IN THE MATTER OF AN ARBITRATION

BETWEEN:

LAKERIDGE HEALTH

(the "Employer")

-AND-

CUPE, LOCAL 6364

(the "Union")

AND IN THE MATTER OF POLICY AND INDIVIDUAL GRIEVANCES CONCERNING A MANDATORY VACCINATION POLICY AND TERMINATIONS

ARBITRATOR **ROBERT J. HERMAN**

APPEARANCES

FOR THE EMPLOYER

ERIN R. KUZZ
ZACK LEBANE
VANESSA AGUIAR
BARRY NAYLER
GORDON SHANTZ
CHAD SHEW

FOR THE UNION AND ONTARIO COUNCIL OF HOSPITAL UNIONS

RYAN NEWALL
SIMRAN PRIHAR
LOUIS RODRIGUES
DAVE VERCH
HEATHER MURRAY
PAM PARKS
CINDY DOWSON
LORRIE BOAKE
JEANNIE LANGDON
LINDA AVERY
AND OTHERS

HEARINGS WERE HELD BY ZOOM ON JUNE 6, JULY 13 AND 22, OCTOBER 24, NOVEMBER 21 AND 24, DECEMBER 14 AND 20, 2022, AND JANUARY 17, 24, FEBRUARY 13, 14, AND MARCH 2, 2023

AWARD

1. There are two policy grievances and four individual grievances before me, all arising from the mandatory vaccination policy of the Employer, Lakeridge Health (referred to as the "Hospital" or "Lakeridge"). The Union, CUPE Local 6364 (the "Union" or "CUPE"), asserts that certain aspects of the vaccination policy are unreasonable, and objects to the application of these aspects to the individual grievors.

2. The nature of CUPE's objections changed in final submissions. The Union's initial position was that the policy was unreasonable in placing unvaccinated employees on unpaid leaves of absence in October 2021, and unreasonable in then terminating those employees who remained unvaccinated. In its final submissions, made in reply to the Hospital's final submissions in chief, the Union changed its position to acknowledge that the Hospital could reasonably have placed unvaccinated employees (who did not work remotely) on unpaid leaves of absence until June 2022, when it should have returned them to active employment.

3. The parties filed an extensive Agreement Statement of Facts ("ASF"), and each party also called witnesses. Although most of the facts are either agreed or not disputed, what is disputed, amongst other matters, is whether the Hospital considered matters other than transmission risks in promulgating the policy in issue, whether the Hospital considered the impact of leaving employees on indefinite, unpaid leaves upon its ability to operate the Hospital and what that impact would have been, and the efficacy of two doses in preventing transmission of the Omicron variant as of June 2022.

4. All witnesses were credible in the sense that they testified in an honest, straightforward manner, and attempted as best they could to accurately convey information about the matters they addressed.

The Facts

5. Lakeridge is comprised of five hospitals, four Emergency Departments and more than 20 community health care locations, providing a comprehensive range of acute care, ambulatory care and long-term care services. The five hospitals are Ajax Pickering Hospital, Bowmanville Hospital, Oshawa Hospital, Port Perry Hospital, and Whitby Hospital. As of October 14, 2021, Lakeridge had 6,626 employees.

6. Lakeridge has a collective bargaining relationship with various trade unions, including CUPE. As of September 2021, CUPE represented approximately 2,647 Lakeridge employees, and as of February 2022, it represented approximately 3,000 Lakeridge employees. Some of the job classifications at Lakeridge represented by CUPE are Registered Practical Nurses ("RPN's"), Clerks, Service Associates, Personal Support Workers ("PSW's"), Screeners, and Secretaries. The increase in the number of employees during this period is largely due to Lakeridge hiring a large number of PSW's and Clinical Externs (nursing students who perform supervised clinical work).

7. The relationship between the Union and Lakeridge is governed by both a Central Hospital Collective Agreement and a Local Agreement.

