IN THE MATTER OF AN ARBITRATION
UNDER THE *CANADA LABOUR CODE*, R.S.C., 1985, C. L-2

BETWEEN:

AIR CANADA

(the "Employer" or "Company")

AND:

INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, LODGE

(the "Union")

(Re COVID-19 Vaccination Policy Grievance – #202108110637)

ARBITRATOR:	Vincent L. Ready
COUNSEL:	Jackie VanDerMeulen and Lennie Lejasisaks for the Employer Ian Roland, Andrew Lokan and Shyama Talukdar for the Union
HEARING VIA VIDEO CONFERENCE:	October 12, December 12 and 20, 2022
WRITTEN SUBMISSIONS:	January 20, February 11, 17, 24 and March 8, 2023
DECISION:	May 11, 2023

This matter pertains to a policy grievance filed by the Union in which it challenges the reasonableness of Air Canada's mandatory vaccination policy (the "Grievance"). The Grievance was filed on August 30, 2021. The Union also filed a number of individual grievances on behalf of certain employees it argues ought to have been accommodated and/or exempted from application of the policy.

In a preliminary decision dated September 6, 2022, I found it appropriate to proceed with a hearing on the merits of the policy grievance to determine the reasonableness of the Policy generally prior to proceeding on the individual grievances. I also found that I was without jurisdiction to hear arguments about the validity of the federal government's *Interim Order Respecting Certain Requirements for Civil Aviation Due to Covid-19, No. 43* (the "*Interim Order*").

Thus, this decision deals only with the threshold issue of whether the Employer's creation of the Policy was a reasonable exercise of management rights.

FACTS

The Background

On August 13, 2021, the federal government announced that COVID-19 vaccinations would be mandatory for federal employees and those working in some federally regulated industries, including Air Canada, by the end of October 2021.

On August 25, 2021, Air Canada announced that it would require all its employees to be fully vaccinated by a government approved vaccine by October 31, 2021, without exception, except under the Employer's Duty to Accommodate obligations. Air Canada mandated vaccines for its employees

prior to the federal government releasing any legislation mandating vaccines for Air Canada employees in anticipation that a policy would be required under such legislation.

On October 29, 2021, the government issued the *Interim Order* pursuant to its regulatory powers under the *Aeronautics Act*. The *Interim Order* provided that effective October 30, 2021, air passengers, those entering restricted areas in airports from non-restricted areas, air carriers and screening authorities (including the Employer and the members of the Union) had to be fully vaccinated, subject to the following exemptions:

1. Those who were not vaccinated due to a medical contraindication or a sincerely held religious belief.

2. Those who had received their first dose before November 15, 2021.

Those exempted for the above reasons were subject to being tested for COVID-19 at least twice a week in order to enter airport property.

On January 28, 2022, the federal government amended the *Interim Order* to remove the exemption for individuals who had received their first dose before November 15, 2021, meaning the only exemptions were now for medical contraindications and genuine religious beliefs.

All versions of the *Interim Order* required air carriers such as Air Canada to establish a policy requiring employees who accessed airports to be fully vaccinated unless they had a valid medical or religious exemption. Those with valid medical and religious exemptions were entitled to access airport facilities but were required to be tested twice weekly. The *Interim Order* made no reference to what would happen to employees without valid exemptions who refused to become vaccinated and were not allowed to attend work.

The *Interim Order* set out the following requirements, among others, for mandatory vaccination policies:

a. As of November 15, 2021, no employee was permitted to access aerodrome property unless they were fully vaccinated (except those with valid medical or religious exemptions).

b. A procedure for granting an exemption from the requirement to be fully vaccinated if the person had not completed a vaccine series due to a medical contraindication or their sincerely held religious belief. (If the exemption was granted, the employee would be permitted to enter aerodrome property with regular rapid testing.)

c. A procedure for issuing a document to an employee granted an exemption confirming the granting of the exemption.

d. A procedure to ensure that an employee granted a medical or religious exemption was tested for COVID-19 at least twice a week, allowing them to enter airport property.

While there were various iterations of the *Interim Order*, the above requirements did not change over time. That is, during the term of the *Interim Order*, there was no ability for unvaccinated employees without exemptions to access aerodrome property for work, while unvaccinated employees with valid exemptions were entitled to work on aerodrome property with regular testing.

The federal government ultimately suspended the requirement for mandatory vaccination policies in the federally regulated air, rail and marine transportation sectors on June 14, 2022.

Air Canada's Policy

Samuel Elfassy, the Employer's VP of Safety, testified about the Employer's development and implementation of the Policy. According to Mr.

Elfassy, the COVID-19 pandemic had a devastating impact on Air Canada's workforce and operations, including an initial flight capacity reduction of 85 to 90 per cent, resulting in the layoff of 50 to 60 per cent of the Employer's employees, and a revenue decline of 80 per cent. The Employer's operation began to recover around the same time that vaccines became widely available in the fall of 2021.

Mr. Elfassy's evidence was that the Employer operates under a "Safety First, Always" principle, which was a core motivating factor behind its decision to implement the Policy. He asserted that this approach led the Employer to apply the precautionary principle in order to protect its employees, customers, and the general public from unnecessary illness and death.

Mr. Elfassy testified that the Employer began planning the Policy as soon as it became aware that the federal government intended to implement the *Interim Order*, although it had been contemplating a mandatory vaccine policy even before that time. According to Mr. Elfassy, the Employer decided that mandatory vaccination was appropriate based on a number of factors, including its prioritization of safety, its leadership in embracing health measures in response to COVID-19, the scientific evidence that vaccines were the most effective way to protect against COVID-19, the widespread availability of vaccines, and individuals' rights to raise human-rights-related exemptions.

