

In the matter of an arbitration under the *Labour Relations Act, 1995*

BETWEEN :

Ontario Public Service Employees Union, Local 461

(the Union)

- and -

Hawkesbury and District General Hospital

(the Hospital)

Grievance of Valérie Bougie, No. 2022-01

ARBITRAL AWARD

Before: Michelle Flaherty

Date : June 10 2024

Hearing held by videoconference on February 27 and April 17,
2024 Written submissions received on May 31, 2024

APPEARANCES

For the Union

Daniel Bastien, Grievance
Valérie Bougie, Grievor

For the Hospital

André Champagne, Lawyer
Marie-Michèle Pellerin-Auprix, Lawyer

OVERVIEW

1. On March 25, 2022, the Hospital dismissed the Grievor, on the grounds that she had failed to comply with the Hospital's mandatory vaccination policy (the "Policy"). The Union filed a grievance contesting the dismissal. The Union did not question the reasonableness of the Policy, but alleged that the Grievor's dismissal was an unreasonable and disproportionate application of it.
2. The arbitration took place on February 27 and April 17, 2024. The parties prepared an Agreed Statement of Facts and agreed to an arbitration procedure: Benoît Daigneault, Director, Labour Relations and Health and Safety, filed an affidavit and was cross-examined on it; the Grievor, Valérie Bougie, testified orally and was cross-examined. The parties then submitted written submissions.
3. For the following reasons, the grievance is dismissed. The Grievor's non-disciplinary dismissal was justified in the circumstances.

THE FACTS

4. For the most part, the facts are not in dispute. The Hospital is a full-service bilingual regional public hospital serving the Prescott-Russell region, including the towns of Hawkesbury, Casselman and Clarence-Rockland. The Union is the bargaining agent certified to represent the technical staff employed by the Hospital.

Mandatory Vaccination Policy

5. In August 2021, Ontario's Chief Medical Officer of Health issued Directive No. 6, requiring all public hospitals to develop a COVID-19 vaccination policy ("the Directive"). The Directive did not require mandatory vaccination, but stipulated that any employee who was not fully vaccinated must undergo regular testing.

6. In August 2021, the Hospital began developing its own policy on COVID-19 vaccination and informed the Union of its intention to make vaccination mandatory. The Hospital's Policy came into effect on September 7, 2021. It includes the following elements:

- With the exception of those with a medical or human rights exemption, all employees were to receive their first dose of the vaccine by September 7, 2021, and their second dose by October 15, 2021.
- As of September 7, 2021, anyone who had not been vaccinated or who had not declared their vaccination status to Occupational Health and Safety was required to undergo regular testing for COVID-19 and to complete training on the COVID-19 vaccine.
- As of October 15, 2021, all staff had to be fully vaccinated unless they had a medical or human rights exemption.
- Section 3.2 of the Policy states, "Violation of this policy may lead to disciplinary action up to and including termination for cause."

7. On March 14, 2022, the Provincial Directive was revoked by Ontario's Chief Medical Officer of Health. However, the Hospital's Policy remains in force, and vaccination is still mandatory for its employees.

The Grievor

8. The Grievor worked at the Hospital as a Technologist in the Medical Imaging Department from March 11, 2014 until her dismissal on March 25, 2022. The Grievor was also a clinical instructor for radiology students. The nature of her work involved face-to-face interactions with patients as well as with other Hospital employees. There were no disciplinary measures in her file.

. The Grievor is not willing to be vaccinated against COVID-19. In short, during the six months following the implementation of the Policy, the Grievor raised numerous concerns regarding vaccination. She contacted hospital management on several occasions to advocate against mandatory vaccination and to express her opinion. In her view, compulsory vaccination is both illegal and unconstitutional.

1 . The Grievor was pregnant while the Policy was in force. She felt that no clear research had been done regarding the side effects of the COVID-19 vaccine, particularly for pregnant and nursing women. The Grievor testified that she still believes that COVID-19 vaccines present risks and remains unvaccinated to this day.

