CAUT LegalAdvisory

January 2022

Mandatory Vaccination Policies in the Workplace: A Case Law Review

Issue

When is an employer's mandatory vaccination policy reasonable?

Overview

The first grievances challenging COVID-19 vaccination policies in the workplace have made their way through arbitration. Arbitrators have been applying the KVP test[1] in a "nuanced contextual approach"[2] to decide whether these policies are reasonable.

While the analyses that arbitrators have adopted have been similar, the outcomes have differed owing to the unique circumstances in each case. Arbitrators have weighed employer interests, including their legal obligations under health and safety legislation, impacts on business operations and the vulnerability of their clientele against employee interests, including legal entitlements under human rights legislation, the right to bodily integrity and medical privacy. We can expect a similarly individualized analysis as the case law develops.

Two arbitrators determined that employers should bear the costs of COVID-19 testing required under their policies, but that employees were not entitled to be paid for the time required to test at home (unless, as stated by one arbitrator, they could not vaccinate for medical or religious reasons).

---

1. *Lumber and Sawmill Worker's Union, Local 2537 v KVP Co*, [1965] 16 LAC 73: The test in KVP sets out the criteria an employer must meet in order to unilaterally institute a rule. To be "reasonable", a rule must satisfy the following conditions:
    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 the company can act on it.
    5. The employee concerned must have been notified that a breach of the rule could result in his discharge if the rule is used as a foundation for discharge.
    6. It must have been consistently enforced by the company from the time it was introduced.
2. *Electrical Safety Authority v Power Workers' Union (COVID-19 Vaccination Policy)*, (11 November 2021), unreported, (Stout), at para. 13.

Case Law

"Vax or Else" Policies

United Food and Commercial Workers International Union, Local 333 v Paragon Protection Ltd., (9 November 2021), unreported, (von Veh)

Paragon employed about 4400 security agents who were deployed to work at third-party sites, some of which had mandatory vaccination policies. In 2015, the union and the employer had the forethought to bargain specific collective agreement language that contemplated circumstances where Paragon's clients adopted vaccination mandates. This language required that guards be vaccinated in keeping with third-party client requirements or be reassigned, if possible.

By late 2021, most of Paragon's clients had adopted compulsory vaccination policies and the employer required that guards provide proof of vaccination, regardless of where they were assigned. The union grieved this direction.

Result

- Pursuant to a KVP analysis, the rule was reasonable.
- The parties had already bargained language presupposing the need for a vaccination policy.
- The employer had also developed a vaccination exemption protocol on the basis of medical and non-medical human rights grounds.
- Compelling the production of proof of vaccination was likely permissible under human rights legislation and accommodating workers on the basis of personal beliefs, as opposed to protected grounds, was likely not required. The arbitrator found that the personal subjective perceptions of employees to be exempted from vaccinations could not override or displace available scientific considerations.
- The arbitrator also found that the policies struck the balance between the rights of those employees who did not vaccinate with the employer's obligations to provide a safe environment for other staff, the employer's clients and members of the public with whom the employer's security guards might interact.
- The arbitrator distinguished this case from an earlier "vax or mask" case, as that case dealt with an annual influenza vaccine as opposed to the unique circumstances of the more infectious and fatal COVID-19.

Electrical Safety Authority v Power Workers' Union (COVID-19 Vaccination Policy), (11 November 2021), unreported, (Stout)

The employer had successfully implemented a "vax/disclose or test" policy. The work was almost entirely remote, employees were seldom deployed in-person to third-party work sites, and there had been no outbreaks. When the employer later imposed a mandatory vaccination policy which could result in employees being suspended, terminated or placed on an unpaid leave if they did not vaccinate, the union grieved.

Result

- Pursuant to a KVP analysis (adapted from the analysis in earlier decisions on "vax or mask" policies), the rule was unreasonable.
- There was no evidence that non-vaccinated workers posed a hazard in the workplace, since their work was largely remote, and only a small number of employees had refused to disclose.
- There was no evidence that the previous policy had been ineffective in guarding against transmission or that it had interfered with the employer's operational objectives — there was evidence of only one complaint from a client that a worker's status was unknown.
- There had been a long-standing practice of replacing one worker for another, and it would not have interfered with operations to continue that practice where an employee whose vaccination status was unknown had to be replaced by a vaccinated employee.
- In balancing interests, the arbitrator carefully weighed employee interests in maintaining their bodily integrity and employment against the specific operational needs of this employer at this time.
- The arbitrator left the door open to a mandatory vaccination policy should circumstances in the workplace or the community change.
- In obiter, the arbitrator remarked that compulsory vaccination may be reasonable in environments where the clientele was vulnerable, like certain healthcare settings. He also noted that his finding that this particular policy was unreasonable in the circumstances should not be taken as an endorsement for refusing vaccination.

Amalgamated Transit Union, Local 113 v Toronto Transit Commission and *National Organized Work Union v Sinai Health System*, 2021 ONSC 7658

These two applications were heard together owing to their similarity and their pressing need for a decision. Both employers implemented mandatory vaccination policies which required that workers be vaccinated or face disciplinary action, up to and including termination. Both unions grieved the policies, but the policies would be implemented before the grievance processes had concluded.