8. The Local Agreement reflects the seriousness with which both parties take health and safety considerations, as Article R.1(a) reads as follows:

> a) It is in the mutual interests of the parties to promote health and safety in the workplace and to prevent and reduce the occurrence of workplace injuries and occupational diseases. **The parties agree that employees have the right to a safe and healthy work environment and that health and safety is of the utmost importance. The parties agree to promote health and safety and wellness. The parties further agree that when faced with occupational health and safety decisions, the hospital will not await full scientific or absolute certainty before taking reasonable action(s) that reduces the risk and protects employees.** The Hospital shall provide orientation and training in health and safety to new and current employees on an ongoing basis and employees shall attend required health and safety training sessions.
>
> (emphasis added)

9. In addition to its Local Agreement obligations, Lakeridge has a duty under section 25(2)(h) of the *Occupational Health and Safety Act* (the “Act”) to “take every precaution reasonable in the circumstances for the protection of a worker”.

10. Lakeridge requires all employees to be vaccinated against Measles, Mumps, Rubella, Diphtheria, Pertussis, Tetanus, Hepatitis B, and Varicella.

11. It is not disputed that COVID-19 presents a serious risk for employees and members of the general public. Nor is it disputed that risk factors for transmission include close proximity to others, longer exposure, crowded places, closed spaces, less fresh air, forceful exhalation activities such as speaking loudly, and viral load. Most transmission occurs prior to and shortly after symptoms onset. Each additional risk factor in the workplace increases the risk of transmission.

12. Up to approximately 40% of individuals infected with COVID-19 will remain asymptomatic, meaning that they will show few or no symptoms and might therefore be unaware that they are infected. Nonetheless, asymptomatic carriers can transmit COVID-19. Pre-symptomatic carriers of the COVID-19 virus, who have contracted the

virus but might not yet have developed symptoms, can also spread the virus. The available evidence suggests that the virus is likely transmitted most frequently when people are in close contact with others who are infected (either with or without symptoms) and that most transmission occurs indoors.

13. The third wave of the pandemic lasted from March to July 22, 2021. The fourth wave, when the Delta variant was dominant, ran from July 23, 2021 to approximately November 3, 2021. This variant was more transmissible and carried with it more severe symptoms that the previous variants. The Omicron variant became dominant as of approximately November 4, 2021, and it is even more transmissible, although symptoms are not typically as severe as with the Delta variant. Although it was not the dominant variant as November 2021 progressed, Delta continued to exist and continues to infect people.

14. Throughout the pandemic, hospitals have been a common setting for COVID-19 outbreaks. As of February 1, 2022, there were 87 active outbreaks in Ontario hospitals, and as of May 9, 2022, there were 103 active outbreaks. Also as of May 9, 2022, there have been at least 156,222 hospitalizations due to COVID-19 in Canada, representing approximately 4.3% of all documented COVID-19 cases.

15. Health Canada and the Public Health Agency of Canada have publicly stated that the available scientific evidence supports the following propositions:

(a) vaccines are very effective at preventing severe illness, hospitalization and death from COVID-19, including against variants of concern such as the Delta variant;

(b) people who have been vaccinated with at least two doses of an mRNA vaccine are less likely to have COVID-19 with or without symptoms, and are less likely to spread COVID-19 to others. The timing of the doses has an impact on the efficacy of vaccines to prevent transmission

(c) people who have been vaccinated with at least two doses of a viral vector vaccine are less likely to have COVID-19 with symptoms, and spread COVID-19 to others. Again, the timing of the doses has an impact on the efficacy of vaccines to prevent transmission; and

(d) people who have been vaccinated with at least two doses of a COVID-19 vaccine are less likely to have long-term symptoms from COVID-19.

16. The Hospital employed a multi-pronged approach to infection control during the COVID-19 pandemic. The first measures adopted included the wearing of Personal Protective Equipment ("PPE") (including masking), distancing where possible, and increased hygiene. Later, as they became readily available, Lakeridge added Rapid Antigen Tests ("RAT's"), and ultimately required vaccination.

