CITATION: Amalgamated Transit Union, Local 113 et al v. Toronto Transit Commission and National Organized Workers Union v. Sinai Health System, 2021 ONSC 7658
COURT FILE NOS.: CV-21-671477-0000
and CV-21-671579-0000
DATE: 20211120

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Amalgamated Transit Union, Local 113 and Carlos Santos on his own behalf and on behalf of all other Members of the Amalgamated Transit Union, Local 113 (Applicants)

AND:

Toronto Transit Commission (Respondent)

AND RE: National Organized Workers Union (Applicant)

AND:

Sinai Health System (Respondent)

AND:

Ontario Hospital Association (Intervener)

BEFORE: J.T. Akbarali J.

COUNSEL: *Dean Ardron, Simon Blackstone, Kristen Allen and Emily Home*, for the Applicants, Amalgamated Transit Union, Local 113 and Carlos Santos on his own behalf and on behalf of all other Members of the Amalgamated Transit Union, Local 113

Frank Cesario, Dolores Barbini and Eleanor A. Vaughan for the Respondent, Toronto Transit Commission

Ian J. Perry and Daniel Tucker-Simmons, for the Applicant, National Organized Workers Union

Bonnie Roberts Jones, Elisha C. Jamieson-Davies and Rachel M. Counsell, for the Respondent, Sinai Health System

Frank Cesario, Eleanor A. Vaughan and Danika L. Winkel for the Intervener, Ontario Hospital Association

HEARD: November 17, 2021

ENDORSEMENT

Overview

[1] The respondent employers have enacted policies requiring their employees to be fully vaccinated against COVID-19. Some members of the applicant unions do not want to be vaccinated. The unions have grieved the mandatory vaccination policies.

[2] On these applications, they ask the court to grant interim injunctive relief, restraining the employers from enforcing their mandatory vaccination policies pending the results of the grievance process. If the injunctive relief is not granted, the unvaccinated union members face discipline, including unpaid suspension, and termination from employment, before the grievance process has concluded. These reasons are about whether the employers should be stopped from suspending or terminating unvaccinated employees before the policies can be challenged in the grievance process.

[3] These reasons are not about whether the respondents' mandatory vaccination policies are in breach of the collective agreements, nor whether the respondents were entitled to enact the policies. These reasons are not about the rightness or wrongness of the policies. The challenges to the vaccination policies are before the labour arbitrators, not the court.

Procedural Background

[4] The applications were heard on an urgent basis, one after the other given the similarity in the issues raised, although each much be judged on its own evidentiary record and in its own unique context.

[5] Due to the urgency of determining the issues, and the overlap of arguments made in the two applications, I release this joint set of reasons applicable to both applications.

[6] The first application is brought by Amalgamated Transit Union, Local 113, ("ATU") and the President of the Union, Carlos Santos, against the Toronto Transit Commission ("TTC"). I refer to this application as the TTC application.

[7] The second application is brought by National Organized Workers Union ("NOWU") against Sinai Health Authority ("Sinai"). I refer to this application as the Sinai application. I note that Sinai has agreed to delay enforcement of its vaccine policy until the release of these reasons.

Brief Conclusion

[8] For the reasons set out below, I dismiss the Sinai application on the basis that there is no gap in the legislative regime that would support the exercise of the court's residual jurisdiction in this case.

[9] For the reasons set out below, I dismiss the TTC application on the basis that the applicants have failed to establish two elements of the test for an interlocutory injunction; they have failed to demonstrate irreparable harm, and the balance of convenience favours the TTC. It is not in the interests of justice to grant the injunctive relief sought.

Factual Background

The TTC Application

[10] I address the evidence on the TTC application in greater detail in the context of my analysis of the legal issues, and in particular, the elements of the test for injunctive relief. At this juncture, I set out only a brief recitation of the basic facts to orient the reader.

[11] The Toronto Transit Commission has pronounced a policy requiring its employees to be fully vaccinated against COVID-19, unless an approved exemption applies pursuant to the Ontario *Human Rights Code*, R.S.O. 1990, c. H. 19. The policy provides that unexempted employees who have not proven they are fully vaccinated by November 21, 2021 shall be placed on unpaid leaves of absence. Unexempted employees who have not confirmed that they are fully vaccinated by December 31, 2021 will be terminated from employment.

[12] ATU represents 11,500 of the TTC's more than 15,000 employees. ATU is the certified bargaining agent for all operators, maintenance employees, divisional clerks, collectors, revenue operations employees and others. ATU also represents a separate bargaining unit of customer service centre employees, which has not grieved the mandatory vaccine policy.

[13] As of October 26, 2021, 12.2% of TTC's active employees, and 14.9% of ATU members had not disclosed their vaccination status to the TTC. The TTC thus assumes they are unvaccinated.

[14] The ATU has filed affidavits, including from three of its unvaccinated members. Their reasons for remaining unvaccinated can be described as follows:

a. One affiant is a type 1 diabetic with a family history of heart disease, stroke, and diabetes. They fear they would be susceptible to significant negative side effects were they to receive a vaccination. Moreover, this affiant expresses faith that God has protected them thus far from COVID-19 and will continue to do so.

b. Another affiant believes their multiple health conditions, including high blood pressure and low kidney function, would be negatively impacted by the vaccine. They are concerned about potential adverse side effects from the vaccine, and they believe there is insufficient information about the long-term effects of the vaccine to assure them that it is safe. They also do not believe the vaccine guarantees protection against COVID-19. In addition, they think they may have already had COVID-19.

c. The third affiant also worries about the long-term effects and potential adverse side effects from the vaccine.

[15] None of the reasons advanced by the three affiants qualifies for an exemption from the TTC's mandatory vaccination policy.

