Arbitrator Finds Three-Dose Mandatory Vaccination Requirement Reasonable In Long-Term Care Homes

In *Regional Municipality of York v Canadian Union of Public Employees, Local 905 (Long Term Care Unit)*, Arbitrator Stephen Raymond found that a mandatory vaccination policy (Policy) which required long-term care home employees to receive three doses of the COVID-19 vaccine was reasonable.

The employer, the Regional Municipality of York, operates two long-term care homes. This particular award was the second of three grievances regarding the Policy. The first award (April 2022) found that the employer's two-dose Policy was reasonable throughout the operations of the employer, including its two long-term care homes. This second award, as discussed below, holds that the three-dose requirement is reasonable in the long-term care homes. A third grievance, currently deferred, will consider the reasonableness of the termination provisions in the Policy.

Background

The parties in this case proceeded by way of an Agreed Statement of Facts.

The union argued that the Policy did not meet parts one and two of the test to determine whether a policy imposed unilaterally by an employer is appropriate, as set out in *Re Lumber and Sawmill Workers' Union, Local 2537 and KVP* (*KVP*): (i) it must not be inconsistent with the collective agreement, and (ii) it must not be unreasonable.

Specifically, the union asserted that the Policy was inconsistent with the collective agreement and was unreasonable because it was no longer supported by the government directive (Directive) mandating that all long-term care homes implement a three-dose policy. That Directive had been revoked on March 14, 2022. The union also argued that the Policy did not strike an appropriate balance between the interests of individual employees and the employer, and that it should have been consulted about the three-dose requirements.

The employer maintained that the Policy was reasonable and in accordance with its statutory obligations under the *Occupational Health and Safety Act* and

the *Fixing Long-Term Care Act*, *2021*. It also argued that the Policy was consistent with the information available from the Ontario Science Table.

Analysis and Decision

Arbitrator Raymond found the three-dose requirement was reasonable, rejecting the union's arguments that the Policy did not meet parts one and two of the *KVP* test.

With respect to part one of the test, the Arbitrator found that there was no inconsistency between the collective agreement provision which required management rights to be carried out in a manner that is "fair, reasonable, and consistent with the collective agreement" and the Policy. Additionally, nothing in the collective agreement precluded the employer from unilaterally introducing policies.

Arbitrator Raymond also rejected the union's argument that the employer failed to meet part two of the *KVP* test, finding that the Policy was reasonable.

The Arbitrator accepted that individual employees who chose not to comply with the Policy have real and serious interests, including the right to bodily integrity.

However, he also accepted that the employer was addressing what was initially a mandated provincial Directive and was therefore obligated to implement a mandatory vaccination policy. When that Directive was revoked, the employer reasonably chose to maintain the Policy to protect the health and safety of its employees, an obligation which arises out of both the collective agreement and statute. In particular,the employer had specific obligations as the provider of a long-term care home, in light of the fact that many of its residents were susceptible to the most serious outcomes from the virus. The Arbitrator stated:

25. As I explained in the first decision, I do accept that the Provincial Directive made it an obligation for the Employer to have a two-dose mandatory vaccination policy. The extension of that Directive on December 31, 2021, to include a third dose made it an obligation of the Employer to have a three-dose mandatory vaccination policy. It had to do so. It had to follow the law. When that Directive was revoked on March 14, 2022, it does not follow that the Employer's mandatory vaccination is necessarily unreasonable; it is simply that the justification for it provided by the Directive was gone. It is not inherently unreasonable to have a vaccination policy without the mandate of the Directive. …

Arbitrator Raymond was also persuaded that the employer's interests should be given more weight than those of the individual employees. He found that the employer had to create a three-dose mandatory vaccination policy because of the collective agreement, the statutes governing it and the facts from the Ontario Science Table.

The Arbitrator then found the failure of the employer to consult with the union on the three-dose Policy was concerning. However, he stated that a failure to consult could not form the basis for a violation of the collective agreement unless there was language in the collective agreement that requires

consultation: the *KVP* test is only about a unilaterally imposed policy—"it presupposes that there has not been consultation." For that reason, absent any specific collective agreement language to the contrary, the failure to consult alone could not form the basis of a successful grievance.

As a result, the Arbitrator concluded that this employer had a positive legal obligation to impose a three-dose mandatory vaccination policy.

Key Takeaways

This decision is another example of the general acceptance by arbitrators of vaccination policies. While vaccination policies will continue to be assessed on a case-by-case basis, employers should take note of the fact that the arbitrator in this case upheld a three-dose policy, absent the government Directive which initially required it.

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