17. Vaccines became available to frontline healthcare employees in January, 2021. At that time, the recommended interval between first and second doses was three weeks. Therefore, frontline employees of Lakeridge, such as RPNs, could have received two doses of an approved vaccine by February, 2021.

18. Vaccines became available to other Lakeridge employees, such as clerical staff, in March, 2021. At that time, the recommended interval between first and

second doses was longer, but all employees of Lakeridge could have been fully vaccinated by June 2021.

19. When vaccines became available, Lakeridge employees were emailed a link to enable them to easily book a vaccination appointment online. The Hospital engaged in communications, programs, and sessions with staff to educate staff on the efficacy and safety of the vaccine. Some of Lakeridge's efforts included an online educational training module, town halls, and direct consultation with the occupational health department and expert physicians.

20. In April, 2021, Lakeridge convened a working group, the Vaccine Ethics Working Group ("VEWG"), which included members of Lakeridge's senior leadership team, union representatives (including from CUPE), a physician, and a clinical ethicist, to discuss, amongst other matters, the possibility of implementing a mandatory COVID-19 vaccination policy. By late April, 2021, the third wave of the pandemic was beginning to decline in Ontario.

21. Because there is a dispute over whether the Hospital considered any factor other than transmission risks in issuing the policy in question, details of some internal Hospital communications are set out below.

22. In a communication on May 9, 2021 between senior Hospital personnel charged with consideration of a policy to address COVID-19, it was noted that the Hospital needed to consider protecting employees and patients and how severe the consequences would be of not getting vaccinated. The communication included the statement that "the data shows the vaccine to be effective at protecting oneself

from the chance of either catching the virus or how severe it would be if you did catch it." The Hospital was apparently concerned not only about transmission risks but also the risks of becoming infected and the severity of symptoms if one did. Its concern was motivated in part by the desire to maximize the prospects that employees could continue to work and that the Hospital could continue to provide services to the community.

23. On May 12, 2021, the VEWG recommended against mandatory vaccination at that time.

The June 2021 Vaccination Policy

24. On June 23, 2021, Lakeridge implemented the first iteration of its Healthcare Worker COVID-19 Immunization Program and COVID-19 Outbreak Management - Policy and Procedure (the "June Policy").

25. The June Policy required employees to attest to their vaccination status and recommended that employees become vaccinated. Employees who refused to disclose their status or did not provide proof of vaccination (without a valid medical exemption) were required to participate in an educational program about the benefits of vaccination and the risks of not being vaccinated.

26. Lakeridge indicated in the June Policy that it would offer the vaccine to employees and that any unvaccinated employees may be required to take alternate precautions to prevent transmission of COVID-19, in line with prescribed public health measures during periods when COVID-19 is widely circulating in the

community or when there were outbreaks. The June Policy further contemplated the possibility of unvaccinated employees being reassigned or placed on leaves of absence during periods of outbreak.

27. On August 17, 2021, the Ontario Chief Medical Officer of Health issued Directive #6, effective as of September 7, 2021. Directive #6 required all hospitals to establish, implement and ensure compliance with a COVID-19 vaccination policy that required its employees, staff, contractors, volunteers and students to provide:

> (a) proof of full vaccination against COVID-19; or
>
> (b) written proof of a medical reason, provided by a physician or registered nurse in the extended class that sets out:
>
> > (i) a documented medical reason for not being fully vaccinated against COVID-19, and
> >
> > (ii) the effective time-period for the medical reason; or
>
> (c) proof of completing an educational session approved by the hospital about the benefits of COVID-19 vaccination prior to declining vaccination for any reason other than a medical reason.

28. Directive #6 allowed a hospital to have a mandatory vaccination policy and to remove the education session option in paragraph (c) of the Directive. It also required any employee who was not fully vaccinated to submit to regular RAT's at least once a week.

29. Around this time, Lakeridge's Senior Management Team ("SMT") was aware that Lakeridge was experiencing significant staffing challenges, which could be compounded by putting staff on leaves or by terminating their employment. Nevertheless, the SMT recommended that Lakeridge consider the implementation of a mandatory vaccination policy.

