



November 2021

## Mandatory COVID-19 Vaccination Policy Upheld by Arbitrator

By Irv Kleiner

In an arbitration between the UFCW (the "Union") and Paragon Security (the "Employer"), the Union grieved the Employer's implementation of a mandatory COVID-19 vaccination policy on September 3<sup>rd</sup>, 2021 (the "Policy"). The Employer had previously issued a notice to its security guard employees in which they were advised that all employees were to be fully vaccinated by October 31<sup>st</sup>, 2021.

The Union asserted that the Policy violated the collective agreement and was unreasonable. In addition, the Union alleged that the Policy violated the Ontario *Human Rights Code*. The Union argued that with the advent of the Policy, the Provincial Government had compromised a person's right to be free from "an invasive procedure requiring needle injection and a serum to be injected into a person".

The Union also argued that the Employer's vaccination policy was not in conformity with established case-law on implementing employer rules as set out in the *KVP v. Lumber and Sawmill Workers Union Award* (which was referred to in an earlier Bulletin). In the *KVP Award*, it was held that a unilaterally introduced rule had to satisfy the following requirements:

1. It must not be inconsistent with the collective agreement.
2. It must not be unreasonable.
3. It must be clear and unequivocal.
4. It must be brought to the attention of the employee affected before it can be acted upon.
5. The employee concerned must have been notified that a breach could result in discharge.
6. The rule should have been consistently enforced by the company.

The Employer maintained that it had no other alternative but to implement the Policy as an "operational necessity to properly service" to its clients. In addition, the Employer contended that the policy was also

necessary to maintain a safe and healthy work environment for its employees, clients and their staff, and the general public that the Employer served. The Employer also denied that it had violated *the Human Rights Code* as it had also developed an *exemption policy* in order to allow employees to request an exemption on the basis of creed, religion, and disability.

The Employer communicated with its employees and advised them that various health and safety strategies had been adopted by the Employer with a view to protecting employees, clients and clients' staff from the Delta variant of COVID because of the higher transmissibility of the variant. The Employer also advised employees that many of Paragon's clients had required exclusively vaccinated security personnel and in some cases, they would not allow anyone on their sites who was not fully vaccinated. The Employer referred to the measures that the Province had imposed which would result in unvaccinated citizens being restricted from engaging in many civic activities.

Ontario Arbitrator von Veh was appointed to adjudicate the grievance. Reference was made to an Article in the Collective Agreement which provided the following:

***"If an employee is assigned to a site where specific vaccination and or inoculation is required by law or where conditions of contractors having access to the site stipulates specific vaccination and inoculation requirement, the employee must agree to receive such vaccination or inoculation. The Company shall provide access to any vaccination or inoculation and any cost for such will be borne by the Company. In addition, employees required to be vaccinated or inoculated on their own time shall be paid in accordance with the call in provisions of this Agreement. Where an employee refuses such vaccination or inoculation for any reason, the Company shall reassign the employee as per the relevant provisions of this Agreement."***

This Article in the Collective Agreement was negotiated into the Agreement a number of years prior to the emergence of the pandemic.

Reference was also made to the Ontario Human Rights Commission Policy statement on COVID-19 vaccine mandates and proof of vaccine certificates, dated September 22, 2021:

***"While receiving COVID-19 vaccine remains voluntary, the OHRC takes the position that mandating and requiring proof of vaccination to protect people at work or when receiving services is generally permissible under the Human Rights Code as long as protections are put in place to make sure people are unable to be vaccinated for Code related reasons are reasonably accommodated. This applies to all organizations."***

***Upholding individual human rights while trying to collectively protect the general public has been a challenge throughout the pandemic. Organizations must attempt to balance the rights of people who have not been vaccinated due to a Code protected ground such as disability, while ensuring individual and collective rights to health and safety."***

***The OHRC and relevant human rights laws recognize the importance of balancing people's right to non-discrimination and civil liberties with public health and safety including the need to address evidence based risks associated with COVID-19."***

***Receiving COVID-19 vaccine is voluntary. At the same time, the OHRC's position is that a person who chooses not to be vaccinated based on personal preference does not have the right to accommodation under the Code. The OHRC is not aware of any tribunal or court decision that found a singular belief against vaccinations or masks amounted to a creed within the meaning of the Code."***

***While the Code prohibits discrimination based on creed, personal preferences or singular beliefs do not amount to a creed for the purposes of the Code."***

***Even if a person could show they were denied a service or employment because of a creed based belief against vaccinations, the duty to accommodate does not necessarily require they be exempted from vaccine mandates, certification or COVID testing requirements. The duty to accommodate can be limited if it would significantly compromise health and safety amounting to undue hardship- such as during a pandemic."***

The Employer called the Director of Human Resources as its only witness. The witness referred to a list of the Employer's client sites that were subject to a vaccination policy. The Employer's clients had implemented their own policies for their employees and for their contractors which included Paragon's security guards. The Director of Human Resources testified that the Employer's policy was developed out of necessity while having due regard to its clients implementing their own vaccination policy which required Paragon's guards to be fully vaccinated.

