



November 2021

Mandatory Vaccination Policy Rejected by Arbitrator. What Does This Mean for Employers?

By Irv Kleiner

On November 10, 2021, we informed our readership of an arbitration award between *UFCW and Paragon Security*, in which Award Arbitrator Fred von Veh upheld a mandatory COVID-19 policy that had been implemented by the employer, Paragon Security.

In an Award that was just released yesterday involving *Electrical Safety Authority ("ESA") and Power Workers Union (the "Union")*, Arbitrator Stout distinguished the facts before him from those in the *Paragon* Award in the course of upholding the Union's Grievance to strike down a mandatory COVID-19 vaccination policy that had been unilaterally implemented by the ESA.

The ESA maintained that it had the right under the collective agreement to establish the policy and that the establishment of such a policy was a reasonable exercise of the Employer's management rights that also fulfilled the Employer's legal obligations to protect the health and safety of its employees and the public.

Arbitrator Stout determined that the policy was unreasonable to the extent that employees could be disciplined or terminated for failing to become fully vaccinated. In addition, he found that it was unreasonable to place employees on an unpaid administrative leave for failing to be fully vaccinated. He did however conclude that it was not unreasonable for the ESA to require employees to confirm their vaccination status as long as their personal medical information was protected and kept confidential and that it could only be disclosed with the employee's consent.

It is noteworthy that Arbitrator Stout emphasized that he did not view the dispute as being about the merits of being vaccinated or the effectiveness of COVID-19 vaccines. He recognized that the science clearly supports the proposition that the vaccines being used are safe and effective at reducing the likelihood of becoming critically ill and the rate of mortality. He also acknowledged that vaccinating the population is necessary in order to properly manage the healthcare system.

The Arbitrator limited his focus to assessing the reasonableness of implementing a rule or policy that required all employees to disclose their vaccination status and which also indicated that a refusal to vaccinate would result in the employee's employment being placed in jeopardy.

Arbitrator Stout pointed out that there were no collective agreement provisions that dealt with vaccinations and that there had never been a requirement for any employee of the ESA to be vaccinated as a condition of employment. He further indicated that he had not been provided with any prior authority that would support a mandatory employer vaccination policy for all employees without specific collective agreement language, or legislative authority, outside of a health care or long term care setting. A good number of the arbitral precedents that were relied upon by the employer in this case, were in the context of health care and long term care.

Just as in the Paragon case that we previously reported, Arbitrator Stout assessed the ESA mandatory policy in the context of the *KVP* test which sets out the scope of management's right to unilaterally establish rules or policies. He also considered some of the jurisprudence under Section 7 of the *Canadian Charter of Rights and Freedoms* which held that an enforced medical treatment is an assault if there is no consent. Arbitrator Stout stated as follows in this regard:

".....I agree that an individual employee's rights including the right to privacy personal autonomy, and bodily integrity as well as rights under the Charter are fundamental to a just and democratic society. Such fundamental rights should not be easily abrogated or constrained by employers. However these fundamental rights are not absolute and there are circumstances where the rights of the collective outweigh the rights of the individual.I am of the view that a more nuanced contextual approach applying the KVP test and the balancing of interests is the more appropriate way to address the issue before me.

Context is extremely important when assessing the reasonableness of a workplace rule or policy that may infringe upon an individual employee's rights. The authorities reveal a consensus that in certain situations, there where the risk to health and safety is greater, an employer may encroach upon individual employee rights with a carefully tailored rule or policy.

In cases where the rule or policy involves the health and safety, one must consider the obligations that arise under the Occupational Health and Safety Act including an employer's obligation to "take every precaution reasonable in the circumstances for the protection of the worker". This statutory obligation fits neatly within the KVP test which is grounded in a contextual analysis and a balancing of interests approach to determine the reasonableness of any rule or policy. "

What has emerged from this case is that context is paramount and that there cannot be a "one size fits all" mandatory vaccine policy that will apply to every workplace. Arbitrator Stout recognized that in workplace environments that presented high risks or where there were vulnerable populations (such as persons who are sick or elderly, or where there are children who cannot be vaccinated), mandatory vaccination policies may not only be entirely reasonable but may also be necessary and required in order to protect those vulnerable populations.

In workplace settings where employees can work remotely and where there is no specific problem or significant risk of an outbreak presented, or of any significant interference with the employer's operations, then a reasonable less intrusive alternative policy may be in order. Arbitrator Stout also pointed out however that circumstances may not always be static and that this COVID-19 pandemic has taught us that what may be unreasonable at one point in time may not be unreasonable at a later point in time.