11. The Hospital issued several reminders to the Grievor that failure to comply with the Policy could lead to termination of employment. These included:

- The Hospital held an individual meeting with the Grievor on or about September 27, 2021.
- On or about October 14, 2021, the Hospital granted a one-month extension to the Grievor and all other employees who were not fully vaccinated, until November 15, 2021.
- On or about October 19, 2021, the Hospital sent a final reminder to the Grievor indicating the importance of being fully vaccinated by November 15, 2021. The Hospital also notified the Union that the Grievor had received this final reminder.

12. On or about November 15, 2021, the Employer met with Grievor to place her on unpaid administrative leave until November 29, 2021 or until she complied with the Policy. The Hospital extended the Grievor's unpaid administrative leave several times, on November 29, 2021, January 13, 2022 and February 10, 2022. In total, the unpaid leave lasted more than four months.

13. The Hospital terminated Grievor's employment on March 25, 2022. The termination letter explains the Hospital's position:

À ce jour, et en dépit de ces occasions et de nos instructions claires et répétées, vous continuez à refuser de suivre la politique. Nous n'avons aucune raison de croire que vous reconsidérerez votre décision si on vous accorde une nouvelle période de congé administratif sans solde. COVID-19 et ses variantes continuent de poser un risque important pour la santé et la sécurité du personnel et des patients de l'hôpital. L'hôpital continue d'avoir l'obligation de prendre toutes les précautions raisonnables pour protéger le personnel et les patients de cette menace permanente pour leur santé et leur sécurité, y compris en maintenant la politique en vigueur et en continuant d'exiger que tout le personnel soit et reste entièrement vacciné au sens de la politique. Votre refus persistant de respecter cette condition d'emploi et d'aider l'hôpital à remplir son devoir de protéger la santé et la sécurité du personnel et des patients a miné la relation d'emploi et ne nous a laissé d'autre choix que de procéder à votre congédiement.

14. The Grievor gave birth on April 19, 2022. Since she was no longer an employee of the Hospital, she was not entitled to supplement her employment insurance payments under the Collective Agreement. In fact, the unpaid leave and her subsequent dismissal had significant financial consequences for the Grievor.

The Hospital's Decision

15. Mr. Daigneault testified that for employees who did not comply with the Policy, dismissal was not automatic. The Hospital first placed these employees on unpaid administrative leave, and dismissals were then carried out by the Hospital on a case-by-case basis.

16. In this respect, the factors considered by the Hospital related primarily to the grounds protected by the *Human Rights Code*, R.S.O. 1990, c. H.19 ("Code") and the employee's willingness (or not) to comply with the Policy. According to Mr. Daigneault, if an employee expressed a desire to be vaccinated, but had some impediment or reason protected by the *Code*, that employee was not subject to dismissal for cause. Mr. Daigneault asserted that the Hospital evaluated the employee's entire file. However, it is not clear to what extent the Hospital took into account the Grievor's years of service or her clean

disciplinary record.

17. During the Hospital's last interview with the Grievor prior to her dismissal, she expressed her firm intention not to be vaccinated. It is clear that the Grievor has strong personal convictions regarding the COVID-19 vaccine. It should be noted, however, that the Grievor did not request an exemption, either medical or under the *Code*. The Union does not contend - and nothing in the evidence allows me to conclude - that the application of the Policy to an employee in the Grievor's circumstances was unreasonable or in violation of the *Code*.

18. The Hospital considered whether to further extend the Grievor's unpaid leave. As indicated in the letter of dismissal, COVID-19 continued to pose risks and the Hospital considered that mandatory vaccination was still necessary. In the letter of dismissal, the Hospital stated that there was no reason to believe that the Grievor would comply with the Policy.

19. Mr. Daigneault also testified to the operational difficulties the Hospital experienced in the context of the pandemic. Hospital staff absenteeism rates were high due to COVID-19. In addition, the Hospital had difficulty filling temporary assignments, especially when these were of no predefined duration. The Hospital also faced the additional challenge of filling these positions with bilingual staff.

ISSUE TO BE DECIDED

20. In this case, the reasonableness of the Mandatory Vaccination Policy is not in dispute. The only issue is whether, in the circumstances of this case, it was reasonable for the Hospital to terminate Grievor's employment for non-compliance with the Policy.