Mr. Elfassy further testified that Air Canada decided to apply the Policy to all employees, rather than only those covered by the *Interim Order*, due to the logistical difficulties in applying the Policy to some employees and not others, the fact that most employees interacted with others in the workplace and that even remote employees may be required to report to work in person, and finally, Air Canada's strong prioritization of health and safety.

The evidence is that Air Canada's Policy was announced on August 25, 2021, and was to take effect September 10, 2021. The key features of the Policy were that:

a. It applied to all Air Canada employees.

b. Employees were required to be fully vaccinated before October 31, 2021.

c. To be fully vaccinated, employees needed to receive the full series of a Canadian government approved vaccine (AstraZeneca, Moderna, Pfizer, Janssen), at least two weeks prior to the implementation of the policy.

d. All employees were required to report and document their vaccination status in Air Canada's Vaccine Status Reporting Tool.

e. There was a process for individuals to request and be granted accommodation from the mandatory vaccination requirement based on medical or religious grounds.

f. Employees who did not comply with the Vaccination Policy or did not receive an exemption were placed on an unpaid leave of absence.

The Policy stated that unless they qualify for an exemption, employees who were not fully vaccinated or failed to properly upload their proof of vaccination on the Company's Vaccination Status Reporting Tool would be:

a. Considered non-vaccinated.

b. Prohibited from entering any Air Canada workplace.

c. Considered unavailable to fulfill their duties, including employees who usually worked from home or who were working from home at the time the Policy came into force.

d. Placed on an unpaid leave without benefits for six months after which the employment relationship would be reassessed.

e. Ineligible for business or personal travel privileges.

Initially Air Canada indicated that employees would remain on unpaid leave until April 30, 2022, at which point Air Canada would assess whether it would be terminating the employment of unvaccinated employees. Ultimately Air Canada did not terminate anyone's employment under the Policy and extended the unpaid leaves until the Policy was rescinded in June 2022.

Approximately 15 employees were granted medical or religious exemptions. The Employer did not allow employees who were granted medical or religious exemptions to attend the workplace even if they agreed to regular testing. Rather, employees who received exemptions were placed on a paid leave of absence on November 1, 2021, and invited to apply for positions approved for remote work. Most of the employees who received an exemption were not successful in applying for these roles and were placed on unpaid leaves of absence.

Discussions About the Policy

Beginning on August 31, 2021, and before the Policy was finalized, Air Canada and the Union discussed the Policy in several Occupational Health and Safety Policy Committee meetings. The Employer explained the rationale for the Policy, which it believed was required for Air Canada's compliance with the *Interim Order* and to maintain a safe workplace. The Employer explained how the Policy would be implemented. The Union had a chance to ask questions and express concerns about the impact of the Policy on its members.

Air Canada also met with the Union's appointees to the Health and Safety Policy Committee on three further occasions after the Policy was finalized, but before the deadline for employees to be fully vaccinated. These

meetings took place on September 20, October 1, and October 22, 2021 and allowed the Union to discuss its concerns and give further feedback on the Policy.

Work Performed by Bargaining Unit Members

Francis Mathieu-Paradis, the Employer's Senior Manager of Occupational Safety and Health, and Michael Collett, the Employer's Managing Director of Maintenance Planning, Supply Chain, Logistics and Transportation, testified in detail about the duties performed by employees in the Union's Technical Services, Airport & Cargo Operations and Logistics & Supply Business Units ("TMOS") bargaining unit, as well as the working environment of these employees. According to Mr. Mathieu-Paradis and Mr. Collett, most of these employees have some level of daily interaction with colleagues, customers or other individuals working at the airport. These interactions occur in the following places:

a. ramps;

b. aircraft hangars;

c. onboard aircraft with colleagues or passengers present;

d. in the hold of the aircraft;

e. punch clock rooms;

f. cargo centres;

g. baggage rooms working with several other colleagues;

h. multi-person vehicles (including vans, tractors and golf carts);

i. equipment rooms;

j. computer rooms;

k. shower facilities; and

l. common lunchrooms.

Steve Prinz, the Union's General Chairperson, Western Region, also gave evidence on the working conditions of the Employer's employees in the TMOS bargaining unit. According to Mr. Prinz, most employees in the bargaining unit work outside, in cavernous hangars or in other settings where social distancing is possible. He acknowledged that these employees do typically have some closer contact in settings such as entrances and the lunchroom.

Mr. Prinz acknowledged that there are positions in the bargaining unit, such as Cabin Service, Cleaning Attendants and Line Maintenance, where close and frequent interaction with co-workers and passengers in enclosed areas may be required. Mr. Mathieu-Paradis and Mr. Prinz both testified that bargaining unit members who work outdoors may work in close proximity to others and some of their duties may still take place in enclosed areas. Mr. Prinz testified that a small fraction of employees in the bargaining unit worked remotely for part of the pandemic but acknowledged that most of the of bargaining unit work cannot be performed remotely.

Mr. Prinz acknowledged in cross-examination that this small number of bargaining unit employees who were temporarily working remotely were still required to attend on-site for meetings, training or other operational requirements. According to Mr. Collett's evidence, when the Employer implemented the Policy, it also initiated a return to work in-person for remote employees. Mr. Collett testified that the Employer viewed remote work as temporary and always intended for remote employees to return to work in-person. For example, employees in the Winnipeg Finance Branch, which is covered by a separate collective agreement from the TMOS bargaining unit,

worked remotely for part of the pandemic but returned to the office on a rotational basis following the introduction of the Policy.

