



Vaccine Mandate Update – March 2023

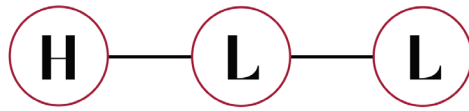
We haven't published an update regarding vaccine mandates since [December of 2022](#) as the trend of upholding mandatory vaccination policies by labour arbitrators continued. Recently, there have been some new developments, particularly with respect to non-union employees. While most arbitrators continue to find mandatory vaccination policies are a reasonable exercise of management rights in the face of the COVID-19 pandemic, some employees challenging the termination of their employment following refusal to vaccinate are finding relief. For non-union employee, the first court decision was decided in favour of the employer.

Ontario Court finds Refusal to Vaccinate Frustrated the Employment Contract

- [Croke v. VuPoint Systems Ltd.](#) (Ontario Superior Court of Justice, February 21, 2023)

The plaintiff was employed as a Systems Technician by VuPoint, providing satellite television and smart home installation services on behalf of Bell Canada; 99% of VuPoint's annual income stemmed from work commissioned by Bell. In September 2021, Bell advised VuPoint that its installers would have to be vaccinated against the COVID-19. As a result, the employer adopted a mandatory vaccination policy. Those non-compliant with the policy would be prohibited from performing work for certain customers, including Bell; the policy did not specify that termination was a consequence for refusal to vaccinate.

Three weeks after adopting the policy, the plaintiff was given two (2) weeks working notice that his employment would be terminated for non-compliance with the policy. At court, the plaintiff argued that the employer had a duty to warn him of the consequences of noncompliance with the policy.



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Justice Pollak found that the plaintiff had been given working notice of termination, during which he was aware of the consequences of non-compliance, yet he remained unvaccinated and advised the employer that he would not consent to receive any COVID-19 vaccine. The plaintiff could not now argue that he had failed to receive “clear and unambiguous” warnings that his failure to comply with the policy could lead to the termination of his employment.

In finding that the employment contract was frustrated by Bell’s mandatory vaccination policy, Justice Pollak made the following comments:

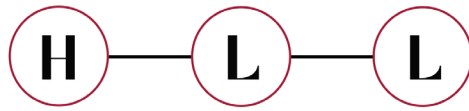
- Bell’s implementation of its mandatory vaccination policy meant the plaintiff could not perform any work for the employer unless he was vaccinated;
- Bell’s policy resulted in the plaintiff lacking a necessary qualification to perform any of his duties;
- Bell’s policy was a “supervening event”. It was an unforeseen circumstance that was not contemplated by either party when they entered the employment relationship in 2014;
- The employer was required, by contract, to comply with Bell’s policies;
- The plaintiff’s inability to perform the duties of his position for the foreseeable future constitutes a radical change that strikes at the root of the employment contract; and
- The employer was not required to modify the plaintiff’s contract to ensure he could continue working.

The plaintiff was not entitled to damages for wrongful termination.

Two Arbitration cases confirm that Failure to Vaccinate is not Just Cause for Termination

- **[Island Health v United Food & Commercial Workers Local 1518](#)**
(Doyle, January 6, 2023)

The employer, Island Health, implemented a mandatory vaccination policy in compliance with an Order by British Columbia’s Public Health Officer which



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required all employees in healthcare to be vaccinated against COVID-19. The grievors objected to vaccination based on their religious beliefs and were terminated. Even though the beliefs of one of the grievors were clearly shaped by misinformation she had read on the internet, Arbitrator Doyle found that the Union had established a *prima facie* case of religious discrimination. The employer had not considered, at all, whether it could accommodate the grievors and had violated the *Human Rights Code* and the collective agreement when it did not accommodate the grievors to the point of undue hardship.

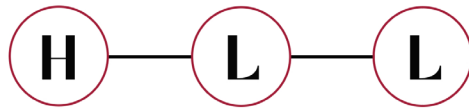
- [**Teamsters Canada Rail Conference v VIA Rail Canada Inc., \(Clarke, March 13, 2023\)**](#)

VIA Rail Canada terminated the grievor for noncompliance with their mandatory vaccination policy and claimed the grievor's termination was administrative. The Union claimed this was a disciplinary dismissal which violated the mandatory discipline process in the collective agreement and the Ministerial Order of Transport Canada requiring employers to place unvaccinated employees on leave without pay. Arbitrator Clarke found that the grievor's termination was not an administrative dismissal because it was not supported by the Order, violated the collective agreement, and did not allow for an evaluation period to assess whether the pandemic would continue or whether public health authorities would revise their recommendations and allow for non-vaccinated employees to safely return to work.