Arbitrator Stout observed that at this time there is no government mandate that requires all of the employees of the ESA to be vaccinated. Further he found that the ESA, as an organization that promotes safety, had done a good job of protecting its employees and that there had been no breakouts in their work environment. Only 7 out of some 400 employees had contracted the virus and only 2 out of those 7 may have had been work related and had occurred before vaccines were available to the general population. The vast majority of the ESA employees had been voluntarily vaccinated (88.4%) and had disclosed their status to the ESA. Only 14 out of 415 employees had not disclosed vaccination status.

Prior to the implementation of the subject policy, the ESA had established a policy in September of 2021 which allowed employees who did not voluntarily disclose their vaccination status to be tested. The Union

did not object to the testing policy and acknowledged it as being reasonable. Arbitrator Stout found there had been no significant change in the situation since September of 2021 other than a concern by the ESA that mandatory vaccination rules and policies by third parties could interfere with the ESA's business and desire to bring employees back to work in January of 2022. Arbitrator Stout determined that the ESA had not demonstrated any difficulties in protecting their workplace through the use of a **combined** vaccination and testing regime.

In the course of rejecting the mandatory policy, Arbitrator Stout stated as follows:

"I have been provided with no analysis of any workplace dangers or hazards associated with ESA's concerns. I have also been provided with no analysis of any substantial interference with ESA's business. I have no evidence that these concerns have manifested themselves in any actual problems in the workplace that cannot be reasonably addressed under a policy that provides for a combined vaccination or testing regime or other reasonable means. At this point, the ESA has legitimate concerns but those concerns do not at this point justify imposing mandatory vaccination regime with threats of discipline or discharge.

The vast majority of the work that is undertaken by ESA employees have been effectively undertaken remotely and many employees have a right to continue working remotely under the collective agreement.

I recognize that some ESA employees will require access to third party sites or locations or many need to travel. However, I am not satisfied that the ESA has proven that a significant problem exists with regard to third party access and travel which would interfere with operations. There is no evidence that work has been significantly impeded or lost as a result of some employees (a significant minority) not being vaccinated. The PWU has indicated that in the context of mandatory vaccination for travel they would raise no objection to travel being assigned to employees who are fully vaccinated.

There are many third parties who have enacted vaccination policies that limit access to their premises. However, many of these third parties also provide a testing alternative. I am not satisfied at this time that these issues cannot be addressed by a policy that includes a testing option.

.....In my view, disciplining or discharging an employee for failing to be vaccinated when it is not a requirement of being hired and where there is a reasonable alternative is unjust. Employees do not park their individual rights at the door when they accept employment. While an employer has the right to manage their business, in the absence of a specific statutory authority or specific provision in a collective agreement, an employer cannot terminate an employee for breach of a rule unless it meets the KVP test and found to be a reasonable exercise of management rights."

Once again, it will be important for employers to appreciate the importance of the context within which any such vaccination policy is created and implemented. The Stout Award clearly signals that any rule or policy must be shown to be reasonably necessary and must involve a proportionate response to a real and demonstrated risk or business need.

Finally, Arbitrator Stout did refer to the *Paragon* Award but was quick to point out that the dispute over the mandatory vaccine policy in that case was distinguishable in that it arose in a different context wherein employees performed all of their work at third party sites. In addition, he also pointed out that the *Paragon* collective agreement contained language that required employees to receive a specific vaccination required at an assigned site. As such, Arbitrator Stout did not view his award as being in conflict with Arbitrator von Veh's award in *Paragon*.

Conclusion

This Award which was released on the heels of the *Paragon* Award also supports an application of the *KVP* test but clearly signals the importance of critically assessing the need for the establishment of a mandatory vaccination policy that includes a right to terminate or discipline employees who refuse to vaccinate. In the absence of government enacted mandatory vaccination legislation, employers will have to carefully consider whether or not there is a need for such a policy while having due regard to the type of

business they operate and the risks that may be presented to employees and to members of the general public by introducing a less invasive alternative to mandatory vaccinations.

The ESA Award should cause employers to consult with their legal counsel before they introduce a mandatory vaccination policy so as to reduce the risk of having the policy set aside and of potentially having terminated employees reinstated with full compensation if the policy is found to be unreasonable.

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

The issues raised in this publication are for information purposes only. The comments contained in this document should not be relied upon to replace specific legal advice. Readers should contact professional advisors prior to acting on the basis of material contained herein.