[16] The three affiants all attest that they will experience financial hardship if they are placed on unpaid leave, or terminated from employment. They cite their financial responsibilities for their dependents, the lack of savings to weather a long period without income, and the negative effect that losing their income would have on their families. They describe the stress they feel as a result of the situation they are in.

[17] One affiant indicates that, if they do get vaccinated, they will feel they have been bullied and coerced into vaccination because they cannot afford to lose their job. Another indicates they will not get vaccinated, notwithstanding the significant consequences to their family. Another deposes that they believe they may be compelled to get vaccinated against their wishes because of the economic hardship that losing their income would place on their family. They dispute that vaccination under these circumstances is truly consented to.

The Sinai Application

[18] Here I set out a more complete review of the facts in the Sinai application than I did in the TTC application. I do so because, as I have indicated, I dismiss this application on the basis of the threshold jurisdictional question. Much of the fact-finding I would have done in the context of the analysis of the test for interlocutory relief does not arise in the jurisdictional analysis. As a result, I set out the relevant facts below in order to ensure a complete factual record exists in the event of an appeal.

[19] Sinai employs 6,523 employees, of which 3,726 are unionized. The unionized employees belong to 10 different unions. Sinai also engages privileged staff, like physicians and midwives, learners, and volunteers.

[20] The applicant NOWU covers over 500 employees between the full-time and part-time bargaining units. The majority of NOWU members are directly involved with patients, and include porters, dietary aides, operating room attendants, and housekeeping attendants.

[21] Sinai has pronounced a policy requiring its employees to be fully vaccinated against COVID-19 by December 9, 2021, or their employment will be terminated, subject to individual considerations arising out of medical or non-medical exemptions. To be fully vaccinated by December 9, 2021, an employee must have had their first dose of the vaccine by November 11, 2021.

[22] Approximately 20 NOWU members have failed to submit proof of receipt of their first dose of the vaccine.

[23] The mandatory vaccination policy is described by Sinai's Executive Vice President, People & Culture, and Chief Human Resources Officer, Susan Brown, as not only "another tool" to reduce the spread of COVID-19, but as a "critical tool." The mandatory vaccination policy replaced a policy that required unvaccinated employees to, among other things, report two COVID-19 test results every week to Occupational Health, and which provided for progressive discipline for non-compliant employees.

[24] Ms. Brown describes several reasons that led Sinai to conclude a mandatory vaccination policy was required. First, the first Canadian study on the positive predictive value of rapid antigen point of care testing for SARS-CoV-2, the virus that causes COVID-19, was published. It came to Sinai's attention on October 19, 2021. Its results indicated that antigen point of care tests had a low overall positive predictive value and a high proportion of false positives.

[25] Second, compliance rates among staff with the "vaccinate or test" approach are problematic. Sinai's record indicates that, as of November 12, 2021, 225 of its employees had declined to get vaccinated, and 52 were only partially vaccinated. Moreover, 179 unvaccinated employees were non-compliant with the testing regime that Sinai had put in place.

[26] Third, Sinai relies on formal and informal arrangements with other downtown hospitals, referred to as its partner hospitals. These arrangements include shared professional staff, shared employees and shared patients. The arrangements are designed to ensure optimal patient care, ensure that the needs of high acuity and complex patients are met, and effectively respond to emergencies. Sinai's partner hospitals have introduced mandatory vaccination policies, creating challenges for Sinai to retain a vaccinate or test approach. Ms. Brown deposes to two specific incidents, including (i) a Sinai employee was denied access to a partner hospital to pick up equipment needed in Sinai's ICU because they could not show proof of vaccination; and (ii) a partner hospital demanded proof of vaccination of Sinai employees who were completing an urgent transfer of a newborn patient for urgent surgical consultation at the partner hospital. It is apparent that unvaccinated employees create the risk of delaying urgent patient care needs when they must interact with partner hospitals.

[27] Fourth, on October 19, 2021, the Ontario COVID-19 Science Advisory Table, a group of scientific experts and health system leaders who evaluate and report on emerging evidence relevant to the COVID-19 pandemic, responded to a letter from Premier Doug Ford soliciting hospital administrators' input on the idea of mandating vaccination for all healthcare workers. The Science Table strongly supported a vaccine mandate for hospital workers, for reasons including vaccine safety, reducing the risk of transmission of COVID-19, and noting that vaccine mandates for healthcare workers have been in effect for more than two decades. The Science Table concluded that a vaccine mandate was evidence-based policy.

[28] Fifth, on the same day, the Ontario Hospital Association also responded to Premier Ford, recommending a vaccination mandate.

[29] Sixth, Sinai considered all of the above factors, and undertook an operational risk assessment, reviewing unit by unit staffing levels, vacancy rates, and sick time. It considered its

obligation to mitigate unnecessary risks to the health and safety of its staff and patients. It made the judgment call to implement a mandatory vaccination policy for COVID-19. It was not alone – about 70% of Ontario hospitals have introduced a mandatory vaccination policy.

[30] The provincial government declined to impose a provincial vaccine mandate on healthcare workers. In an affidavit filed by Dr. Peter Juni, the Scientific Director of the Ontario COVID-19 Science Advisory Table, he deposes to his understanding that the decision to maintain a permissive approach to mandatory vaccination policies related to concerns that a provincial mandate could impact human resourcing in certain hospitals in rural communities. The Health Minister indicated that Ontario supported the right of hospitals to make individual decisions with respect to vaccine mandates.

[31] In addition, to its vaccine mandate, Sinai has continued its other measures aimed at preventing the spread of COVID-19, including masking, screening, and its efforts to educate and communicate with its workforce about the importance of becoming vaccinated against COVID-19. However, Ms. Brown notes that, despite Ontario hospitals taking measures to prevent the spread of COVID-19, throughout the pandemic there have been 24,772 cases of COVID-19 among Ontario's health sector workers as of the date she swore her affidavit. Between February 16, 2020 and June 12, 2021, 568 COVID-19 outbreaks were reported to have originated from within hospitals.