The Director of Human Resources also testified that the Employer had become aware of concerns that employees had about co-workers and other employees not being vaccinated. Employees had indicated to the Employer that they felt they were vulnerable due to health concerns or to age and had reservations about working in close proximity and sharing equipment with other unvaccinated employees.

As a result, the Employer's evidence was that the Employer had adopted what it believed to be a reasonable approach to protect its employees, clients and members of the general public with whom the Employer interacted with.

The Arbitrator made the following findings:

1. The Employer's Policy was reasonable, enforceable, and compliant with *the Ontario Human Rights Code* and *the Occupational Health and Safety Act*.
2. The Employer's "exemption policy" made reference to a family physician's confirmation of an exempted ground. Arbitrator von Veh recommended that because many employees may not have "family physicians" the policy should instead require confirmation/supporting medical documentation from a "physician, immunologist or allergist".
3. The Company's Policy struck a balance in order to respect the rights of employees who have not or do not wish to be vaccinated while respecting a safe workplace for staff, the Employer's clients, and members of the public with whom the guards interact.
4. The Company had a statutory obligation under *the Occupational Health and Safety Act* to protect the health and safety of its employees. Section 25(2) of the legislation requires that every employer must take "every precaution reasonable in the circumstances for protection of its worker".
5. Receiving the COVID-19 vaccine is voluntary. On the basis of the Human Rights Commission's guidelines, personal subjective perceptions of employees cannot override and displace scientific considerations. There is a wealth of scientific information on the pandemic and COVID-19.
6. The Collective Agreement Article that deals with vaccinations was negotiated approximately 5 years prior to the emergence of the pandemic and had been properly incorporated into the Policy.
7. The Employer had unilaterally imposed a "rule" that had satisfied the KVP award requirements in that the Policy encompassed "reasonable rules and regulations to be observed by the employees" as set out in the management rights clause of the collective agreement.

At the time that the Award was released, the Arbitrator communicated with the parties and indicated certain additional information which he thought would provide assistance to the parties and which will also be useful for the labour relations community.

1. The Arbitrator referred to a quotation from an article that had been published in the Toronto Star on October 9<sup>th</sup>, 2021 which indicated the following: "***There is no theological justification for avoiding the vaccine-last month, Mennonite Church of Canada said they would not be providing religious exemptions from the COVID-19 vaccine because there "is nothing in the Bible, in our historic confessions of faith, in our theology or in our ecclesiology that justifies granting a religious exemption from vaccinations against COVID-19."***
2. The Arbitrator referred to a quotation from an article that had been published in the Toronto Star on October 6<sup>th</sup>, 2021 which indicated the following: "***Those concerns (relating to medical exemptions) intensified Tuesday after chief medical officer Dr. Kieran Moore said that the narrow list of legitimate medical exemptions- mainly severe allergic reactions and inflammation in or around the heart- means just "one to five in 100,000" Ontarians should qualify for one."***

3. While the Arbitrator confirmed that Paragon's Policy was reasonable and enforceable, he also saw fit to address what would happen if an employee was granted an exemption from being vaccinated and returned to work. The Arbitrator suggested that the Policy should also indicate that where an unvaccinated employee relies upon an acceptable medical reason or creed/religion based reason, such employee must submit to a regular rapid antigen testing for COVID-19 at his own time and expense and demonstrate a negative result. The testing is to occur at least once every seven calendar days. Test results must be kept confidential. Untested staff are not to be permitted to work.

## Conclusion

This arbitration Award is significant for the labour relations community in that it clearly confirms that a mandatory COVID vaccination policy is reasonable in the context of protecting the health and safety of an employer's employees, customers, customers' employees and the public. The Award also confirms compliance of a mandatory vaccine policy with the *Ontario Human Rights Code*.

While this Employer's collective agreement contained an article that supported the introduction of the Policy, the language in the Agreement was not solely determinative but was supportive of the overall finding that the Policy was reasonable and lawful.

It continues to be important for employers to consult with legal counsel prior to implementing vaccine policies and regarding the consequences of employees/unions not following such policies, especially where such consequence can include termination of employment. Consideration should also include negotiating specific collective agreement language regarding vaccinations.

If you have any questions, please contact any member of our Employment & Labour Law Group.

## Author

**Irv Kleiner**  
Partner

**Tel:** 416 777 5403  
ikleiner@torkinmanes.com

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