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Ontario Arbitrators come to different conclusions with respect to whether mandatory COVID-19 vaccination policies were reasonable

November 17, 2021

Recently, two Arbitrators came to different conclusions with respect to whether mandatory COVID-19 vaccination policies were reasonable.

In the first arbitral award rendered on November 9, 2021 (*United Food and Commercial Workers Union, Canada, Local 333 and Paragon Protection Ltd.*), Arbitrator Von Veh dismissed the union's grievance and upheld the mandatory vaccination policy implemented by the employer, a security company, finding that the policy was reasonable, enforceable and compliant with the *Human Rights Code* ("***Code***") and the *Occupational Health and Safety Act* ("***OHSA***"), and did not breach the collective agreement. However, in the second arbitral award rendered on November 11, 2021 (*Electrical Safety Authority and Power Workers' Union*), Arbitrator Stout allowed the union's grievance and found that the employer's mandatory vaccination policy was unreasonable to the extent that employees could be disciplined or discharged for failing to get fully vaccinated. The Arbitrator also found that it was unreasonable at this time to place employees on an unpaid administrative leave if they did not get fully vaccinated (noting, however, that this may change as the situation unfolds in the coming weeks and months).

In this Focus Alert, brief summaries of the two decisions are presented, as well as the implications they may have for employers who implement mandatory COVID-19 vaccination policies.

Arbitrator Von Veh Finds Mandatory COVID-19 Vaccination Policy to be Reasonable

On November 9, 2021, Arbitrator Von Veh dismissed a grievance with respect to Paragon Protection Ltd.'s ("**Paragon**") mandatory COVID-19 vaccination policy, a company who employs approximately 4,400 security guards across Ontario and has approximately 450 client sites in Ontario. A majority of those client sites had mandatory vaccination policies, requiring exclusively vaccinated security personnel and in some instances, excluding all non-vaccinated individuals from those sites.

Paragon's COVID-19 Vaccination Policy ("**Paragon's Policy**") was challenged by the union as being unreasonable and non-compliant with the *Code*. Paragon's Policy required that all staff be fully vaccinated against COVID-19 by October 31, 2021 or face potential disciplinary action, up to and including termination for just cause, while permitting exemptions for "health and religious reasons". For employees assigned to client sites that required all personnel to be fully vaccinated before

October 31, 2021, those employees had to be fully vaccinated by that earlier date.

Arbitrator Von Veh found that Paragon's Policy was reasonable, enforceable and compliant with the *Code* as well as the *OHSA*. Paragon's Policy was also found to strike an appropriate balance between respecting the rights of employees who had not, or did not wish to be vaccinated, while also respecting a safe workplace for Paragon's staff, clients and members of the public with whom Paragon's security guards interact. The Arbitrator held that by introducing Paragon's Policy, Paragon was satisfying its obligations under paragraph 25(2)(h) of the *OHSA* to take "every precaution reasonable in the circumstances for the protection of a worker." Also, the Arbitrator held that employees' personal subjective perceptions to be exempted from vaccinations could not override and displace available scientific considerations.

It should be noted that the collective agreement contained a provision that required employees assigned to a work site which had a vaccination and/or inoculation requirement to receive such vaccination and/or inoculation, or be subject to reassignment. This specific provision in the collective agreement was a factor (among others) in the Arbitrator's finding that Paragon's Policy was reasonable. The Arbitrator also found that Paragon acted reasonably (as per the *KVP* principles) in unilaterally introducing Paragon's Policy. In the end, Arbitrator Von Veh concluded that Paragon's Policy did not breach the collective agreement and dismissed the grievance.

