation were allowed time extensions. To stay fully vaccinated within the meaning of the September Policy, employees were required to receive any boosters recommended by Health Canada or any other public health authority.

104 CUPE members were placed on unpaid leaves. 11 of those members were terminated for refusing to undergo RATs. 47 CUPE members were subject to termination. The length of time between being placed on unpaid leave and being terminated varied for these employees, but by and large they were terminated within days of the October 29th deadline. The four named grievors were all unvaccinated and placed on unpaid leave. Three of these grievors worked in-Hospital and were terminated. The fourth grievor worked primarily from home, coming into the Hospital on occasion for training, etc. The fourth grievor retired while she was on unpaid leave.

The Hospital did not enforce the booster vaccination requirement set out in the September Policy, though it did encourage employees to stay up to date on their booster shots. By the time booster doses became available, Hospital staffing was at a “critically low level”. Enforcing the booster vaccination requirement and potentially placing more employees on leave would have seriously compromised the Hospital’s ability to continue providing healthcare services.



By June 2022, there were just two CUPE members actively employed in the Hospital who were not fully vaccinated with two doses. Both employees had claimed medical exemptions after receiving their first doses. At that time, the legal framework surrounding the Hospital's pandemic management had shifted; Directive #6 was revoked in March 2022 and the redeployment regulation had been terminated in April.

Medical Evidence of Note

Both parties brought in expert witnesses to give scientific evidence about COVID-19, the vaccines, and vaccine efficacy.

The following medical facts were uncontroversial:

- RAT does not have a major impact on COVID transmission rates.
- RAT does not measure whether someone is disease free, or if they are actually infected.
- RATs can be deliberately undermined by the test taker.
- There is strong evidence that vaccination curtailed transmission of the Delta variant of COVID.
- Receiving two vaccine doses provides some level of protection against the transmission of the Omicron variant.
- Receiving two vaccine doses lessens the severity of COVID symptoms, including substantially decreasing the risk of hospitalization and death from COVID. The vaccines remain effective in reducing the severity of symptoms for the Omicron variant.
- Individuals who have received two doses of the vaccine are less likely to spread the virus than unvaccinated individuals.
- Asymptomatic and pre-symptomatic carriers of the COVID virus can transmit the virus to others.
- The Omicron variant led to a huge rise in cases but led to less severe outcomes on average.

The two experts diverged in their evidence regarding the efficacy of the vaccine against the Omicron variant:

Dr. Loeb believes that protection against transmission of Omicron does wane several months after receiving a second dose, but that vaccination still continues to provide meaningful protection. In contrast, Dr. Deonandan believes that the protection against Omicron transmissions is not significant several months after the second dose. Given the levels



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of vaccination in the community, the numbers of people who have already been infected, and are therefore reasonably protected against transmission risk, and alternative methods such as masking and RAT's, he believes that there was no longer a need for mandatory vaccination a number of months after October 2021. [para 70]

Arbitrator Herman preferred Dr. Loeb's evidence that two doses of the vaccine provide significant protection against the Omicron variant, even months after receiving the second dose. He found Dr. Loeb's analysis of the relevant studies to be logical, analytical, and reliable.

Studies indicating that the vaccine's effectiveness in protecting against COVID transmission diminished for the Omicron variant were released after the September Policy was implemented, and after the termination of the unvaccinated employees, so were irrelevant in assessing the reasonableness of the Hospital's actions at the time in question. Neither doctor presented any evidence pertaining to the COVID-19 situation as of June 2022.

Analysis

a) Mandatory Vaccination Policy was Reasonable

Arbitrator Herman determined that when the September Policy was issued, vaccines were the best possible preventative measure. The arbitrator identified two major purposes of the September Policy:

- (1) "The Hospital wanted a policy that would align with mandatory vaccination policies imposed by other Hospitals in the area, in order to **reduce recruitment and retention issues** at Lakeridge and to present a common approach to staffing and patient access and safety issues." [para 159]
- (2) "[The Hospital] wanted to **maximize its ability to continue to provide services to the public, and to minimize staff illnesses or absences because of COVID-19 or related matters.** I am satisfied that the extent of staff absences due to infections or exposure was considered by the Hospital, and that the Hospital was concerned that **unvaccinated employees would likely experience more severe symptoms, which would in turn exacerbate staff absences** and



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further reduce the Hospital's ability to continue to provide service to the community." [para 159]

The Hospital was not hasty in its implementation of its vaccination policy; it spent considerable effort encouraging vaccination and facilitating knowledge of vaccination in advance of the September Policy. Based on the medical evidence that was available in September 2021, mandatory vaccination was a "reasonable step" towards protecting the health and safety of employees as required by s. 25(2)(h) of the OHSA.