[32] As part of its evidentiary record, NOWU has delivered affidavits from two of its unvaccinated members.

[33] One describes themselves as a single parent of four children. They believe they have not been fully informed of the adverse effects or risks resulting from the vaccines, and that the current available information is insufficient. They do not want to get the vaccine because of these concerns. However, they cannot afford to lose their job. If the enforcement of the policy is not delayed, they depose that they will have no choice but to submit to the vaccine, under protest. They depose that they have endured significant stress and anxiety as a result of the vaccination policy.

[34] Another affiant holds the same concerns about the vaccines. This affiant also deposes that they tested positive for COVID-19 in January 2021 and have made a complete recovery. They applied for a medical exemption to the vaccine policy relying on an antibody test showing a high volume of antibodies for COVID-19 in their system, but the request was denied. They depose that if the implementation of the vaccination policy is not delayed, they will have no choice but to submit to the vaccine, under protest. Moreover, they also depose to suffering significant amounts of distress as the date for termination under the policy approaches.

[35] None of the affiants' objections to the vaccine qualify them for an exemption to Sinai's policy.

Issues

[36] These applications require me to address the following issues:

a. As a threshold matter in the Sinai application, do the circumstances exist for the court to exercise its residual jurisdiction given that the labour arbitration process is underway?

b. Are the elements of the test met to grant interim injunctive relief? In particular,

   i. Is there a serious issue to be tried?

   ii. If the injunction is not granted, will the applicants suffer irreparable harm which cannot be compensated for in damages? and

   iii. Does the balance of convenience favour granting the injunction?

Do the circumstances exist for the court to exercise its residual jurisdiction?

[37] This jurisdictional question was raised by the respondent in the Sinai application. It was not squarely raised as an issue in the TTC application. Rather, in the TTC application, the respondent chose to focus on the merits of the test to grant interim injunctive relief. There is overlap in the analysis of the jurisdictional issue, in particular with the second element of the test for interim injunctive relief: whether the applicant will suffer irreparable harm which cannot be compensated for in damages.

[38] There may be factual differences between the two applications that led counsel for the TTC to structure argument in this manner. In any case, because counsel in the TTC application did not address the threshold jurisdictional question, I only undertake the jurisdictional analysis with respect to the Sinai application.

[39] While there is no disagreement that this court has residual jurisdiction to grant an interlocutory injunction in labour relations matters, Sinai argues that I ought, as a threshold matter, to conclude that the circumstances in which the court will intervene are constrained, and do not exist here. It argues that the Canadian labour relations regime mandates that unions must use the arbitral process to seek redress for an employer's alleged wrongdoings. Courts should only intervene where there is a gap, that is, no adequate alternative remedy available through the appropriate administrative tribunal.

[40] Sinai relies on the recent decision of Dunphy J. in *Blake v. University Health Network*, 2021 ONSC 7139, at para. 17, where Dunphy J. underscored the importance of judicially exercising the judicial discretion to intervene. Justice Dunphy cautioned against using the court's residual authority to undermine the exclusive jurisdiction of the labour arbitration process. Instead, he held that the residual discretion "must be seen as complementary to, and not destructive of, those fundamental labour relations principles." He declined to take jurisdiction to consider whether to issue an interim interlocutory injunction against the enforcement of a mandatory vaccine policy, noting that, unlike this case, the request was made by certain unionized employees, but not by the union itself. He concluded that the decision of the collective bargaining agents not to pursue a particular remedy is entitled to considerable deference given the fundamental nature of the labour relations principles involved.

[41] Sinai also relies on the decision of Benotto J. (as she then was) in *Ontario Nurses' Association v. The Toronto Hospital*, 1996 CarswellOnt 4070. Justice Benotto was asked to grant an injunction suspending layoff notices given to 387 nurses. In considering whether she had the jurisdiction to do so, she recalled that labour legislation is meant to provide a complete code which governs all aspects of labour relations. The court's residual jurisdiction only exists where the statutory scheme does not provide an adequate alternative remedy: para. 7. Justice Benotto held that, even if the board had no jurisdiction to grant an interim award, she would still find she had no jurisdiction "for the board has power to make its order retroactive." The timing of the layoffs was thus within the jurisdiction of the board: para. 8. She also noted that the applicant had not sought an expedited arbitration. With the remedies available to the board, she concluded there was no gap in the legislative scheme to fill through the court's residual jurisdiction: para. 10.

[42] In *Rattai v. Hydro One Inc.*, 2005 CanLII 13784, at paras. 9 and 12, Nordheimer J. (as he then was) declined to grant injunctive relief preventing the reclassification of four bargaining unit members pending the determination of an unfair labour practice, because an expedited hearing before the appropriate administrative tribunal provided an adequate alternative remedy. He distinguished the case before him from cases where the court exercised its residual jurisdiction to grant injunctive relief when the injunctive relief was necessary to preserve the moving party's rights pending the ultimate determination of the arbitration. Justice Nordheimer cautioned against the court providing ready access to every party who is disgruntled with the timeliness of a tribunal's proceedings, or its interim decisions, lest the court undermine the labour relations regime.

[43] Justice Nordheimer relied on the decision of the Supreme Court of Canada in *Vaughan v. Canada*, 2005 SCC 11, where Binnie J. held, at para. 39, that courts should not jeopardize the comprehensive dispute resolution process contained in the legislation by permitting routine access to the courts.