The unions sought injunctive relief, asking the Court to restrain the employers from enforcing their policies.

Result

- Both applications were dismissed.
- To be granted an injunction, the unions had to show that their members would otherwise experience irreparable harm and that the balance of convenience favoured the unions.
- The *ATU v TTC* application focused on the merits of the case, and whether, based on the test, an injunction *should* be granted. Although ATU argued that the harm of being compelled to receive a vaccine was irreparable, the Court found that the harm was more properly characterized as the harm of losing one's job for failure to vaccinate. This is considered a reversible or compensable harm — it is the same harm that any worker would face in a disciplinary case.
- The *NOWU v Sinai* application focused on whether an injunction *could* be granted. The Court determined that while it did have the residual jurisdiction to grant injunctions in labour relations matters, those circumstances were limited to occasions where some gap in the arbitral process prevented an administrative tribunal from granting an adequate remedy. Otherwise, the parties in a unionized workplace were required to proceed by arbitration. The Court found there was no gap in the case at hand, so there was no jurisdiction to make the order being sought by the union.

"Vax or Test"

Ontario Power Generation and The Power Workers Union, Re OPG-P-185, (12 November 2021), unreported, (Murray)

The Employer implemented a "vaccinate or test" policy requiring that employees be vaccinated against COVID-19 or, if unvaccinated, undergo weekly testing during an initial orientation phase, and twice-weekly testing thereafter. Employees who were testing were required to pay $25 a week to cover the cost of testing or procure their own kits. They were not paid for time spent testing, recording themselves being tested or uploading the results. Anyone failing to comply with any of the measures would be placed on an unpaid leave of absence for six weeks and their employment would be terminated for cause should they fail to comply within that period. Unvaccinated employees were also barred from the worksite gym, regardless of whether they were regularly testing for COVID-19.

The Union filed a grievance contesting many aspects the policy.

Result

- The testing scheme was reasonable in light of the pandemic and an employer's general duty to provide a safe workplace.
- The employer was required to pay the cost of testing.
- The employer was not required to pay wages for the time spent testing at home. It was reasonable to have employees test from home because it took 15 minutes and because it would limit exposure in the event a test was positive. Otherwise, testing in the workplace could take 30-45 minutes during which other employees may be exposed to the virus. The Arbitrator also feared that paying workers to perform tests from their homes would incentivize workers to test rather than vaccinate.
- Unlike other suspensions pending the outcome of discipline, it was completely within the control of workers to decide when and whether they wished to return to work. Under those circumstances, an unpaid leave was appropriate.
- The arbitrator viewed participating in a Rapid Antigen Testing programme as a sensible and necessary part of a reasonable voluntary vaccine and testing programme.
- In light of the gravity of a global pandemic, the harmlessness of the testing process and the reasonableness in offering testing as an alternative to vaccination, a refusal to participate in testing could lead to termination without cause.

Hydro One Inc. and Power Workers' Union, Re HO-P-136, (22 November 2021), unreported, (Stout)

Hydro One introduced a vaccination or testing policy which was in many respects identical to the one in contention before Arbitrator Murray in *Ontario Power Generation*. There were also questions as to who must pay for testing and whether workers were owed wages for taking tests at home. The Union also grieved a portion of the policy's exemption procedure for employees claiming accommodation on the basis of religion or creed. By the time the matter was heard, Hydro One had tweaked their questionnaire and the Arbitrator found it reasonable.

Result

- Arbitrator Stout found that where workers were required to test, the employer must bear the cost. This order was without prejudice to the employer's ability to bring the issue back before the arbitrator on a month's notice.
- Employees required to self-administer rapid antigen tests on their own time, before reporting to work, were not entitled to compensation for the time spent taking the test or reporting the results.
- The employer was required to consider reasonable compensation on a case-by-case basis for those granted medical or religious exemptions from receiving vaccinations.
- The employer was also required to consider reasonable compensation where employees had to travel to obtain a PCR test.
- Where the parties could not agree on the reasonableness of compensating an individual employee, the matter could be brought before the Arbitrator.
- The following questions on the exemption questionnaire were clear and reasonable in the circumstances:
    - *What creed/religion do you belong to?*
    - *How long have you practiced your creed/religion?*
    - *Why does your belief in this creed/religion prevent you from being vaccinated against COVID-19?*
    - *Have you been vaccinated against any other illnesses? If so, why were those vaccinations permissible under your creed/religion?*
- The employer had adequately protected employee medical privacy interests:
    - The employer did not store employee QR codes (their proof of vaccination).
    - The time spent verifying the vaccination status was short.
    - The only information retained by Hydro One was a notation on whether the employee was subject to testing.
    - Managers were only informed that an employee may or may not attend a workplace, and they did not have access to medical information.
    - The information collected by Hydro One was only stored in Canada, and its service providers did not have access to medical information.
    - Hydro One had undertaken to advise individual employees and the union in the event of a breach.