

## EMPLOYMENT TERMINATION

# Vaccine refusal and dismissal

Arbitrator upholds termination of employment for failure to comply with mandatory COVID-19 vaccination policy in case argued by **Sherrard Kuzz**



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**IN A** recent arbitration decision, *Lakeridge Health v. CUPE, Local 6364*, 2023 CanLII 33942 (argued by the authors), arbitrator Robert Herman upheld the dismissal of hospital employees (including those working from home) for continued refusal to comply with a mandatory COVID-19 vaccination policy.

The decision, that the hospital was justified in requiring employees to be vaccinated and that it was reasonable to place unvaccinated employees on unpaid leave of absence, is consistent with rulings in many earlier COVID-19 vaccination arbitration decisions. However, as of the time of writing, this is the first Canadian arbitration decision to treat failure to comply with a COVID-19 vaccination requirement as disciplinary misconduct and cause for dismissal of a unionized employee.

## The vaccination policy

On September 28, 2021, Lakeridge Health (the “Hospital”) implemented a mandatory vaccination policy (the “Policy”), requiring all employees to be fully vaccinated against COVID-19 as a condition of continued employment. The Hospital implemented the Policy only after it engaged in a variety of less intrusive measures designed to encourage vaccination and exempted those who could not be vaccinated for a reason protected under the Ontario Human Rights Code<sup>1</sup>.

The Hospital did not take lightly the decision to terminate employees for continued refusal to vaccinate. However, as a health-care employer, Hospital administrators recognized the serious health and safety risks unvaccinated employees posed both to other staff and the public. As well, faced with continued staff shortages, Hospital administrators believed it would be extremely difficult to fill vacancies with temporary positions, which would be necessary if unvaccinated staff were placed on unpaid leave and did not have their employment permanently end.

The Policy gave unvaccinated employees time to provide proof of vaccination, failing which an employee was initially placed on unpaid leave, and thereafter their employment was terminated. The length of time on unpaid leave prior to termination varied based on an employee’s individual circumstances – from several days to three weeks. The Hospital was flexible in its application of the Policy and extended the timeline for those who expressed a willingness to become vaccinated. Of the 326 Hospital employees not fully vaccinated and placed on leave, 80 were terminated under the Policy.

## The grievances

The Canadian Union of Public Employees (“CUPE”), representing 47 of the terminated employees, filed two policy grievances and four individual grievances. Initially, CUPE asserted the Policy was unreasonable for placing unvaccinated employees on unpaid leave of absence and dismissing any employee who remained unvaccinated. In final submissions at the arbitration hearing, CUPE changed its

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position, acknowledging it was reasonable to place unvaccinated employees who did not work remotely on unpaid leave, but asserting these employees should have been returned to work in June 2022.

## The arbitrator’s decision

Arbitrator Robert Herman confirmed the Hospital was justified in requiring employees to be vaccinated and that it was reasonable to place unvaccinated employees on unpaid leave of absence. This was consistent with the decision reached in several earlier COVID-19 vaccination arbitrations.

However, no prior arbitration decision had upheld dismissal as a consequence of failure to vaccinate. On this contentious issue, whether failure to vaccinate was disciplinary misconduct that could result in dismissal, the arbitrator stated:

... The Policy did not serve to protect only the employees who got vaccinated, but also vaccinated employees and patients and their families who might be exposed to unvaccinated employees. Cases that stand for the principle that employees who refuse or decline to take medicine do not engage in disciplinable conduct have limited application in this context. This is particularly so where the [Occupational Health and Safety] Act requires that employers take reasonable steps to protect the health and safety of employees and where the Local Agreement stipulates that employees have the right to a safe and healthy work environment and directs the Hospital not to wait until there is scientific certainty before taking reasonable actions to reduce the risks to employees.

It is a legitimate response to a breach of the Policy to discipline employees who refused to comply with the reasonable requirement that they be vaccinated in order to protect other employees, patients

and Hospital visitors. Employees were not forced to get vaccinated; they were required to get vaccinated only if they wished to continue to work for the Hospital.

And further:

Again, the reasonableness of terminating unvaccinated employees, as with the overall Policy, must be assessed in context of a large hospital that provided essential health care services to the community ... at a time when the communities it served were experiencing severe COVID-19 infections and consequences and the need for the Hospital to maximize the services it could provide was absolutely critical. The Hospital was already having serious challenges in continuing to provide these services because of the numbers of infected patients, or patients with other issues, and because of understaffing....

COVID-19 infections continued to have a serious impact on employees and patients, with the likelihood of getting infected and the impact of becoming infected likely to be considerably more significant if an employee was not vaccinated. Employees were already required to be vaccinated against a number of diseases, so they understood that getting vaccinated might be required of them. A failure of all active employees to get vaccinated against COVID-19 was highly likely to negatively affect the Hospital's ability to provide its health care services to the public.

The arbitrator held it was reasonable to include remote workers in the Policy's application, as these employees might still attend the Hospital for work-related reasons and were needed for potential re-deployment to onsite work.

### Key takeaways for employers

This is the first decision to confirm that, in certain circumstances, continued refusal to be vaccinated may be treated as disciplinary misconduct justifying termination of employment. We expect this decision will have significant implications for other employers responding to similar grievances, particularly in health care. **CL**

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1 R.S.O. 1990, c. H.19

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