[44] Sinai argues that, in this case, there is a clear process under the *Labour Relations Act, 1995*, S.O. 1995, c.1 ("*LRA*") allowing NOWU to challenge the vaccination policy, including in an expedited fashion. I note that NOWU's evidence includes an affidavit from a NOWU employee who is the business agent responsible for NOWU's bargaining units at Sinai. In his evidence, he undertakes to expedite the referral of the grievances so they can be adjudicated as fast as possible.

[45] Sinai also notes that an arbitrator hearing the grievance is empowered to grant retroactive remedies, reinstate employment with seniority and compensation for time lost, and address human rights concerns.

[46] Moreover, Sinai argues that in the parties' collective agreement, the parties turned their minds to these issues. In article 3 of the collective agreement, the ATU acknowledged it is the exclusive function of Sinai to, among other things, establish and enforce reasonable rules and regulations to be observed by employees. In article 8, the parties agreed to a process for grievance and arbitration when there was a difference between a member of the bargaining unit and the hospital.

[47] NOWU argues that the relief sought in this application is necessary to preserve the employees' rights pending the completion of the grievance process. It argues that without the injunctive relief, at least some unvaccinated employees will be coerced into becoming vaccinated, contrary to principles of informed and voluntary consent. For them, the arbitration will become moot. As Dunphy J. put it in *Blake*, at para. 19, "no remedy exists to undo a vaccine once administered."

[48] This raises squarely a consideration that also arises in the context of the analysis of the irreparable harm branch of the test for interim injunctive relief. NOWU argues that the vaccination policy is coercive, and the employees who get vaccinated against their wishes will be irreparably harmed through violations of informed consent to medical treatment and bodily autonomy, and the reasonable probability of personal injury arising from the vaccine. In the context of the jurisdictional argument, this harm is alleged to render the arbitration moot if enforcement of the policy is not enjoined.

[49] NOWU relies on *CEP, Local 30 v. Irving*, [2013] 2 S.C.R. 486, at paras. 49-50, where Abella J. described as "unassailable" the labour arbitration board's conclusion that breathalyzer testing "effects a significant inroad" on employee privacy, involving coercion and restriction on movement. She referred to jurisprudence to the effect that "using a person's body without his consent to obtain information about him invades an area of personal privacy essential to the maintenance of his human dignity." NOWU argues that if being compelled to submit to an oral fluid test causes irreparable harm, surely requiring an employee to irreversibly alter their body by submitting to vaccination is irreparable harm. However, *Irving* did not deal with irreparable harm. In *Irving*, the union had grieved the employer's alcohol testing policy, and the arbitration board allowed the grievance. The board's award was set aside as unreasonable on judicial review. The New Brunswick Court of Appeal dismissed the appeal from that decision. The majority of the Supreme Court of Canada allowed the appeal dealing with the merits of the policy. The case underscores the ability and expertise of the labour arbitrator to deal with grievances of the sort at issue here. Justice Abella's comments may be relevant during an examination of the merits of the dispute between NOWU and Sinai, but they do not answer the question of whether there is an adequate alternative remedy for the applicants in the statutory scheme, nor whether there is irreparable harm militating in favour of injunctive relief.

[50] In my view, NOWU has mischaracterized the harm at issue. The harm which the employees may suffer is being placed on unpaid leave, or being terminated from employment, if they remain unvaccinated. They are not being forced to get vaccinated; they are being forced to choose between getting vaccinated and continuing to have an income on the one hand, or remaining unvaccinated and losing their income on the other. Characterizing the harm in this manner is consistent with the recent decision of the Superior Court of Quebec: *Michel Lachance c. P.G. du Québec* (not yet reported), at para. 144, where the court concluded that a vaccine mandate did not cause irreparable harm because it did not force vaccination:

> Prenant en considération que a) le Décret attaqué ne force pas la vaccination contre la COVID-19 des demandeurs et des intervenants de la santé qui refusent la vaccination et qu'il ne crée pas de situation physiquement irreversible et que: b) la

> suspension du travail est un prejudice reparable si le Décret devait être declare invalide, les repercussions que ce dernier pourrait par ailleurs avoir sur la qualité, la fiabilité ou la resilience du système de santé et sur sa capacité de répondre aux besoins de la population québécoise ne vont pas au-delà d'un scenario hypothétique.[1]

[51] I accept that this is a difficult, stressful, and unwelcome dilemma for the employees concerned. But having to choose between two undesirable alternatives does not create harm that will render the arbitration moot.

[52] Because I have concluded that the harm in this case is not the alleged violations of informed consent, bodily autonomy or the reasonable probability of personal injury from being coerced into becoming vaccinated, the expert evidence proposed by the parties with respect to the safety of vaccines is not relevant, and I need not address it, nor consider whether the experts ought to be qualified[2]. No one is forced to get vaccinated.

[53] Notwithstanding the stress, both emotional and financial, caused by the loss of employment, loss of employment has been repeatedly held to be a reparable harm: see, for example *Lachance*. The same conclusion was reached by Marrocco J. in *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, 2017 ONSC 2078, at para. 79 (dealing with random drug and alcohol testing).

[54] Similarly, in a case involving a paramedic suspended for refusing to have an influenza vaccine as required by the *Ambulance Act*, R.S.O. 1990, c. A.19, *Kotsopoulos v. North Bay General Hospital*, [2002] O.J. No. 715 (S.C.J.), the court declined to grant injunctive relief, finding it was open to the arbitration board to provide complete and retroactive monetary compensation as well as relief from loss of seniority or opportunity. The court wrote, at para. 18:

> …little differentiates this situation from many other labour disputes, in which an aggrieved employee contests a suspension or dismissal by his employer in the context of a collective agreement. Every such employee would probably face a loss of income, loss of seniority, loss of the opportunity to practice his or her skills and could claim a loss of self-esteem, while awaiting the outcome of arbitration proceedings. However, lacking more convincing evidence of irreparable harm, I am satisfied that

---

[1] NOWU asked me to consider that this decision was rendered after the vaccine mandate in question was lifted, making the decision moot. It suggested that the court's comments were thus *obiter*. I understand I am not bound by the decision in *Lachance*. However, the case remains a persuasive authority I can consider, and provides support for my conclusion about the manner in which the harm in this application should be understood.