Arbitrator Stout Finds Mandatory COVID-19 Vaccination Policy to be Unreasonable

In contrast, on November 11, 2021, Arbitrator Stout came to a different conclusion, finding that the Electrical Safety Authority's ("**ESA**") COVID-19 Vaccination Policy ("**ESA's Policy**") was unreasonable. Prior to October 5, 2021, the ESA had a voluntary vaccination disclosure and testing policy, which permitted employees who did not voluntarily disclose their vaccination status to be tested for COVID-19 on a regular basis. The union did not object to this policy. On October 5, 2021, the ESA's Policy was introduced which required all staff to be fully vaccinated by a certain date depending on an employee's job, subject to a valid exemption under the *Code*. Unless there was a protected ground exemption under the *Code*, the ESA's Policy stated that it would not provide alternate work accommodations for employees who chose not to comply with the ESA's Policy. Furthermore, employees who did not meet or follow the requirements could be subject to discipline, up to and including termination. The ESA could also, at its discretion, place employees who did not meet or follow the requirements on unpaid leave.

The union asserted that the ESA's Policy was unreasonable and a significant overreach of management rights; the ESA responded that it was a "reasonable exercise of management rights that fulfills their legal obligations to take every reasonable precaution to protect their workers and the public."

Arbitrator Stout noted that there was no specific provision in the collective agreement which

addressed vaccinations; that the ESA had not previously required employees to be vaccinated; and there was no legislative requirement that ESA employees be vaccinated. The Arbitrator also reviewed the *KVP* principles when employers unilaterally impose a policy, which require, among other things, that the policy be consistent with the collective agreement and be reasonable. The Arbitrator also noted that context is extremely important when assessing the reasonableness of a workplace rule or policy that may infringe upon an individual employee's rights. Arbitrator Stout further held that the authorities reveal a consensus that in certain situations, where the risk to health and safety is greater, an employer may encroach upon individual employee rights with a carefully tailored rule or policy. More specifically, the Arbitrator stated that while an individual employee's right to privacy and bodily integrity is fundamental, so too is the right of all employees to have a safe and healthy workplace.

The Arbitrator further emphasized that the circumstances at play may not always be static and that the pandemic has been fluid and continues to evolve. Arbitrator Stout stated that "[w]hat may have been unreasonable at one point in time is no longer unreasonable at a later point in time and vice versa."

In terms of this specific workplace, the Arbitrator found that there was no evidence of any workplace dangers or hazards associated with the ESA's concerns. The Arbitrator also stated there was no evidence that these concerns had manifested themselves in any actual problems in the workplace that could not be reasonably addressed under a policy that provided for a combined vaccination or testing regime or other reasonable means. The Arbitrator added that while the ESA's concerns were legitimate, those concerns "at this point" did not justify imposing a mandatory vaccination regime with threats of discipline or discharge.

In the end, the Arbitrator concluded that the ESA's Policy was unreasonable to the extent that employees could be disciplined or discharged for failing to get fully vaccinated. The Arbitrator also found it was unreasonable at this time to place employees on an administrative leave without pay if they did not get fully vaccinated. The ESA was directed to provide a testing option to those who had not been vaccinated. Arbitrator Stout also added that the ESA could revise its policy to indicate that at some point in the future if problems occur in their operations or safety concerns become such that they cannot be adequately addressed by a combined vaccination and testing regime, then with reasonable notice, the ESA could place employees on an administrative leave without pay if they are not fully vaccinated. The Arbitrator also confirmed that it was not unreasonable for the ESA to require employees to confirm their vaccination status as long as their personal medical information is adequately protected and only disclosed with their consent.

Arbitrator Stout was also clear to specify that his decision should not be taken as a "vindication for those who choose, without a legal exemption, not to get vaccinated". The Arbitrator added that those individuals are "misguided and acting against their own and society's best interests".

In Our View

While Arbitrators Von Veh and Stout came to different conclusions with respect to whether mandatory COVID-19 vaccination policies were reasonable, these decisions make clear that the reasonableness of a COVID-19 vaccination policy will be highly fact-specific and context-specific to an employer's workplace and circumstances. The decisions showcase the importance of assessing the need for a mandatory vaccination policy with due regard to the specific context and circumstances of the employer's business/operations, the dangers/hazards associated with the workplace (including any specific problems), any applicable legislative or regulatory requirements and the applicable collective agreement.