THE PARTIES' POSITIONS

21. The Hospital contends that it was appropriate to exercise its management right and terminate the Grievor's employment for cause, following six months of reminders of her non-compliance, including a period of over four months of unpaid administrative leave. Initially, the Hospital asserted that it had the right to respond to non-compliance with the Policy by imposing disciplinary measures. Alternatively, the Hospital submits that it had just cause to impose the non-disciplinary dismissal since there was no reasonable cause to believe that the Grievor would comply with the Policy in the near future.

22. The Union contends that disciplinary action cannot be imposed on the grounds that the Grievor has not consented to medical treatment and/or disclosure of her vaccination status. The Union also submits that dismissal is an inordinate measure in the circumstances, in light of Grievor's eight years of service and her clean disciplinary record.

ANALYSIS

The jurisprudence

23. The question of whether an employee can be dismissed for non-compliance with a mandatory vaccination policy has been examined in several arbitration decisions.

24. Several arbitrators have concluded that non-compliance with a mandatory vaccination policy may give rise to disciplinary measures, up to and including dismissal: *Revera Inc. (Brierwood Gardens et al.) v. Christian Labour Association of Canada*, 2022 CanLII 28657 (ON LA) (White) at paras. 153 - 157; *Maple Leaf Foods Inc., Brantford Facility v. United Food and Commercial Workers Canada, Local 175*, 2022 CanLII 28285 (ON LA) (Chauvin) at paras. 56 - 57; *Unifor Local 973 v. Coca-Cola Canada Bottling Limited*, 2022 CanLII 25769 (ON LA) (Wright) at para. 45; *Lakeridge Health v. CUPE, Local 6364*, 2023 CanLII 33942 (ON LA) (Herman) at paras.

174 – 184; and *Lakeridge Health v. OPSEU, Local 348*, 2023 CanLII 61431 (ON LA) (Herman); and *Peterborough Regional Health Center v. OPSEU*, unreported decision of December 18 2023 (Allen).

25. In *Lakeridge Health v. CUPE, Local 6364*, 2023 CanLII 33942 (ON LA), arbitrator Herman concluded that the dismissal was justified after a four-week administrative leave. According to him (at paragraph 189):

It is difficult to see how long service or a clean disciplinary record, for example, would act to prevent or nullify a leave or termination that is a reasonable part of a mandatory vaccination policy. Or why factors such as an employee relying on misinformation, or having a real fear of vaccination, or having concerns about the safety of vaccinations, would be sufficient to nullify what is otherwise a justified leave or termination. Individual circumstances (other than exemptions based on religious or medical grounds) do not address the validity of requiring mandatory vaccination as a condition of employment, or the justification for placing an employee on leave or terminating an unvaccinated employee, nor in the circumstances do they provide mitigating factors against the terminations.

26. However, other arbitrators have adopted different approaches, which we can classify into three categories.

27. In *Quinte Health v. Ontario Nurses Association*, 2024 CanLII 14991 (ON LA), arbitrator Hayes concluded that non-compliance with a mandatory vaccination policy is not *a priori* a valid reason for disciplinary dismissal. Rather, the issue must be assessed in light of the circumstances, including the employee's years of service and disciplinary history.

28. In *Humber River Hospital v. Teamsters Local Union No. 419*, 2024 CanLII 19827 (ON LA), arbitrator Parmar concluded that refusal to consent to medical treatment is not an act of insubordination and therefore not subject to discipline. According to Arbitrator Parmar, an employee has the right to refuse medical treatment. Although this may have non-disciplinary consequences, the employee may not be disciplined regarding the deeply personal choice not to be vaccinated. However, as Arbitrator Parmar explains:

This does not mean that the Hospital's requirement that employees be vaccinated in order to work is not enforceable. Just because the Hospital cannot invoke its disciplinary powers to suspend or terminate an employee does not mean that they must allow an employee who has failed to provide the necessary proof of vaccination to be present in the workplace. That too is something arbitrators have repeatedly stated – employees must accept the consequences of their choices. An employer retains the power to address the situation resulting from the employee's choice if it renders the employee unable to safely work in the workplace. The employer can take other forms of action that are not disciplinary in nature, and these other actions may, if justified in the specific circumstances, include non-disciplinary termination.