[2] I make brief mention of Dr. Juni's affidavit in my recitation of facts. However, I cite Dr. Juni's affidavit for the sole purpose of contextualizing the provincial government decision not to implement a vaccine mandate for all health care workers in the Ontario. I do not rely on any evidence offered by Dr. Juni *qua* expert.

> it would not be appropriate for a court to issue an interlocutory injunction in such a situation.

[55] This approach is consistent with the approach taken to wrongful dismissal cases outside of the unionized context, where courts have repeatedly confirmed that loss of employment can be compensated in money damages. For example, in a recent decision where an unvaccinated employee of a third party supplier to the federal government was at risk of termination from his employment because he was non-compliant with the federal government's policy requiring its suppliers who interact with government employees to be vaccinated against COVID-19, McHaffie J. concluded that the loss of employment, while a significant and important consequence, is something that can be compensated in money damages: *Lavergne-Poitras v. Canada (Attorney General)*, 2021 FC 1232, at para. 7.

[56] Were the court to intervene to grant injunctive relief whenever a member of a bargaining unit was facing the loss of employment, the courts would be full of applications for injunctions, and the labour relations scheme designed by Parliament would become impoverished.

[57] NOWU has not proven that all of its unvaccinated members will get vaccinated if enforcement of the policy is not enjoined. It has proven that some of its unvaccinated members will likely get vaccinated rather than lose their income. If the harm in this case were characterized as the injury that results from getting vaccinated when one does not wish to be, then only those members who would get vaccinated as a result of the policy would suffer irreparable harm. On such an approach, the same policy would create irreparable harm to some people (those who will get vaccinated) and reparable harm to others (those who choose to remain unvaccinated and forego their income). This approach thus imports a subjective element into the question of irreparable harm.

[58] Importing a subjective element to assess harm, as I am urged to do here, is legally unworkable. On such an analysis, the court would have residual jurisdiction to enjoin the implementation of the policy with respect to those who are susceptible to acceding to it to keep their income, because the powers of the labour arbitrator cannot extend to undoing a vaccination. At the same time, the court would have no residual jurisdiction to enjoin the implementation of the same policy with respect to those who will not get vaccinated, even if it means losing their income, because that harm is reparable and can be addressed through the labour arbitration process. Leaving aside the practical difficulties with determining which bargaining members fall into which camp, the court's residual jurisdiction cannot be engaged or not depending on how an individual member will respond to the policy. When a union seeks injunctive relief for the benefit of all of its members, jurisdiction cannot workably arise on a case-by-case basis.

[59] For these reasons, I conclude that, in this case, the statutory scheme provides an adequate alternative remedy, including the ability to expedite the arbitration, and the power of the labour arbitrator to make retroactive awards, restore seniority, and address human rights issues. In these circumstances, the court's residual jurisdiction is not engaged.

[60] This conclusion is sufficient to dispose of the Sinai application. The application for injunctive relief is denied.

Are the elements of the test to grant an interlocutory injunction met?

[61] In view of my conclusion regarding the Sinai application, I turn to consider the elements of the test to grant an interlocutory injunction with respect to the TTC application only.

[62] Injunctive relief is an extraordinary remedy: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at para. 52; see also *Unifor, Local 707A and Communications, Energy and Paperworkers Union, Local 707 v. Suncor Energy Inc.*, 2018 ABCA 75, at para. 8.

[63] The elements of the *RJR-MacDonald* test to grant an interlocutory injunction, set out at para. 43 of that decision, are well known. The applicant bears the onus of establishing that:

a. there is a serious issue to be tried;

b. if the application is not granted, the applicant would suffer irreparable harm; and

c. the balance of convenience lies with the applicant. Put another way, this branch of the test requires the court to consider which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction pending a decision on the merits (in this case, on the merits of the arbitration).

[64] The criteria are not watertight compartments. The strength of one may compensate for the weakness of another. The overriding question is whether the interests of justice call for a stay: *Yaiguaje v. Chevron Corporation*, 2014 ONCA 40, at para. 19.

Is there a serious issue to be tried?

[65] The threshold to establish a serious question to be tried is a low one: *RJR-MacDonald*, at para. 55. Absent exceptional circumstances, which do not exist here, it is both unnecessary and undesirable for the court to engage in a prolonged examination of the merits: *RJR-MacDonald*, at paras. 50-56.

[66] This caution is particularly apt in this case, where the merits of the grievance lies within the exclusive jurisdiction of the arbitral dispute resolution regime enacted under the *LRA*.

[67] The TTC does not concede that there is a serious issue to be tried, but declined to join issue in favour of focusing on the other branches of the test.

[68] Vaccine mandates are currently being tested in courts and in labour arbitrations. In at least one labour arbitration, an employer's mandatory vaccination policy has been successfully contested: *Electrical Safety Authority and Power Workers' Union (COVID-19 Vaccination Policy)*, unreported (dated November 11, 2021) (Stout).

[69] ATU has alleged that the TTC's policy is contrary to the collective agreement and its regulations, the *Charter of Rights and Freedoms*[3], the Ontario *Human Rights Code*, the *Health Care Consent Act, 1996*, S.O. 1996, c. 2, the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, and the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1.

[70] There is no doubt that the grievance filed by ATU meets the low threshold required for this branch of the test.