Four More Cases Affirm that Mandatory Vaccination Policies are Reasonable

- [**Unifor, Local 1999 v Reliance Comfort Limited Partnership \(Rogers, January 2, 2023\)**](#)

The employer implemented a mandatory vaccination policy requiring employees to receive their second vaccination dose at least 14 days before November 27, 2021, to be considered "Fully Vaccinated." Arbitrator Rogers found that the policy was reasonable especially given the employer's



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responsibilities to its employees and customers. However, the arbitrator found the employer's arbitrary deadline and 14-day criterion were not justified by the scientific evidence, particularly the advice provided by the National Advisory Committee on Immunization that the optimal interval between first and second doses for both Pfizer and Moderna COVID-19 vaccines was eight weeks.

- **[Canadian Union of Public Employees, Local 1866 v Worksafe New Brunswick \(Doucet, January 3, 2023\)](#)**

The Government of New Brunswick implemented a mandatory vaccination policy requiring public service employees be fully vaccinated. Failure to do so would result in placement on leave without pay. The Union alleged employees could be accommodated by working remotely but Arbitrator Doucet concluded that the policy was a reasonable and lawful response given the information available at the time the policy was implemented in November 2021. He further found that the employer did not have the flexibility to adjust a vaccination mandate that applied to remote workers and was issued by the government.

- **[Bailey v New Brunswick Power Corporation, \(Doucet, January 11, 2023\)](#)**

Public service employees subject to a government vaccination mandate and placed on leave without pay alleged that they had been unjustly disciplined. Arbitrator Doucet upheld the vaccination policy which he concluded was *prima facie* reasonable and did not violate the collective agreement. The policy protected both the workforce and an overwhelmed provincial healthcare system and the grievors' strong personal opinions about the vaccine could not outweigh the importance of creating and maintaining a safe work environment as mandated by occupational health legislation. The *Charter of Rights and Freedoms* did not protect the job or economic losses arising out the employees' opposition to the COVID-19 vaccine because they had the choice to decline the vaccine.



- **[Unifor, Local 4209 v YRC Freight Canada Company](#) (Hodges, January 29, 2023)**

The employer was a federally regulated carrier with terminals across Canada and the United States and implemented a mandatory vaccination policy after the Canadian and American governments passed regulations requiring all truck drivers passing through the border be fully vaccinated to avoid having to quarantine on arrival. Failure to vaccinate would result in the driver or owner operator being held out of service. Arbitrator Hodges found that the policy was reasonably necessary to accomplish the purpose of ensuring the movement of shipments to and from the United States. The employer's business was critical to its customers, and the public in both countries, and the employer had an obligation to ensure its employees complied with the border crossing regulations of both nations.

Arbitrator Upholds Termination for Refusal to Rapid Test

- **[Syndicat des Employés-es de RDS – CSN v Le Réseau Des Sports \(RDS\) Inc.](#) (Provencal, January 10, 2023)**

Bell Media adopted its mandatory vaccination policy in March 2020. Unvaccinated employees were required to carry out rapid screening tests twice a week. The grievor refused to comply with the rapid screening test requirement and was suspended and eventually terminated for failing to comply with the policy. Arbitrator Provencal cited previous arbitral decisions which have confirmed that requiring testing of unvaccinated employees is a reasonable exercise of management's rights. The grievor was fully aware that his position was in jeopardy if he refused to comply with the policy; his actions demonstrated his intention to remain non-compliant if reinstated and the arbitrator saw no reason to intervene with the employer's decisions to suspend and terminate the grievor.



Arbitrator finds Vaccination Policy was Consistently Applied to Employees

- [*Trillium Health Partners v Canadian Union of Public Employees, Local 5180*](#) (Steinberg, January 23, 2023)

The hospital's vaccination policy incorporated a progressive action model based on the individual disciplinary record of each non-compliant employee. Two exceptions applied: (1) unvaccinated employees who had a pending accommodation request; and (2) unvaccinated employees currently on a leave of absence. These employees would be disciplined if they remained unvaccinated following the denial of their accommodation request, or when they returned from their leave unvaccinated. Arbitrator Steinberg found that the hospital did not contravene the *KVP* principle requiring an employer's policy be applied and enforced consistently. The hospital had sent out numerous communications to its employees regarding its expectations under the policy and the consequences for non-compliance and the arbitrator found that the hospital had not lulled its employees into a false sense of security.

Labour Board Reverses Termination Pay Awarded to Unvaccinated Employee on Unpaid Leave

- [*Country Living Furnishings Inc. v Sellen*](#) (Alberta Labour Relations Board, January 25, 2023)

The employee refused to comply with the employer's mandatory vaccination policy and was placed on an unpaid leave of absence. Approximately three (3) weeks later the employer asked the employee whether she would be returning to work with her vaccination record. The employee refused to vaccinate and eventually asked for a letter of reference. The employer agreed to provide one if the employee formally resigned. An Employment Standards Officer ordered the employer to pay the employee termination pay in lieu of notice of termination. On appeal to the Labour Board, Vice Chair Armstrong concluded that the employer's inquiry about the employee's vaccination status was consistent with its position that she had not been terminated but



was on an unpaid leave. While the employee had not resigned, she had not been terminated and was not entitled to termination pay.

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