29. The Ontario Court of Appeal applied the doctrine of frustration of contract to justify the non-disciplinary dismissal of a non-unionized employee who had refused to comply with a mandatory vaccination policy: *Croke v. VuPoint System Ltd*, 2024 ONCA 354 (CanLII). This doctrine was also applied in a British Columbia case, where an arbitrator found that a unionized health care worker had effectively rendered his employment unenforceable by refusing to be vaccinated: *Fraser Health Authority (2022)*, 349 L.A.C. (4th) 209 (Doyle).

30. Strictly speaking, it is not necessary for me to determine whether disciplinary action was appropriate in the Grievor's circumstances. At a minimum, I accept the Hospital's alternative argument and find that a non-disciplinary dismissal was justified in the circumstances.

31. With the exception of *Fraser Health Authority*, the notion of frustration of contract does not typically apply to unionized employees. Indeed, in the context of labour relations, there is no individual employment contract that could be rendered unenforceable. That said, dismissal may be justified in certain non-disciplinary circumstances, where a unionized employee is unable to perform the duties of his or her position in the reasonably foreseeable future. This may occur, for example, when an employee loses a security clearance, permit or license that is necessary to perform the duties of his or her position.

32. In the same vein, there is considerable case law concerning non-disciplinary dismissals in

cases of non-culpable absenteeism, where an employee is unable to perform the duties of his or her position in the reasonably foreseeable future: see, for example, *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, [2008] 2 SCR 56 at para. 18. In such circumstances, an employee's years of service and disciplinary record are not determinative factors. Rather, the question is whether she will be able to perform the duties of her position in the reasonably foreseeable future.

33. In this case, it is not disputed that the Hospital could reasonably require its employees to be vaccinated against COVID-19. There was no duty to accommodate the Grievor under the *Code*. For reasons unrelated to the *Code*, she decided not to be vaccinated, thereby making herself unavailable to work at the Hospital.

34. I consider that at the time of the Grievor's dismissal, it was reasonable for the Hospital to conclude that she would be unable, in the reasonably foreseeable future, to fulfill the fundamental obligations associated with the employment relationship. The Grievor was clear and consistent in her firm intention not to be vaccinated.

35. The circumstances of the pandemic were fluid and it was very difficult for any employer to discern the "reasonably foreseeable future." However, in terminating the Grievor's employment more than six months after the introduction of the Policy, the Hospital took a measured approach. It first placed the Grievor on unpaid leave for more than four months and repeatedly informed her that her employment was in jeopardy. While not determinative, it is telling that the Hospital's Policy remains in place and that the Grievor is still not vaccinated or able to work at the Hospital to this day.

36. Although she had been informed that non-compliance with the Policy could result in the termination of her employment, the Grievor firmly indicated that she was not prepared to be vaccinated. The fact that the Grievor has approximately eight years of service and a clean disciplinary record does not alter the fact that in the reasonably foreseeable future, she would still be unable to fulfill the basic obligations of her position.

37. It is well established that an employer is bound to respect the reasons expressed at the time of dismissal and cannot invoke other reasons at the time of arbitration. In my opinion, this principle has been respected in the context of this case.

38. Although the Policy and certain letters sent to the Grievor mention disciplinary measures, the letter of dismissal makes no such reference. Rather, the letter indicates that non-compliance with the Policy had undermined the employment relationship. In my view, the letter of dismissal captures the arguments put forward by the Hospital at arbitration, including the contention that a non-disciplinary dismissal was justified in the circumstances.

CONCLUSION

39. For these reasons, the grievance is dismissed. The Grievor chose not to comply with the employer's vaccination policy. This is a deeply personal decision, but it is not without consequences. The Hospital was entitled to deal with the situation, at the very least with administrative rather than disciplinary measures.

40. In March 25, 2022, more than six months after the Policy came into effect and after having placed the Grievor on unpaid leave for a period of more than four months from November 15, the Hospital was entitled to terminate her employment for valid non-disciplinary reasons. It was reasonable for the Hospital to conclude that the Grievor would be unable to fulfill the basic obligations of her position for the reasonably foreseeable future.

Signed at Ottawa, Ontario, on June 10 2024

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke.

Arbitrator Michelle Flaherty