Will the applicants suffer irreparable harm if the injunction is not granted?

[71] Irreparable harm is harm that cannot adequately be compensated by damages. It cannot be quantified in money terms or cannot be cured. It refers to the nature of the harm suffered rather than its magnitude: *RJR-MacDonald*, at paras. 59 and 79.

[72] Evidence of irreparable harm must be clear and not speculative and must be supported by evidence that demonstrates that the applicant (not others) would suffer it: *1998289 Ontario Inc. v. Leamington (Municipality)*, 2021 ONSC 6510, (Div. Ct.) at para. 38, *Sazant v. College of Physicians & Surgeons (Ontario)*, 2011 CarswellOnt 15194 (C.A.), at para. 11.

[73] The ATU identifies five ways in which it argues its unvaccinated members will suffer irreparable harm if the injunction is not granted:

a. Many will be compelled by the extreme economic duress imposed by the policy to undergo vaccination against their will, constituting an invasion of bodily autonomy and privacy;

b. All will suffer psychological stress and emotional harm which is not easily quantifiable or compensable through damages;

c. All will lose unionized employment (where there is a right to reinstatement under the collective agreement);

d. Some will be forced into early retirement, resulting in a loss of self-esteem, fulfilment, and changes to their retirement plans and lifestyle that are not compensable by damages;

e. The failure to grant interlocutory relief will do irreparable harm to the integrity of the arbitration proceeding and the relationship between the TTC and the ATU's members.

---

[3] *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

[74] The first and third items are the iteration of the argument I addressed above in the context of the jurisdictional question in the Sinai application. To accept those items as irreparable harm, I must conclude that the harm is that some members of the ATU will get vaccinated when they do not wish to be, rather than lose their income. But as I have already found, the harm at issue is the loss of employment or income that the unvaccinated will suffer. Choosing vaccination as a less undesirable alternative than the loss of one's income (which may be restored if the challenge to the policy in the labour arbitration is successful) is not properly characterized as the harm, for the reasons I explained at paras. 47-57 above.

[75] Irreparable harm cannot exist for some employees and not others because they react differently to the same policy. As much as it is legally untenable to determine the court's jurisdiction on a case-by-case basis, it is equally untenable to ascertain irreparable harm in an application brought by a union on a member-by-member basis, importing a subjective element into the analysis. Injunctive relief is extraordinary relief. In the context of the comprehensive statutory scheme governing labour relations, the court should only rarely step in to exercise its residual jurisdiction. The approach ATU advocates asks the court to exercise its residual jurisdiction to enjoin the enforcement of a policy against people who will not suffer irreparable harm, because of the individual decisions of other people subject to the same policy. This is not a legally tenable result. The court should not cast an injunctive net broadly, especially in the labour relations context.

[76] I note that the issue became stark during the TTC's counsel's submissions. He argued that the vaccination policy in *Kotsopoulos* was not coercive because Mr. Kotsopoulos had decided that he would refuse the flu vaccine even if it meant the loss of his income. In my view, it is fancy footwork to call a policy that mandates vaccines coercive if a person subject to it will get the vaccine, but not coercive if a person subject to it will continue to refuse the vaccine. That approach does not focus on the nature of the harm at issue or an objective assessment of the policy, but rather, is a problematic results-driven analysis that is individually dependent.

[77] Fundamentally, I do not accept that the TTC's vaccine mandate policy will force anyone to get vaccinated. It will force employees to choose between two alternatives when they do not like either of them. The choice is the individual's to make. Of course, each choice comes with its own consequences; that is the nature of choices.

[78] Nor do I accept that psychological stress and emotional harm amounts to irreparable harm. Any employee facing termination can be expected to suffer from stress and emotional harm. If that was sufficient to establish irreparable harm, the courts would routinely be asked to enjoin terminations of employment, both within and outside the unionized context. That result would be inconsistent with the nature of injunctive relief as extraordinary, and with the nature of the comprehensive labour relations scheme crafted by Parliament.

[79] This conclusion finds support in the jurisprudence. For example, in *Sazant*, the Court of Appeal held that a physician who was seeking to stay the revocation of his licence pending his motion for leave to appeal had not made out the irreparable harm branch of the test. Although the court accepted that the physician was emotionally and psychologically attached to the practice of

medicine, and would suffer financial loss if the revocation was not stayed, it found that these losses will almost always exist in this type of proceeding. Something more must be required, otherwise irreparable harm as a consequence would always weigh in favour of granting a stay: paras. 11, 13. See also *Kotsopoulos*, at para. 18, cited in para. 54 above.

[80] ATU also raised the prospect of stigma attaching to those who are suspended or terminated due to their decision not to get vaccinated. Assuming the argument is that this stigma changes the character of the psychological stress and emotional harm, I have two difficulties with this contention. First, the evidence about stigma is speculative at best. The evidence does not allow me to conclude that suspension or termination from employment under these circumstances would result in stigma, or that it would make the stress and harm one suffers on the loss of one's position significantly different than the stress and harm any employee suffers on the loss of their position. Second, on ATU's submission, rather than suspending or terminating the employment of those who remain unvaccinated, the TTC could reduce harm by employing a rapid testing regime. In a test or vaccinate system, if the stigma of being unvaccinated exists, the same stigma would attach to those who must complete rapid antigen tests due to their unvaccinated status. In effect, any stigma that comes from being unvaccinated does not arise as a result of the TTC's policy, but is a societal consequence of the choice not to be vaccinated.

[81] I also disagree with ATU that someone who opts for early retirement rather than vaccination will suffer irreparable harm. To the extent the loss is characterized as a monetary loss, it is a reparable harm at arbitration. To the extent it is a loss of self-esteem, it is addressed by my analysis regarding psychological stress and emotional harm, above.