The Local Agreement between the Hospital and the Union also contained the following precautionary language:

It is in the mutual interests of the parties to promote health and safety in the workplace and to prevent and reduce the occurrence of workplace injuries and occupational diseases. **The parties agree that employees have the right to a safe and healthy work environment and that health and safety is of the utmost importance. The parties agree to promote health and safety and wellness. The parties further agree that when faced with occupational health and safety decisions, the Hospital will not await full scientific or absolute certainty before taking reasonable action(s) that reduces the risk and protects employees.** The Hospital shall provide orientation and training in health and safety to new and current employees on an ongoing basis and employees shall attend required health and safety training sessions. [para 8]

This precautionary principle favoured taking swift action to protect the health of employees. There was a "sufficient nexus" between vaccinations and the workplace to make the September Policy reasonable.

The Union argued that the unpaid leaves were unreasonable in regard to employees who had been, or could, work remotely. Arbitrator Herman concluded that the "[September] Policy was reasonable in its application to all employees, including those who worked remotely." [para 170] The Hospital could not allow unvaccinated employees to work remotely, as a significant portion of their duties and responsibilities had to be performed in the Hospital. Even employees who had already been working remotely prior to the pandemic were required to come into the Hospital from time to time where they would inevitably see coworkers, patients, and visitors.



Furthermore, all Hospital staff, whether they worked in-person or remotely, needed to be available for redeployment on short notice. If there was an outbreak in a unit, unvaccinated staff could not be redeployed to that unit due to the high risk of infection and transmission. Unvaccinated staff who had been exposed to a COVID infection could not be redeployed elsewhere in the Hospital due to their increased risk levels. Unvaccinated employees were at a higher risk of community infection, even if they worked from home, increasing the likelihood that they would be unavailable for redeployment at any given time. Allowing unvaccinated employees to work from home would have materially hampered the Hospital's ability to redeploy its staff to provide care where it was needed.

Arbitrator Herman determined that the mandatory vaccination requirement was reasonable. The Hospital did not force anyone to get vaccinated, it merely set vaccination as a condition of continued employment in order to protect patients, employees, and visitors.

b) Terminating Unvaccinated Employees was Reasonable

Arbitrator Herman then assessed the reasonableness of terminating the unvaccinated employees, rather than allowing them to stay on unpaid leave indefinitely. He assessed the reasonableness of the Hospital's decision in the context of the serious understaffing that the Hospital was facing. The Hospital had hundreds of vacancies and was struggling to continue to provide adequate service to the community.

The Hospital's rationale for terminating the employees, rather than leaving them on an indefinite leave, was that termination was necessary to further the core goals of the September Policy— namely, to provide a full complement of vaccinated Hospital staff to service the community's healthcare needs. Failing to terminate unvaccinated employees would remove the incentive to get vaccinated. Furthermore, it would be difficult to fill the temporary vacancies if potential hires were aware that their new position could disappear upon the incumbent's return.

Arbitrator Herman found that “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.” [para 177] The Hospital was competing with other health care centres to recruit and retain staff. It is difficult to recruit for positions in which the incumbent is on an indefinite unpaid leave. Potential hires are far more likely to choose a position



which is not temporary, and which they know will not disappear post-pandemic. Terminating the unvaccinated employees, rather than placing them on leave, made the Hospital more competitive in the hiring market at a time when it needed all the new hires it could get.

Arbitrator Herman rejected the Union's argument that employees who decline medical treatments or who refuse to disclose medical information should not be subject to discipline. He found that in a hospital context, during an active worldwide pandemic, different rules applied:

...Again, this is **not a normal scenario**. The September Policy was issued in the context of a pandemic that had already caused significant numbers of deaths and life-threatening illnesses, both of patients and staff who worked in hospitals, and continued to do so. **Unvaccinated employees presented greater risks for all employees and patients, not only for themselves**. The Policy was designed to protect the health and safety of both employees and patients, when vaccinations were the most effective protective measure, against transmission, against becoming infected and against the potentially life-threatening consequences of becoming infected... [para 171]

Case law supports that discipline may be appropriate for breach of a unilaterally imposed company policy. In this case, the importance of the subject matter of the policy (i.e., preventing transmission and increasing staff retention and recruitment) justified requiring employees to comply to its terms. The cases cited by the Union had limited application in a context in which (a) serious risks to the health and safety of employees and patients were involved; (b) the mandatory vaccination policy conformed with the requirements of the OHSA; (c) the Local Agreement contained a preventative principle that allowed the Hospital to take prompt action to reduce health and safety risks, and; (d) the employees were already obligated to get a number of vaccines, so they understood that getting additional vaccinations could be required. The importance of the overall subject matter justified the Hospital's treatment of non-compliance with the September Policy as disciplinable misconduct.

