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Ontario Vaccine-Mandate Cases: January 2022 Update

In our last update on vaccine-mandate cases, we wrote about four arbitration cases, an Ontario injunction, and two duty-of-fair-representation cases before the Ontario Labour Relations Board. The union successfully challenged a mandatory vaccination policy in one of those cases.

In this month's article, we pick up where we left off and report on recent arbitration cases, interim-order requests, duty-of-fair-representation cases, and also spend some time on discipline cases related to breaches of COVID-19 protocols. There continues to be only one arbitration case that has found a mandatory vaccination policy to be unreasonable.

Vaccine-Arbitration Cases

On January 4, 2022, Arbitrator Herman found that a mandatory vaccination policy, which required employees to be fully vaccinated or put on unpaid leave, was *reasonable* (allowing for exemptions of reasons of religious belief or creed): *Bunge Hamilton Canada, Hamilton, Ontario v United Food and Commercial Workers Canada, Local 175*.

Arbitrator Herman distinguished this decision from Arbitrator Stout's conclusion in *Electrical Safety Authority* (which found a vaccine policy that placed non-compliant employees on unpaid leave to be *unreasonable*). See our prior publication on the Stout decision. In the *Bunge* case, the company's landlord, Hamilton Oshawa Port Authority, was a federally-regulated business that required everyone on its property to be vaccinated.

On January 12, 2022, Arbitrator Jesin upheld a vaccine mandate requiring employees working at Scotiabank Arena to disclose their vaccination status or be placed on an unpaid leave of absence. The union did not challenge the vaccine mandate, only the requirement that employees share their vaccination status. Arbitrator Jesin found that the requirement was reasonable, particularly in workplaces where employees work in close proximity, and where there is no means to enforce a reasonable vaccine mandate without disclosing vaccination status: *Teamsters Local Union 847 v Maple Leaf Sports and Entertainment*.

Interim-Order Requests

On November 30, 2021 and January 12, 2022, cease and desist orders challenging mandatory vaccination policies were denied by Arbitrators Burkett and Noonan (respectively). The cases arose in British Columbia and in the Federal sector. While Ontario arbitrators have limited ability to issue interim rulings, the British

Columbia *Labour Relations Code* and the *Canada Labour Code* grant arbitrators wide powers to issue interim orders: *Richmond (City) v International Association of Professional Firefighters, Local 1286* and *Canada Post and Canadian Union of Postal Workers*.

Duty-Of-Fair-Representation Applications

On September 28, 2021, January 10, 2022 and January 11, 2022, the Ontario Labour Relations Board dismissed three duty-of-fair representation complaints against applicants' respective unions. All applicants were seeking representation in regards to non-compliance with company vaccination policies, and in each case, the matter was dismissed as the applicants failed to establish a *prima facie* case for breach of the *Labour Relations Act*: *Dino S. Mujkanovic v Amalgamated Transit Union Local 113* and *Tiffany Bloomfield, Danielle Hurding, Mel Lewis, Lexi L. Bezzo, and Jaclyn Wagner v Service Employees International Union* and *Rosanna Mustari, Kevin Francis, Terence Thomas, Rodney Nembhard, and Quincy Akande v CUPE Local 79*.

Discipline Cases Related to Breaches of Covid-19 Protocols

This is a category of cases that we have not previously reported as part of our regular update. Recently, there has been some activity in this area, so we thought it would be useful to provide a review of the new decisions and prior decisions of interest.

On January 4, 2022, Arbitrator Gedalof upheld the termination of a long-standing employee who remained at work for four days while failing to report symptoms of COVID-19, exposing co-workers and causing significant disruption through the ensuing isolation of several co-workers. Given the employee's serious record of discipline for breaches of health and safety, including falsifying records, Arbitrator Gedalof found that the employer had just cause for termination: *Johnson Controls Canada LP v Teamsters Local Union*.

Two prior discharge cases were upheld when: 1) an employee who tested positive for COVID-19 failed to self-isolate and returned to work prior to receiving her test results; and 2) an employee experiencing symptoms of COVID-19 ignored company policy and reported to work: *Garda Security Screening Inc. v. IAM, District 140* (Shoker Grievance) (Keller, July 2, 2020) and *Labourers' International Union Of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 183 v Aecon Industrial (Aegon Construction Group Inc.)*.

HUNTER-LIBERATORE-LAW

On July 7, 2021, Arbitrator Love reversed the termination of an employee who had been dismissed for subordination following the employee's failure to call for a COVID-19 test and failure to self-isolate. Given that the employee's symptom did not meet the criteria for COVID-19 at the time (diarrhea thought to be due to "bad chicken wings"), and the fact that the employer's COVID-19 company policy was not sufficiently clear or available to employees, Arbitrator Love found termination to be excessive. However, due to the employee's behaviour during the investigation, he was given a five-day suspension, together with a make-whole order: *Terrapure Environmental (Envirosystems Incorporated) v International Union of Painters and Allied Trades, District Council 138 (Jeremy Arnot – Termination)*.

On July 6, 2021, Arbitrator Mitchnick ordered reinstatement of an employee who was medically unable to wear a mask for prolonged periods of time, and who had been terminated due to "frustration" of the employment contract after the employee failed to adhere to the Return-to-Work plan outlined by the employer. Arbitrator Mitchnick, however, did not find that the employer had demonstrated unequivocal accommodation of the employee's job restrictions, and therefore reinstatement was ordered: *Unifor Local 333 v Moore Packaging Corporation*.
