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Arbitrator Strikes Down Employer's Automatic Termination Provision In A Mandatory Vaccination Policy

By Irv Kleiner and Shreya Patel

In a recently released arbitration award, Arbitrator Misra held that a mandatory vaccination policy, which included the right of the Employer to terminate employees who refused to comply, was unreasonable in the context of specific provisions in the collective agreement between Chartwell Housing Reit (the "Employer") and Healthcare, Office and Professional Employees Union, Local 2220 (the "Union").

The relevant provisions in the collective agreement between the Employer and the Union were considered by Arbitrator Misra.

The first collective agreement provision required that before the Employer could make any significant changes in workplace rules or policies that impacted bargaining unit employees, the Employer was required to discuss the changes with the Union and provide copies of any such changes and policies.

The second provision in the collective agreement indicated that existing rights, privileges, benefits, practices and working conditions were to be continued to the extent that they were more beneficial and not inconsistent with the terms of the collective agreement unless modified by mutual agreement of both parties.

Effective September 2021, the Employer introduced a mandatory COVID-19 vaccination policy that required all staff to receive COVID-19 vaccines, subject to medical exemptions ("September Policy"). Thereafter, on October 1, 2021, the Minister of Long-Term Care exercised his power to make COVID-19 vaccinations mandatory for all staff and others working at long-term care homes in Ontario, subject to medical exemptions (the "Minister's Directive"). Pursuant to the September Policy, the Employer was in a position to place employees on an administrative unpaid leave of absence or terminate their employment if they refused to comply with the Policy.

In October 2021, 16 employees were placed on an unpaid leave because of their failure to provide proof of vaccination; 14 of these employees were subsequently terminated for just cause as a result of their failure to comply with the September Policy.

The Union was in favour of vaccinations and recognized that the mandatory vaccination requirement was a legal requirement for long-term care homes as imposed by the Minister's Directive. The Union was not challenging the propriety of the Minister's Directive, nor was the Union disputing that employees who did not prove their vaccination status had to be placed on unpaid leave.

It was the Union's position that the bargaining unit employees should not have been subject to discipline or termination, as termination of an employee's employment was not a requirement of the Minister's Directive and this aspect of the September Policy was also contrary to the collective agreement. Specifically, the Union argued that the Employer violated the collective agreement by failing to give notice to the Union of the change in the September Policy, and also violated the collective agreement when it promulgated the disciplinary aspect of the September Policy without first reaching an agreement with the Union about this significant change to employees' existing rights, benefits or working conditions.

The Employer's position was that employees who refused to comply with its September Policy were engaging in culpable non-compliance, which also amounted to employment misconduct that would justify their termination of employment. In support of this position, the Employer argued that there had been months of education and counselling sessions that had been provided to employees with respect to the vaccinations. Advance warnings were also provided to employees that they had to be vaccinated or the Employer would place them on an unpaid administrative leave of absence. Employees were also warned that they could risk being terminated if they remained unvaccinated or did not disclose their vaccination status. The Employer argued that the establishment of the September Policy was not inconsistent with the collective agreement because the Employer had the exclusive management right to establish rules and policies, and to enforce them in a fair manner. The Employer also argued that the requirement for employees to become vaccinated was more beneficial than any aspect of the collective agreement.

Arbitrator Misra held that the Employer violated the collective agreement, as it failed to provide the Union with a copy of the subject policy, which permitted the Employer to place employees on unpaid leaves of absence or terminate them. It should be noted that the Employer's previous immunization policies did not include a threat of termination of employment for failure to become vaccinated. It was also held that the Employer failed to discuss the changes to the September Policy with the Union prior to implementing the changes that the Employer had made to this policy.

Arbitrator Misra held that prior to the September Policy being implemented, bargaining unit employees who were non-compliant with the Employer's vaccination policies were removed from the work schedule and placed on an unpaid leave of absence. This practice was found to be more beneficial to them than the change in the September Policy, which imposed discharge as a penalty for an employee's refusal to become vaccinated in addition to being placed on an unpaid leave of absence. Arbitrator Misra, therefore, held that the Employer violated the collective agreement when it failed to continue the existing practice of placing employees on an unpaid leave of absence, and when the Employer failed to discuss the new disciplinary aspect of the September Policy with the Union.

With respect to whether the September Policy was reasonable, particularly as it related to the consequences of non-compliance (i.e., employees being terminated in addition to being placed on an unpaid leave of absence), Arbitrator Misra accepted that the "mandatory vaccination" aspect of the September Policy was not at issue. The part of the September Policy that was problematic was the one that purported to allow the Employer the right to terminate the employees for non-compliance pursuant to the mandatory vaccination policy without having to go through the step of placing a non-compliant employee on an unpaid leave of absence. As such, it was the inclusion of termination of employment for non-compliance that was found to be unreasonable, as there was no evidence of any necessity of the Employer's operations being impacted without the right to terminate. The "automatic nature" of the imposition of termination as a penalty for non-compliance precluded the Union and bargaining unit employees from relying on any mitigating factors, such as length of the employee's service, an unblemished disciplinary record or any other relevant factors that arbitrators typically consider in discharge cases.

Notwithstanding Arbitrator Misra's determination of the grievance, she included a caution that her decision should not stand for the proposition that an employer will never be able to terminate employees for non-compliance with a mandatory vaccination policy. It was only the "automatic" application in the Employer's September Policy as it related to discharge that was found to be unreasonable by the Arbitrator.

Arbitrator Misra also affirmed in this Award, that employers do not have to allow a non-compliant employee to remain on a leave of absence indefinitely. If employees are given fair advance warning, employers may be in a position to terminate non-compliant employees for just cause, but this will also be subject to a consideration of mitigating factors, such as those referred to above.

It is critical that employers exercise caution before proceeding to terminate employees who refuse to comply with an employer's mandatory vaccination policy. Employers would be well advised to consult with legal counsel when drafting and implementing workplace policies, and particularly those policies that relate to mandatory vaccination.

Should you have any questions regarding this Arbitration Award and its impact on your workplace, or require assistance with your workplace policies, contact a member of our team.

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