Tony Didoshak, the Union's former General Chairperson in Winnipeg, testified in further detail about the working conditions of employees at the Winnipeg Finance Branch, specifically that they were able to work remotely from September 2020 to August 2021. He confirmed that these employees returned to the office on a rotational basis in August 2021 but asserted that when in the office, these employees were separated by cubicles and able to be physically distanced.

Challenges to the Air Canada Policy

On August 31, 2021, the Union filed the Grievance under the Collective Agreement covering the TMOS bargaining unit, which is between the Employer and the Union's District Lodge 140. As mentioned, the Union also represents Air Canada employees under the Winnipeg Finance Branch, which is covered by the Policy but operates under a separate collective agreement.

On September 16, 2021, a bargaining unit member and former member of the local health and safety committee in Vancouver, filed a complaint with the Labour Program of Employment and Social Development Canada ("ESDC") alleging that Air Canada failed to meet its consultation obligations under Part II of the *Canada Labour Code*, RSC 1985, c L-2 (the "*Code*") in respect of the Vaccination Policy. The ESDC issued its decision on October 26, 2021, finding, in part:

> Having investigated your complaint, in my opinion, the employer has complied with the requirements of the Act. As discussed, due to the government mandate, the requirement for consultation was limited. Although they did not consult during the development of

the Policy, the employer did meet with Policy Committees after completion, therefore the requirement has been satisfied.

Covid-19 in the Workplace

Between March 1, 2020 and June 30, 2022, Air Canada identified 6,603 positive cases of COVID-19 amongst employees. A large number of those positive cases occurred amongst the Union's members.

Many of the positive COVID-19 cases in Air Canada's workplaces occurred during the term of the Policy, when only vaccinated employees were at work, which was also a period when more employees were working than compared to the early days of the pandemic. Between September 2021 and June 2022, there were approximately 5,700 positive COVID-19 cases identified amongst employees.

Mr. Elfassy testified that the substantial number of COVID-19 cases in the workforce had a significant impact on scheduling and operations, in part because employees, including those in the Union's TMOS bargaining unit, have specialized training, skills and security clearance, and cannot be easily replaced when absent due to illness.

Efficacy of COVID-19 Vaccines and Rapid Antigen Testing

Dr. Mark Loeb testified on behalf of the Employer as an expert witness at the hearing. Dr. Loeb holds the Michael DeGroote Chair in Infectious Diseases at McMaster University and also has a clinical practice with a speciality in infectious diseases. The Union did not call an expert witness.

Dr. Loeb's evidence was that COVID-19 spreads via respiratory droplets and aerosol particles. Transmission mainly occurs over short distances. In

some circumstances where there is poor ventilation, crowding or indoor gatherings, transmission through aerosols might occur. He testified that the health outcomes of COVID-19 infection are highly variable, from no symptoms to critical illness and death. While most people experience mild to moderate symptoms, some have severe symptoms requiring hospitalization. With respect to the changing variants, Dr. Loeb noted:

a. Data suggests that the Delta variant – which became the predominant strain in Canada in May 2021 – caused more severe disease. The highest risk of hospitalization and death due to the Delta variant was in unvaccinated people.

b. The Omicron variant – which was first detected in Canada in November 2021 – has high transmissibility relative to other variants. This applies to both workplace and community settings. However, the Omicron variant is less likely to lead to severe disease than prior variants.

Dr. Loeb provided the following evidence with respect to rapid antigen tests:

a. There are no studies that have demonstrated that rapid antigen tests reduce transmission of COVID-19 in the workplace or other settings. Further, there is no evidence that twice weekly rapid testing would reduce transmission in the workplace.

b. There is no evidence that rapid antigen testing would have any effect on the severity of COVID-19 symptoms because there is no evidence that rapid antigen tests reduce transmission in the first place.

c. Test accuracy studies cannot assess whether rapid antigen tests can differentiate between those who are infectious and those who are not, because there is no reference standard for infectiousness.

d. A weakness of rapid antigen tests is that they have lower sensitivity compared to reverse transcription-polymerase chain reaction (“PT-PCR”) tests, particularly among people

that have no symptoms and in people with lower viral loads. The failure to detect the virus at lower viral loads means that they might not detect COVID-19 in people at the early stages of infection.

e. The diagnostic accuracy of rapid antigen tests can also be highly variable when used for asymptomatic people – which is the most relevant population given that symptomatic employees should not be at work. Indeed, a study concluded that between 1 in 2 and 1 in 3 positive COVID-19 cases would be missed with rapid antigen tests.

f. The results of rapid antigen tests can be compromised if the swabbing is not performed correctly. Individuals who perform the test themselves are less likely to do so as accurately as a trained laboratory or healthcare worker. Further, testing fatigue can potentially develop for employees who are regularly required to test themselves.

g. Compliance with self-testing can be easily subverted by workers unwilling to be identified as COVID-19 positive (*i.e.* reporting a negative test when it was positive or failing to test).