Therefore, in the continued absence of general mandatory vaccination legislation for all employees in Ontario, the Von Veh and Stout awards show that employers will have to carefully consider their specific circumstances and gather the relevant and necessary evidence to defend themselves against union challenges, including considering expert evidence (depending on the employer's specific circumstances).

While Arbitrator Stout found that the ESA's Policy was unreasonable, to the extent described above, we note again that this decision was highly fact-specific and context-specific. In fact, Arbitrator Stout expressly acknowledged the evolving nature surrounding the pandemic and that the circumstances at play are fluid and may not always be static, even acknowledging that what may have been unreasonable at one point in time is no longer unreasonable at a later point in time and vice versa. In the same vein, Arbitrator Stout expressly found that the circumstances involving the ESA could change whereby a combined voluntary vaccination and testing regime would no longer adequately address safety concerns, such that unvaccinated employees could be placed on administrative unpaid leave.

We also note that Arbitrator Stout recognized that in workplace settings where the risks are high and there are vulnerable populations (people who are sick or the elderly or children who cannot be vaccinated), then mandatory vaccination policies may not only be reasonable but may also be necessary and required to protect those vulnerable populations.

We further note that Arbitrator Stout reviewed Arbitrator Von Veh's decision, stating that award arose in a different context involving a security company whose employees performed all their work at third-party sites and specific vaccination language in the collective agreement. Moreover, Arbitrator Stout saw no conflict between both awards and opined that in the circumstances before Arbitrator Von Veh, he came to a reasonable conclusion. Therefore, it is expected that arbitrators will consider COVID-19 vaccination policies on a highly fact-specific and context-specific case-by-case basis.

We will continue to monitor decisions relating to workplace vaccination policies and will provide updates as they become available. For instance, we intend to publish another Focus Alert in the near future regarding the arbitral award rendered by Arbitrator Murray on November 12, 2021 (*Ontario*

Power Generation and The Power Workers Union), which dealt with various COVID-19-related issues, such as: (1) whether the cost of COVID-19 testing for unvaccinated employees should be paid by the employer and whether such testing should occur during working hours; and (2) the treatment of employees who do not agree to undergo COVID-19 testing.

While we will be publishing a Focus Alert on this arbitral award, we quickly note that Arbitrator Murray found in that case that employees who have not confirmed that they are fully vaccinated are required to self-administer a rapid antigen test, and the cost of such testing is to be borne by the employer. The Arbitrator further concluded that employees are required to self-administer on their own time, prior to reporting to work, and are not entitled to compensation for the time spent in the administration of the test or in the reporting of the results. Additionally, the Ontario Power Generation had also implemented an "Instruction" to employees wherein an employee who refused to participate in the testing program would be placed on an unpaid leave of absence and if the employee did not change their mind and agree to participate in the testing program after six weeks, that employee's employment would be terminated for cause. In denying the union's grievance on this issue, Arbitrator Murray found that employees placed on an unpaid leave of absence were refusing to take the necessary and reasonable step of taking a minimally intrusive test that would demonstrate that they are fit to work and do not present an unnecessary risk to their co-workers during a global pandemic. The Arbitrator further added that when lives of co-workers are at risk, unvaccinated individuals who refuse to participate in reasonable testing are, in effect, refusing of their own volition to present as fit for work and reduce the potential risk they present to their co-workers.

For further information or for assistance drafting COVID-19 vaccination policies, please contact Lynn H. Harnden at 613-940-2731, J.D. Sharp at 613-940-2739, Colleen Dunlop at 613-940-2734, Steven P. Williams at 613-940-2737, Jennifer Birrell at 613-940-2740, Jock Climie at 613-940-2742 or Kecia Podetz at 613-940-2752.