30. On August 18, 2021, the Chair of the Board of Trustees of Lakeridge sent a letter to Board members informing them that there would be a motion discussed at Lakeridge's September Board meeting, that would "focus on strengthening vaccine confidence, including measures up to and including full endorsement of mandatory vaccinations."

31. The Hospital did not consider testing an adequate substitute for vaccination, since testing had no preventive aspect of someone getting infected, since false negative results occurred in roughly 40% of RAT's, since testing only measured an individual's COVID-19 status at a single point in time, and since an employee who tested negative at the start of their shift on Monday could still be infected by the next day. The Hospital was correct in respect of these understandings of the limitations of RAT's. Lakeridge understood that approximately 1800 employees would have to have a RAT at least weekly, given the percentage of employees unvaccinated (including those whose vaccination status was unknown).

32. Nevertheless, as an additional layer of protection, on August 19, 2021, Lakeridge informed all staff that any unvaccinated employees would be required to submit to regular RAT's, effective September 7, 2021.

33. As of August 23, 2021, 71.1% of Lakeridge employees had been confirmed to be fully vaccinated (i.e. two doses), another 11.4% of employees had been partially vaccinated, and the vaccination status of 11.1% of employees was unknown.

34. An August 24, 2021 communication from senior Hospital personnel to the SMT stated that in Ontario at the time unvaccinated persons were roughly 8 times more likely

to get infected, roughly 14 times more likely to be hospitalized, and roughly 25 times more likely to be admitted to ICU's, and that the Hospital had an obligation to protect its community. Again, the Hospital's concerns were not only over the risks of transmission but also included consideration of the consequences of becoming infected and concerns about its ability to continue to provide services. The severity of symptoms of those who became infected would obviously affect the Hospital's ability to continue to provide service to the community.

35. On September 1, 2021, a number of other local hospitals announced mandatory vaccination policies, to be effective as of September 7, 2021. The Hospital was aware of this, and was engaged in continuing discussions with the other hospitals in an effort to coordinate COVID-19 responses with them. Lakeridge reasonably believed that its approach should be similar to that of other hospitals in the area, otherwise patients might be influenced in their choice of hospital by its vaccination policy, and staff might choose to move to another hospital which had a more protective vaccination policy.

36. On September 2, 2021, 76.13% of employees had received two doses of vaccine, 10.09% had received a single dose, and the status of 7.77% was unknown. This left a total of approximately 1,548 employees of Lakeridge Health's 6,487 employees who were still not fully vaccinated.

37. On September 3, 2021, Lakeridge sent a memorandum to all unvaccinated employees indicating that the start date for being required to get a RAT was September 8, 2021. This memorandum also advised that Lakeridge was actively working to finalize a mandatory vaccination policy.

38. As announced, weekly RAT's of non-vaccinated employees began on September 8, 2021. About 1,300 employees requiring such testing. Of these, approximately 200 to 300 were in the CUPE bargaining unit. Generating the lists of employees who required this testing, and cross-referencing employee names to ensure they were tested, took about six hours of work each week. Managers responsible for this task would then spend part of each week verifying that all unvaccinated employees who worked for them had tested negative.

39. In a communication dated September 7, 2021, senior staff recommended to the SMT that a mandatory vaccination policy be implemented. The purposes of the new policy included the prevention and management of COVID-19 infections, to prevent or minimize patients and staff from becoming infected, and to reduce staff absences due to becoming infected or exposed, and in general terms, to enable the Hospital to continue to provide health care services.