[82] Finally, I do not accept that failing to grant interlocutory injunctive relief will do irreparable harm to the arbitration proceeding, and cause irreparable harm to the relationship between the TTC and its employees.

[83] As to the first of those contentions, I find that not granting the injunction will respect the proper role of the arbitrator, who has expertise in labour relations, consistent with Parliament's statutory scheme. The ATU argues that "labour relations delayed is labour relations denied." Yet the arbitrator is capable of controlling his own process to ensure that the grievance proceeds fairly and expeditiously. That is not the role of this court.

[84] The second of those contentions is entirely speculative. There is no evidence before me that failing to grant the injunction will cause harm to the relationship between the TTC and its employees. On the other hand, Mary Madigan-Lee, the Chief People Officer of the TTC, deposes that individual employees have approached her to express their desire that their fellow employees be vaccinated and their concern about working with unvaccinated individuals. I cannot accept that evidence as proof of the truth of the wants of vaccinated TTC employees, but I do accept that individual employees approached Ms. Madigan-Lee and made those statements. All I conclude is that the applicant has not met its burden to establish that irreparable harm will result to the relationship between the TTC and its employees if the injunction is not granted.

[85] For these reasons, I conclude that ATU has failed to establish that irreparable harm would result if the injunction sought is refused.

Who does the balance of convenience favour?

[86] In assessing where the balance of convenience lies, the court must consider which party would suffer greater harm from the granting or refusal of the injunction pending a decision on the merits of the grievance: *RJR-MacDonald* at para. 48.

[87] At this stage of the test, the parties "may tip the scale of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought": *RJR-MacDonald* at para. 71; *Lavergne-Poitras*, at paras. 92-93.

[88] ATU argues that the balance of convenience lies in its favour, and that the TTC will be only minimally inconvenienced if the injunction is granted.

[89] First, it argues that TTC policy does not require passengers to be vaccinated. It argues that the TTC must believe its vehicles and stations are safe even if used by unvaccinated people. Second, it argues that the number of unvaccinated bargaining unit members is small. Third, it argues that the injunction will be brief, because it will end with the determination of the merits of the grievance. Fourth, it argues that community transmission in Toronto is presently low. Fifth, it argues that other commonly available health and safety measures, including rapid antigen tests and the use of enhanced PPE can offset any potential risk to safety. It notes that many other transit agencies across Canada have adopted an approach involving regular testing of the unvaccinated. Finally, it argues that the interlocutory injunction will delay service cuts that the TTC has announced will result from suspensions, relieving the risk of crowding on vehicles, where passengers may be unvaccinated. There is also evidence that indicates that there are passengers on the TTC who do not wear their masks properly.

[90] ATU contrasts this with the harm to its affected members. As explained above, I do not characterize the harm to the bargaining unit members as being forced to be vaccinated. They are not being forced to do anything but choose between two alternatives when they do not like either. Rather, the harm is foregoing income if they choose to remain unvaccinated which, for the reasons earlier given, is reparable harm.

[91] For its part, in describing the harm that will result to the TTC, the TTC invokes the public interest. It notes that it is the third most heavily used mass transit system in North America. It currently averages ridership of approximately 850,000 passengers per weekday, down from its pre-pandemic average of 1.6 million passengers per weekday. The TTC is designated an "essential service" under the *Toronto Transit Commission Labour Dispute Resolution Act*, 2011 S.O. 2011, c. 2.

[92] The TTC operates Wheel Trans service, specifically dedicated to serving people living with disabilities. Wheel Trans operators must interact, sometimes very closely, with these vulnerable individuals.

[93] The TTC's workplace is unique. As Marrocco J. put it, in *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, 2017 ONSC 2078, at para. 151, "…the workplace is literally the City of Toronto and as a result all the people who move about in the City, whether or not they are passengers on the TTC, have an interest in the TTC safely taking its passengers from one place to another."

[94] The TTC has a statutory obligation as an employer under the *Occupational Health and Safety Act* to take every precaution reasonable in the circumstances to protect the health and safety of its workers. It is also expected to protect the health and safety of its riders, and thus to contribute to the protection of the health and safety of the community at large.

[95] Before vaccines were available, the TTC relied on other public health measures to limit the spread of COVID-19, including masking, screening, enhanced cleaning, and improved ventilation, among other measures. Despite the public health measures adopted, the TTC experienced multiple COVID-19 outbreaks. As of November 11, 2021, 1,143 TTC employees have reported contracting COVID-19, and sadly, four have died, including three ATU members.

[96] Since vaccines became available, the TTC has encouraged its employees and community members to get vaccinated. It has held 46 vaccination clinics for employees and customers at which more than 8000 doses have been administered.

[97] On August 19, 2021, the City of Toronto issued a press release confirming its intention to introduce a mandatory vaccination policy. The next day, the Toronto Medical Officer of Health issued a press release strongly recommending that all Toronto employers institute COVID-19 vaccination policies requiring, at a minimum, that workers provide proof of vaccination or proof of a medical exemption and complete a course on the risks of being unvaccinated in the workplace.

[98] The City's Manager also issued a memorandum that strongly encouraged all City agencies and corporations to adopt a policy similar to the City's policy, including mandatory vaccination against COVID-19 to protect both the employees and the public.

[99] The TTC opted to institute a mandatory vaccination policy to achieve a higher level of protection than regular antigen testing would afford. It notes that, unlike vaccination, other public health measures do not protect unvaccinated people against infection with COVID-19 or from suffering the consequences of COVID-19, which can be severe, and include hospitalization and death.