Dr. Loeb provided the following evidence with respect to the effectiveness of COVID-19 vaccines:

a. Rigorous trials have shown that vaccines prevent infection. Large randomized controlled studies of the Pfizer and Moderna vaccines showed vaccine efficacy of greater than 90 percent to protect against symptomatic COVID-19 infection. A vaccine efficacy of 90 percent means that if 100 people became ill with COVID-19, only 10 percent on average would become ill if they were vaccinated. The AstraZeneca and Janssen vaccines have been shown to have an overall vaccine efficacy of 74 percent and 67 percent, respectively.

b. Data from the US Centres for Disease Control and Prevention between April 4, 2021 and December 20, 2021 show that COVID-19 associated deaths were:

    i. 22 fold higher in unvaccinated compared to vaccinated persons from April to May 2021

ii. 16.4 fold higher in unvaccinated compared to vaccinated persons in June 2021; and
iii. 16.3 fold higher in unvaccinated compared to vaccinated persons from July to November 2021.72

c. Ontario data between August 2021 and February 2022 similarly shows that, relative to those with at least two doses of a COVID-19 vaccine, unvaccinated persons had:

i. a 2.3 fold increase in risk of COVID-19 infection;
ii. a 6.4 fold increase in hospitalization; and
iii. a 12.7 fold increase in ICU admission.

d. Even with waning immunity over time, the vaccines used in Canada are highly effective at reducing hospitalization and severe illness from COVID-19.

e. Fully vaccinated people are less likely than vaccinated people to get COVID-19, therefore reducing the risk of transmission to others.

f. Vaccinated persons are less likely to transmit COVID-19 to household members than unvaccinated persons.

Dr. Loeb concluded that twice weekly rapid antigen testing is not an effective alternative or substitute to mandatory vaccination in preventing or reducing the transmission of COVID-19 in a workplace such as Air Canada.

Frequent testing as part of a "test to stay" strategy was supported by several studies cited by Dr. Loeb. For example, the Ontario Science Table study cited in his report concluded that daily testing would pick up 90% of infections. Another study cited in Dr. Loeb's book of documents concluded that daily testing would be "non-inferior" to (i.e., as good as) self-isolation in reducing transmission.

Dr. Loeb acknowledged in cross-examination that if employees were tested frequently and repeatedly, and any positive test led to removal from the workplace, the chances of picking up infections would increase and probability

of transmission would decrease. He also acknowledged that there was indirect evidence that frequent testing reduces transmission.

In Dr. Loeb's examination in chief, he was asked about the effect of masks and he referred to a study in Bangladesh that compared transmission rates between a group that wore surgical masks and a group that did not, and found about a 10% reduction in transmission associated with wearing the masks. Dr. Loeb testified that there was relatively lower risk of transmission if employees worked at a distance from each other.

Air Canada Suspends its Policy

On June 20, 2022, Air Canada announced that it would be suspending its mandatory vaccine Policy in response to the government's decision to suspend the requirement for mandatory vaccination policies in federally regulated industries.

The Employer subsequently began recalling unvaccinated employees back to work in late June 2022.

POSITIONS OF THE PARTIES

Union

The Union argues that the Policy is unreasonable under the test set out in *Lumber & Sawmill Workers' Union, Local 2537, and KVP Co Ltd.*, (1965)16 LAC 73 (Ont Arb) (Robinson) and should be declared invalid. According to the Union, the Policy imposes mandatory medical treatment without consent and thus violates employees' rights under Section 7 of the *Canadian Charter of Rights and Freedoms*, with no need to engage in a balancing exercise. In the alternative, the Union submits that the reasonableness of the Policy should be

determined by balancing the Employer's health and safety interests against the employees' significant interests in bodily autonomy and privacy. The Union emphasizes the importance of conducting this analysis paying specific attention to the workplace context, suggesting that unless the Employer can show that the Policy is the least intrusive means of achieving its health and safety goals, it should be found unreasonable.

For the purposes of its argument, the Union assumes, without conceding, that the *Interim Order* is valid, and therefore focuses its reasonableness arguments on four aspects of the Policy that it alleges go beyond the requirements of the *Interim Order*. First, the Union argues that the Policy's requirement for unvaccinated employees to be placed on unpaid leave goes beyond the requirements of the *Interim Order* and is unreasonable. The Union argues there is no provision in the Collective Agreement that allows the Employer to place employees on unpaid leave. While the Union acknowledges that the *Interim Order* prevented these employees from working, it indicates the order did not preclude the Employer continuing to pay these employees during that time. In the Union's submission, the employees whom the Employer placed on unpaid leave are entitled to their lost wages.

The Union's second basis for challenging the Employer's Policy as unreasonable is that the Employer refused to allow unvaccinated employees with valid medical and religious exemptions to attend the workplace with regular COVID-19 testing despite this alternative being permissible under the *Interim Order*. The Union asserts that rather than allowing exempted employees to work with testing, the Employer breached its obligations under the Collective Agreement by attempting to accommodate exempted workers in a small number of remote positions and ultimately placing most of them on unpaid leave. The Union points out that during the same time period, unvaccinated passengers with exemptions were allowed to fly with a negative COVID test and

interact with Air Canada employees. The Union submits there is no evidence that the presence of the 10-15 employees who were granted exemptions in the workplace would materially increase health and safety risks, and that the evidence of the Employer's expert witness supported testing as a valid alternative for exempt employees. The Union rejects the Employer's contention that it needed to exclude exempt unvaccinated employees from the workplace to protect them from their own higher risk of severe disease and death, pointing out that the Employer must show that allowing exempt unvaccinated employees to attend work with testing would constitute undue hardship in order to justify this part of the Policy. The Union further contends that where the Employer's justification involves risks to the employees themselves, the employees' and society's willingness to accept those types of risks is relevant to the undue hardship analysis. According to the Union, the case law relied upon by the Employer wherein arbitrators have found vaccination policies reasonable even without a testing alternative are not of assistance in this case where the Policy does not provide a testing alternative for employees who have human rights-related exemptions.