The Union tabled case law in which potential issues in hiring and retention were not sufficient reason to justify termination. Arbitrator Herman distinguished these cases because the potential difficulties in recruitment in those cases was theoretical. The Hospital's evidence was clear that "it would have been materially more difficult to attract replacement staff had the



Hospital been limited to seeking to fill vacancies of employees on indefinite, temporary leaves, rather than filling vacancies for permanent positions” [para 182]. In turn, such difficulties would lead to hiring delays that could affect the Hospital’s ability to service the community. Arbitrator Herman stressed that where employees declined to get vaccinated, the Hospital’s goals in providing its services in a safe manner outweighed the employees’ rights to preserve their employment status.

Arbitrator Herman further rejected arguments that, since the termination was a disciplinary measure, unvaccinated employees should have the right to argue their case. This was not a typical disciplinary context; vaccination was necessary in order for the Hospital to provide core services. No circumstance would justify an exception to the September Policy other than a medical or religious exemption, which had already been taken into account. There was no available evidence that a history of previous infection was as effective as vaccination in preventing subsequent infection.

Since the issue did not arise in this grievance, Arbitrator Herman declined to decide whether discharging unvaccinated employees on non-culpable grounds would have been justified.

The Union argued that the Hospital’s failure to enforce the September Policy’s booster vaccine requirement was evidence that the Hospital “can and did” find ways to allow employees to continue working without being fully vaccinated. Arbitrator Herman found that the Hospital’s application (or non-application) of the booster provisions in the September Policy did not affect the reasonableness of the terminations:

...the Hospital was entitled to terminate employees before boosters became available or recommended. This issue would also have arisen in a different factual context, whatever circumstances were at hand when boosters were available and recommended for staff, circumstances that are not addressed in the evidence. The stated requirement in the Policy to get additional vaccinations at a later uncertain date and the failure of the Hospital to enforce that aspect of the Policy is not a reason to nullify those other parts of the Policy that have been found to be reasonable, whether as written or as amended in this Award. [para 205]

The booster doses only became available *after* the time the Hospital was entitled to terminate the unvaccinated employees. This made the Union’s objection moot. However, Arbitrator Herman left open the possibility that non-



enforcement of booster requirements could affect the reasonableness of mandatory vaccination policies going forward. This remains an open question for future arbitral decisions.

Arbitrator Herman concluded that the decision to include termination as part of the September Policy was reasonable:

The need to **protect the health of its employees and patients**, and to act in a way that enabled the Hospital to continue **to provide its services in a relatively safe manner, outweighed the rights of individual employees to preserve their employment status** when they declined to get vaccinated. [para 184]

c) The Timing of the Terminations was Unreasonable

The September Policy did not specify the length of time unvaccinated employees would be placed on unpaid leave before being terminated. Arbitrator Herman found that the Hospital's practice of terminating employees at different intervals was not reasonable. He further found that the actual intervals between being placed on leave and being terminated were too short:

The length of the period on unpaid leave involves a **balancing of the need to terminate employees relatively quickly in order to restaff vacant positions, and the entitlement of employees to have a reasonable period of reflection before termination occurs**. In balancing these interests, I conclude that employees should have been provided with a period of **four weeks on unpaid leave**. Unpaid leaves of this length would not have unduly hampered the Hospital for an extended period in its need and ability to operate and provide services to the public, while providing ample time for employees to consider their positions. [para 198]

Arbitrator Herman concluded that the terminations would have been reasonable had they taken place four (4) weeks after the unvaccinated employees were placed on unpaid leave. This interval would have allowed these employees to experience being unpaid and to consider the repercussions of their choices. He did not opine on the appropriate remedy for employees who were not given this time.

The Union argued that as of June 2022, the Employer could have put less harsh measures in place. Arbitrator Herman did not feel the need to explore this



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point, as it was moot. By June 2022, employees who had been terminated in the third week of December 2021 would have been on unpaid leave for long enough to justify termination. This would have also been true of the grievor who had been working remotely, had she not retired. In addition, Arbitrator Herman noted that none of the Union's suggested alternative measures would adequately deal with the health and staffing issues. Arbitrator Herman declined to address the question of whether disciplinary terminations would have been justified in May or June 2022.

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