[100] The TTC notes that the transit authorities that opted for a "vaccinate or test" policy have faced implementation issues. Although the ATU argued before me that the inconvenience of the injunction could be minimized if the TTC implemented a vaccinate or test policy, the ATU (albeit a different local) has in fact grieved the testing policy put in place by a transit authority in another region. In any event, the TTC compares itself not to smaller transit authorities, but to Metrolinx, which also operates transportation services throughout the Greater Toronto Area, and which has implemented a mandatory vaccination policy like the TTC has done.

[101] The TTC's mandatory vaccination policy identifies its purpose as the protection of its workforce, particularly in view of the more contagious Delta variant, and the potential for future variants, and the provision of indirect protection to others, including colleagues and customers.

[102] The TTC also notes that cases in Toronto have recently been rising. In its experience, as the number of COVID-19 cases rise in Toronto, those trends are reflected in rising case counts among TTC employees.

[103] Having regard to this evidence, the TTC argues that the balance of convenience falls in its favour. It argues that its experience, and the best scientific and public health information available, lead to the conclusion that it would face a greater risk to the health and safety of its workforce and its riders if it is required to permit unvaccinated employees to continue to attend the workplace.

[104] It notes that it was encouraged to adopt a mandatory vaccination policy by the City Manager and that public health authorities encourage vaccination. The TTC relies upon *The Fit Effect v. Brant County Board of Health*, 2021 ONSC 3651, at para. 88 where Broad J. declined to enjoin a public health authority from enforcing instructions to limit indoor gatherings due to COVID-19, finding that significant deference was owed to health units and medical officers of health in the context of the pandemic when considering the balance of convenience.

[105] The TTC also relies upon *Kotsopoulos*, where, in declining to grant injunctive relief to a paramedic who refused the flu vaccine, the court held, at para. 26, that an injunction "would clearly interfere with the approach that has been adopted toward universal immunization. Assuming, as I must, that the regulation operates in the public interest, I am satisfied that the balance of convenience and the protection of the public interest operates against the granting of an injunction."

[106] Although *Kotsopoulos* dealt with a legislated requirement that paramedics be vaccinated against the flu, the TTC argues that it should be entitled to some level of deference given its status as an essential public service, and in view of the fact that it adopted a policy encouraged by City of Toronto and local public health authorities. It cites *RJR-MacDonald*, where the Supreme Court of Canada found that the onus of demonstrating irreparable harm to the public interest is less for a public authority than for a private applicant. Moreover, in *Black v. Toronto (City)*, 2020 ONSC 6398, at para. 136, Schabas J. held that, upon proof that the authority is charged with the duty of promoting or protecting the public interest, and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility, the court should, in most cases, assume that irreparable harm to the public interest would result from the restraint of that action. See also *Poff v. City of Hamilton*, 2021 ONSC 7224, at paras. 223-224.

[107] I conclude I must assume that the City and local public health authorities give public health guidance and advice in the public interest, especially in a pandemic. I see no principled reason why the deference I would accord to the policies pronounced by the City and local public health authorities should not be extended to the TTC, an essential service and City agency, when it promulgates policies consistent with those encouraged by the City and local public health authorities. I thus conclude that the TTC has established that the enforcement of its mandatory

vaccination policy aligns with the public interest broadly, as well as the interests of the TTC's workforce and ridership specifically.

[108] The fact that some TTC riders are unvaccinated is a reflection of the fact that (i) the TTC is an essential service; and (ii) it would be impossible, at a practical level, to check every rider's vaccination status, given the 850,000 average riders on each weekday. In any event, the fact that the TTC would be safer if every rider were vaccinated does not logically support a conclusion that there is no or little inconvenience to the TTC if it were enjoined from improving the safety on the TTC by making sure TTC employees are vaccinated.

[109] The fact that the injunction would be limited in time to the duration of the grievance process, or the fact that there are a small number of unvaccinated bargaining unit members, does not diminish the harm to the public interest were the injunction to be granted. Cases have recently begun to rise in the city, even if they still remain at levels much lower than we have seen previously. The TTC's ridership includes vulnerable people. The TTC has had experience with outbreaks. Four TTC employees have lost their lives to COVID-19. If even one TTC rider or worker dies or is seriously harmed after catching COVID-19 from an unvaccinated TTC employee, it will be one too many. That is harm that is truly irreparable.

[110] Moreover, the use of other public health measures has not insulated the TTC from outbreaks in the past. While other public health measures are useful to reduce risk, they do not eliminate it. The public health guidance is consistent that vaccines are the most useful tool for protecting people from the risks of COVID-19.

[111] Finally, while the service cuts contemplated are regrettable, the potential for unvaccinated workers to spread COVID-19 to co-workers or riders is a risk the TTC should not have to accept. It is a risk which is inconsistent with its obligation to create a safe workplace for its employees and a safe way of getting around the city for its riders.

[112] I conclude that the balance of convenience favours the TTC.

Conclusion

[113] Considering all elements of the *RJR-MacDonald* test together, despite the existence of a serious issue to be tried, I find that it is in the interests of justice to dismiss the request for interim injunctive relief. The balance of convenience weighs strongly in favour of the TTC, and the harm which the applicant's members risk if the injunction is not granted is reparable.

Costs

[114] The parties to the TTC application have agreed that no costs shall be awarded in that application.

[115] The parties to the Sinai application were unable to agree on costs. Each has uploaded their costs outline to Caselines, but I understand that the parties wish an opportunity to make written submissions on costs. I thus direct that Sinai may deliver its written submissions on costs, not to

exceed three pages, by November 25, 2021. NOWU shall deliver its written submissions on costs, not to exceed three pages, by November 30, 2021. Reply submissions shall be no more than two pages in length, and shall be delivered by December 3, 2021. Submissions may be sent to me by way of email to my assistant and copies shall be uploaded to Caselines.

J.T. Akbarali J.

Date: November 20, 2021