The Union's third basis for its position that the impugned Policy is unreasonable is that it goes beyond the *Interim Order's* requirements for employees who did not need to attend airport property. The Union points to employees at the Winnipeg Finance Branch, who do not attend airports and are able to work remotely, as an example of employees who are not required to be vaccinated under the *Interim Order* and do not pose a health and safety risk if unvaccinated. The Union refutes the Employer's contention that the Grievance did not include these employees and asserts its policy grievance covers all its members who were subject to the Policy including those at the Winnipeg Finance Branch.

Fourth and finally, the Union argues that the Policy's requirement for proof regarding religious exemptions to vaccination goes beyond what the

Interim Order mandates and thus renders the Policy unreasonable. The Union objects to the fact that the Employer required employees applying for a religious exemption to submit a letter from their religious leader explaining the employee's religious reasons for being unable to become vaccinated, arguing such action is contrary to the Supreme Court of Canada's jurisprudence holding that the emphasis is on the sincerity of a religious belief rather than whether the belief is objectively recognized by religious leaders or experts.

In addition to its arguments about the Policy's reasonableness, the Union argues the Employer did not fulfill its obligation to consult with the Union under both the Collective Agreement and the *Code*. The Union acknowledges that the *Code* requires the Employer to protect the health and safety of employees, including protecting them from exposure to COVID-19, but points out that the *Code* requires involvement of worker and employer representatives to ensure obligations under the *Code* are met. The Union alleges that despite these obligations, the Employer did not consult with the Union prior to introducing the Policy, even though Union representatives repeatedly raised concerns in Occupational Health and Safety Committee meetings. The Union rejects the Employer's position that its arguments about consultation are barred by the ESDC decision, asserting its arguments about consultation are not merely based on the Employer's obligations under the *Code*, but also its consultation obligations under the Collective Agreement, which were not considered by the ESDC. Further, the Union points out that it was not involved in the ESDC proceeding as it was initiated by an individual employee who did not hold Union office at the time.

The Union relies on the following authorities: *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co Ltd.*, (1965)16 LAC 73 (Ont Arb) (Robinson); *Northcrest v. Amselem*, [2004] 2 SCR 551; *Re IUOE, Local 793 and Earth Boring Co.*, 2021 CarswellOnt 7188 (Ont. Arb. – Rogers);

Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34; *St Peters Health System v. CUPE Local 778*, 2002 CarswellOnt 4709; *Re Electrical Safety Authority and Power Workers' Union (ESA-P-24)*, [2022] O.L.A.A. No. 22 (Stout); *Halton District School Board v. Elementary Teachers Federation of Ontario*, 2020 CanLII 5702 (ON LA); *Imperial Oil Ltd. v. CEP Local 900*, 2006 CarswellOnt 8621; *USW, Local 5319 and Securitas Transport Aviation Security Ltd.*, 2022 CarswellNS 163; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652; *Toronto District School Board v. CUPE, Local 4400*, 2022 CanLII 22110; *Elementary Teachers Federation of Ontario v. Ottawa-Carleton District School Board*, 2022 CanLII 53799; and *Unifor, Local 1999 v. Reliance Comfort Limited Partnership*, 2023 CanLII 2.

Employer

The Employer argues the Policy is a reasonable exercise of management rights. According to the Employer, the vast majority of the Policy is mandated by the *Interim Order* and shielded from challenge for that reason. With respect to the aspects of the Policy that go farther than the *Interim Order,* the Employer advises they are justifiable having regard to the balancing of interests, the precautionary principle, and Part II of the *Code*.

According to the Employer, almost all of the authorities the Union relies on in this case were decided before COVID-19 and in unrelated contexts and thus should be disregarded. The Employer asserts that there is a "near unanimous" arbitral consensus that mandatory COVID-19 vaccination policies are reasonable and fulfil an employer's duty to act in accordance with occupational health and safety obligations and the precautionary principle. The Employer points to case law specifically holding that occupational health and safety obligations may sometimes require employers to go farther than

regulatory minimums. In the context of COVID-19, the Employer asserts this obligation includes both protecting employees from the risks of transmission and protecting them from the potential of more serious health consequences if they do become infected. The Employer adds that the precautionary principle enables it to take action even in the absence of scientific certainty in the context of a global pandemic.

Turning to the four specific aspects of the Policy the Union alleges exceed the requirements of the *Interim Order*, the Employer argues they are reasonable in the context of its workplace, the pandemic, and the case law. Specifically, the Employer argues it was reasonable to place unvaccinated employees on unpaid leave when they were ineligible to work, noting that arbitrators have repeatedly found that unpaid leaves for unvaccinated employees are reasonable in the context of mandatory vaccination policies even where these leaves are not specifically contemplated in the collective agreement. The Employer argues it would be unreasonable to expect it to continue to pay employees for not working when they made a personal decision to remain unvaccinated, especially considering the economic impacts of the pandemic on Air Canada's business.

Second, the Employer rejects the Union's argument that it was unreasonable to exclude unvaccinated employees with valid exemptions from the workplace, even though they were permitted to work with regular testing under the *Interim Order*. The Employer relies on its purported obligation to protect these workers from the risk of severe illness, hospitalization, or death if they contracted COVID in the workplace. The Employer argues that twice-weekly testing would not be sufficient to meet its obligation to protect these employees from these serious health consequences. The Employer argues it was reasonable in this context for it to place these employees on leave while attempting to accommodate them in remote positions.

The Employer further notes that in hindsight, given the large number of positive COVID cases in its workforce, it was possible that if it had allowed these 10-15 unvaccinated exempted employees to work, that transmission in the workplace could have been even worse than it was. The Employer relies on Dr. Loeb's evidence for the proposition that rapid antigen testing was not an effective alternative to vaccination for these workers. The Employer bolsters this position with case law finding mandatory vaccination policies reasonable in part because rapid testing is not a viable alternative to vaccination.

Third, in relation to the Union's argument that it was unreasonable to require employees who don't attend the airport to be vaccinated, the Employer emphasizes that the overwhelming majority of its employees are required to interact with co-workers and customers. With respect to the Union's arguments focusing specifically on the Winnipeg Finance Branch, the Employer alleges they are not properly before me. The Employer asserts that as the Grievance was filed under the Collective Agreement covering the TMOS bargaining unit, it is improper for the Union to refer to the Winnipeg Finance Branch, which is subject to a different Collective Agreement. The Employer argues that I have no jurisdiction to consider evidence or issue a decision in respect of the Winnipeg Finance Branch. In any event, the Employer points out that the employees of the Winnipeg Finance Branch, while able to work remotely for a period of time, were ultimately required to return to in-person work.

Fourth, in relation to the Union's argument that the Employer required improper proof when considering religious exemptions, the Employer argues that accommodation issues are not properly before me at this stage and that the Union did not call any evidence about this issue. The Employer asserts that this part of the hearing is intended to determine whether the Policy is reasonable generally, and whether the Employer has met its consultation obligations, not the Policy's application to specific individuals, which is to be decided in a later proceeding.

Finally, the Employer rejects the Union's argument that it did not properly consult and argues it has met its consultation obligations pursuant to Part II of the *Code*, having regard to the unique circumstances of the COVID-19 pandemic. It argues the consultation it engaged in was sufficient given that it was legislatively mandated to implement a mandatory vaccination Policy. The Employer further argues that I should decline to exercise my jurisdiction to hear this issue because it has already been decided by the ESDC, who determined the Employer had satisfied its consultation obligations under the *Code*. The Employer argues that ESDC has "occupied the field" and that the principles of issue estoppel, collateral attack, and abuse of process should lead me to decline to decide this issue since it has already been decided in a previous proceeding.

The Employer relies on the following authorities: *Securitas Transport Aviation Security Ltd. and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 5319*, March 14, 2022 (Augustus M. Richardson, QC); *Canadian National Railway Company and United Steelworkers, Local 2004 (Covid-19 Vaccination Policy Grievances)*, October 12, 2022 (Christine Schmidt); *United Food and Commercial Workers Canada, Local 175, Applicant v. Hazel Farmer, Inspector, Maplewood Nursing Home, and A Director under the Occupational Health and Safety Act, Responding Parties,* Ministry of Labour F.V. No: 03226PKVR019, OLRB Case No: 0746-20-HS, December 20, 2022; *Power Workers' Union and Elexicon Energy Inc. (Re: Utele-P-2 Covid-19 Vaccination Policy)*, February 4, 2022 (C. Michael Mitchell); *City of Toronto and Toronto Civic Employees' Union, CUPE, Local 416 (Policy Grievance Concerning A Mandatory Vaccine Policy)*, November 21, 2022 (Robert J. Herman); *Coast Mountain Bus Company and Unifor, Local 111 (Vaccination Policy Grievance)*, September 19, 2022 (Jacquie de Aguayo); *Coca Cola Canada Bottling Inc. and Teamsters, Local*

213 (Covid 19 Mandatory Vaccination Policy Grievance), July 11, 2022 (Randall J Noonan); *Unifor, Local 1999 and Reliance Comfort Limited Partnership (Vaccination Policy Grievances)*, January 2, 2023 (Derek L. Rogers); *Unifor Local 973 and Coca-Cola Canada Bottling Limited (Re: Brampton Vaccination Policy Grievance - Grievance No. 33841)*, March 17, 2022 (Mark Wright); *The Toronto District School Board and CUPE, Local 4400 (Re: PR734 COVID-19 Vaccine Procedure)*, March 22, 2022 (William Kaplan); *Elementary Teachers' Federation of Ontario and Ottawa-Carleton District School Board (Policy Grievances 2021-05 and 2021-14 Mandatory Vaccination Protocol)*, June 21, 2022 (Michelle Flaherty); *Canada Post Corporation and Canadian Union of Postal Workers (CUPW/STTP National – Mandatory Vaccination Practice N00-20-00008)*, April 27, 2022 (Thomas Jolliffe, Q.C.); *Bunge Hamilton Canada, Hamilton, Ontario and United Food and Commercial Workers Canada, Local 175 (Policy Grievance Objecting to a Mandatory Vaccine Policy)*, January 4, 2022 (Robert J. Herman); *Toronto Transit Commission v. A.T.U., Local 113*, 2010 CarswellOnt 11482; and *Telus Communications Inc. v. T.W.U.*, 2006 CarswellNat 5615.

DECISION

As stated at the outset, this decision addresses only the issue of whether the Policy was reasonable.

It is well-established in arbitral jurisprudence that any rule or policy unilaterally imposed by an employer, and not subsequently agreed to by the union, must meet the test set out in *KVP, supra*, which is as follows:

a. It must not be inconsistent with the collective agreement;

b. It must not be unreasonable;

c. It must be clear and unequivocal;

d. It must be brought to the attention of the employee affected before the company can act on it;

e. 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 basis for discharge); and

f. It should have been consistently enforced by the company from the time it was introduced.

Certainly, the Employer is correct that there is a fairly consistent arbitral consensus on the reasonableness of two-dose mandatory vaccination policies in the context of the COVID-19 pandemic. Indeed, most arbitrators who have examined these policies and balanced the competing interests involved – employees' privacy and bodily autonomy as well as employers' duty to maintain a safe workplace – have determined that such policies are reasonable.

This is in part due to arbitrators' acknowledgment of the "precautionary principle", which requires that employers take all reasonable measures to protect the health and safety of workers. In the context of a global pandemic, arbitrators have held that the precautionary principle allows, and may, in fact, require, employers to take proactive steps to prevent employee illness and death even in the absence of conclusive scientific evidence.

Arbitrator de Aguayo described the precautionary principle in the context of the COVID-19 pandemic as follows in *Coast Mountain Bus Company, supra*:

> Other arbitrators have also used this precautionary approach, one that recognizes that in the context of a changing and fluid global pandemic, employers may legitimately err on the side of caution in establishing workplace policies to minimize the impacts of COVID-19…I agree with and adopt that approach in this case.

It is fair to say that in applying the precautionary principle and the requirement to be proactive in the context of a global pandemic, arbitrators

have not found drug and alcohol testing cases, which I note the Union has referenced in support of its position in the present case, to be overly helpful given the difference in context. As Arbitrator Noonan noted *in Coca-Cola Canada Bottling Inc., supra*, for example:

> The reason that those cases are of limited assistance is that with COVID-19 it has been amply demonstrated that, unchecked, the virus can spread quickly through workplaces and through the community-at-large, with devastating consequences both to employee health and safety and to the ability of an employer to continue to operate. Because of that, the very nature of anti-COVID policies is precautionary, that is, not as a reaction to a problem in a particular workplace after it has arisen, but rather to prevent it arising in the first place and reduce the risks of contamination and serious illness as a result of contracting the disease. In short, the reasonableness of such policies must, in my view, be analyzed not through the lens of the random drug and alcohol testing cases in which the policies are a reaction to a demonstrable problem that has arisen in the workplace, but rather as policies designed to prevent or reduce the consequences of the problem before it takes hold in the workplace.

As already noted, numerous arbitrators have concluded that mandatory vaccination policies requiring employees to be fully vaccinated in order to work, subject to legitimate human rights-based exemptions, is an appropriate balancing between the interests of affected employees and the employer. Arbitrator Wright described the balance of interests at play in these circumstances as follows in *Unifor Local 973 and Coca-Cola Canada Bottling Limited, supra*:

> As Arbitrator Stout articulated in the *ESA* case, cited above, context is important when assessing the reasonableness of a workplace rule or policy that may have workplace consequences for individual employees. The general context is known to everyone. The Policy is a response to a global health pandemic that has so far claimed 6 million lives worldwide. It makes mandatory the use of vaccines that have proven to be safe and effective at combatting not only the transmission of the virus, but also at providing

> significantly greater protection from serious illness, hospitalization, and death for those individuals who are fully vaccinated. There is no question that it is extraordinary for an employer to enact a workplace rule or policy that impacts an employee's right to privacy and bodily integrity, but there can be no dispute that the global COVID-19 pandemic is an extraordinary health challenge. Not only are employers obliged to ensure that the health and safety of an employee is always protected, under s 25(2)(h) of the *Occupational Health and Safety Act*, employers are statutorily required to "take every precaution reasonable in the circumstances for the protection of a worker."

Consistent with the above authorities, I respectfully do not agree with the Union that the Policy imposes forced medical treatment on employees and therefore engages Section 7 of the *Charter*. While workplace mandatory vaccination policies may give rise to a difficult choice for some employees, they still allow the employee a choice. Employees under the impugned Policy were free to choose not to be vaccinated and accept the consequences of that choice in the context of a global pandemic.

The fact is, a large majority of employees covered by the Policy perform in-person work at airports where they interact and work in close proximity to colleagues. The small number of employees who worked remotely temporarily were being required to return to the office around the time the Policy was implemented and were also required to come into the office for meetings, training and other operational requirements. The evidence is equally clear that COVID-19 was a threat in the workplace and had the potential to result in serious health consequences to the Employer's staff and customers. The number of COVID-19 cases Air Canada identified in its operations – 6,603 between March 1, 2020 and June 30, 2022 – was staggering.

Considering Dr. Loeb's uncontradicted evidence regarding the vaccines' impact on transmission and disease severity, had the policy not been in place, the Employer's operation could have experienced not only an exponentially

larger number of COVID-19 cases, but also a significantly larger number of employees who experienced severe illness, hospitalization, and death.

The interests of unvaccinated employees in their privacy and bodily autonomy are significant and should not be discounted. Employees who chose not to be vaccinated were unable to work and lost their livelihood for approximately nine months. Fortunately, these consequences were only temporary, with the Employer allowing them to return to work once pandemic conditions changed. None of these employees were dismissed or lost their employment permanently. Ultimately, like the arbitrators in the decisions cited above, I find that that in the temporary and unique context of a global pandemic, the Employer's policy struck an appropriate balance between its significant interests in protecting its employees, customers, the public and its operation, and the privacy and bodily autonomy interests of unvaccinated employees.

It is important to note that the reasonableness of the Policy must be assessed in the context and time period during which it was in effect, not in respect of the conditions as they exist today. Much like the employers in the authorities cited above, the Employer here, when faced with a fluid, uncertain global pandemic and a legal obligation to maintain a safe workplace, was entitled to err on the side of caution by implementing a mandatory vaccine policy. The Employer was not required to offer regular rapid antigen testing as an alternative. I accept Dr. Loeb's evidence that rapid antigen testing – although it may have some utility – is less effective at preventing transmission than vaccination. Moreover, the arbitral consensus discussed above establishes that mandatory COVID-19 vaccine policies without testing alternatives are generally reasonable.

The Employer was Mandated by Government to Enact a Mandatory Vaccination Policy

Another important factor in this case is that the Employer was required under the *Interim Order* to create a mandatory vaccination policy. In other words, unlike most unilaterally introduced employer policies, the Policy under consideration in this case was predominantly not the result of a management decision or exercise of discretion. Rather, the government ordered federally-regulated employers to create these policies and to ensure only vaccinated employees were entering these workplaces. It is not open to me as a labour arbitrator to question or overturn the federal government's decision in this regard, nor would I even if I had the jurisdiction.

To the extent there are differences between the Policy and the government mandate, I do not find them of a sufficient nature to render the Policy unreasonable. For instance, I note that while the *Interim Order* does not require that unvaccinated employees be placed on unpaid leave, this is arguably the least intrusive measure an employer can take when an employee has made a personal choice that renders them unable to fulfill their duties. This is especially so in the context of a mandate outside the employer's control. While it is true, as the Union points out, that the Employer could have chosen to provide paid leave for unvaccinated employees who were unable to work under the *Interim Order* and the Policy, there is no basis to find the Employer was required to do so. As the Employer points out, arbitrators have repeatedly upheld the use of unpaid leave for employees ineligible to work under vaccine policies and mandates even where the leave is not specifically contemplated in the Collective Agreement.

While I acknowledge that aspects of the Policy technically go farther than required by the *Interim Order* in that it applies to *all* employees instead of just those employees who enter airport property, the reality is that there are very

few, if any, employees who would never need to enter airport property. The evidence is that the majority of employees covered by the Policy do attend airport property and interact with others in the course of their duties and that even the small number who worked remotely for a time were required to return to the office at the very least for meetings, training, and other operational reasons. Although the Union has pointed to the Winnipeg Finance Branch as an example of employees who were able to work fully remotely and did not attend at airports, as stated previously, I find that I am without jurisdiction to consider the Union's arguments as they relate to those employees who I note are covered by a different Collective Agreement. If the Parties wish to have a decision on the Winnipeg Finance Branch specifically, they can mutually agree to apply this award to that part of the Employer's operation taking into account the structure and layout of the Winnipeg office, or they can make further arguments before me or another arbitrator.

In any case, as set out above, the Winnipeg Finance Branch is not representative of the vast majority of the bargaining unit members' working conditions. To the extent that the Policy may apply to a small number of employees who are not captured by the *Interim Order*, I find that it is nonetheless reasonable based on the precautionary principle, the Employer's duty to protect its employees in the context of a global pandemic, and the fact that it was, for the most part, consistent with the *Interim Order* as discussed above.

I find that the Union's arguments about the Policy's failure to address accommodation options for employees with medical and religious exemptions, including whether those employees ought to have been permitted in the workplace with a testing alternative (as permitted by the *Interim Order*), are more appropriately dealt with in the adjudication of individual grievances.

Similarly, I find that the Union's objections to the proof required by the Employer from employees applying for religious exemptions are also more appropriately dealt with in the course of adjudicating the individual grievances. In coming to that conclusion, I observe that the Policy itself does not mandate any particular proof required to support a request for a religious exemption. It merely sets out the process for applying for the exemption and acknowledges the Employer's duty to accommodate those with a valid basis for seeking the exemption. For each employee who grieved the Employer's handling of their exemption request, the Union will have an opportunity to argue the validity of the Employer's criteria for granting the exemption in that case, the reasonableness of the Employer's accommodation process, and any remedies flowing from that.

The Employer Did Not Breach Its Obligation to Consult

All things considered, I am not prepared to find the Employer breached its consultation obligations in the *Code* and the Collective Agreement. As noted, the Employer was legislatively mandated to implement a mandatory vaccination policy. This fact limited the amount of consultation required or possible given that there was no room for debate about the creation of a policy that would require employees be vaccinated.

Further, the evidence is that the Employer did meet with the Union on numerous occasions before and after finalizing the Policy, giving the Union the opportunity to provide input and feedback on the content of the Policy to the degree possible under the mandate. The Union had the opportunity to raise concerns about how the Policy would affect its members and to ask questions about various aspects of the Policy and how it would be implemented. I see no reason to depart from the ESDC's decision and agree that the Employer has met its consultation obligations under both the *Code* and the Collective Agreement.

CONCLUSION

In sum, I find the Policy to be reasonable in the circumstances and that the Employer fulfilled its consultation obligations in respect to its creation and implementation.

With respect to the individual grievances, I refer those matters back to the parties for resolution within 60 days of the date of this Award. If no resolution is reached within that timeframe, either party may refer the matter(s) back to me for a final and binding decision.

The policy grievance is dismissed. It is so awarded.

Dated at the City of Vancouver in the Province of British Columbia this 11th day of May, 2023.

Vincent L. Ready