40. A component of the recommended policy included terminations of employees who remained unvaccinated after being placed on unpaid leaves of absence. Senior staff had multiple reasons for this recommendation: there appeared to be no end in sight to the pandemic, the Delta variant had become dominant and it was more transmissible and carried with it more severe symptoms, non-compliant employees appeared strongly opposed to getting vaccinated and the Hospital had doubts many of them would ever agree to get vaccinated, and the Hospital constantly needed extra staff and was having significant challenges in recruiting staff. In this respect, the Hospital believed it would have even more difficulty hiring someone for a temporary, indefinite period, which it would have to do if non-compliant employees were kept on indefinite leaves of absence

from which they could later return. The Hospital also felt that even if employees could be hired into temporary vacancies, they would more readily leave to take permanent jobs being offered elsewhere. Lakeridge accordingly believed that it could not continue to provide the services it had been if it had to hold jobs open for unvaccinated employees on leaves.

41. There can be little doubt that the Hospital was correct in its belief that it would have been materially more difficult to fill vacant positions if the Hospital could only offer temporary positions of indefinite length rather than permanent positions. This would be particularly true during a pandemic where many, if not all, hospitals were short staffed and there was already a scarcity of qualified employees to fill existing vacancies.

42. The Hospital also felt that vaccinated employees were being asked to shoulder a disproportionate burden compared to unvaccinated employees, and that if unvaccinated employees could nevertheless later return to work at some point, this would create frustration and anger within the vaccinated workforce. It also believed that requiring employees to get vaccinated or be terminated would incentivize non-vaccinated employees to get vaccinated, whereas just placing them on unpaid leaves of absence would reduce the likelihood that they would ever get vaccinated, with the result that leaving employees on unpaid leaves would mean Lakeridge would have even more vacancies to fill.

43. On September 9, 2021, in meetings with its unions, including CUPE, the Hospital advised that it was actively considering a mandatory vaccination policy,

discussed possible rollout dates of such a policy, and indicated that vaccinations would likely be required by October 29th and that the ultimate outcome would likely be termination.

44. On September 17, 2021, the Hospital Board of Trustees made the decision to implement a mandatory vaccination policy. At the time, the Delta variant was still dominant in Ontario. Studies showed vaccine effectiveness remained high against the Delta variant, and that vaccines were very effective at preventing severe illness, hospitalization and death against both Alpha and Delta variants.

45. A Town Hall meeting was held with employees on or about September 21, 2021, at which they were advised that a mandatory vaccination policy would be issued shortly. Possible time lines for implementation were again raised and employees were told that vaccinations would be required by October 29, 2021 and that non-compliance would result in terminations.

The September Vaccination Policy

46. On September 28, 2021, Lakeridge issued an amended policy (referred to as the "September Policy" or the "Policy") that required all employees to be fully vaccinated against COVID-19 as a condition of employment. The Policy stated that its purposes were to prevent the transmission of COVID-19 among employees and patients, outline expectations with regard to getting vaccinated, and provide direction for the prevention and management of COVID-19 virus infections.

47. As of two days later, September 30, 2021, 90.72% of employees had received two doses of vaccine, 2.03% had received a single dose and the status of 3.31% was unknown. This left a total of approximately 602 employees, out of Lakeridge's 6,491 employees at the time, who were not fully vaccinated. At this point, every employee of Lakeridge had had at least three months (and with respect to some classifications, much longer) to receive their second dose of vaccine.

48. The September Policy indicated that Lakeridge had an obligation to decrease the risk of infection and complications in the vulnerable populations being cared for, that employees would have until October 22, 2021 to submit proof of having received the first dose of a COVID-19 vaccine, and after receiving their first dose, employees would then have until November 12, 2021 to submit proof of having received a second dose. Alternatively, an employee could request a medical exemption. If an employee did not submit proof of a first dose by October 22, 2021, the September Policy stated that they would be placed on an unpaid leave of absence. If the employee still did not get their first dose, indicate their intent to comply with the September Policy, or request a medical accommodation, the September Policy as initially issued stated that by November 5, 2021, they would be subject to termination for cause based on willful misconduct, disobedience or willful neglect of duty. The September Policy also stated that failure to comply with the RAT protocol would result in discipline up to and including termination for cause.

49. On October 1, 2021, Lakeridge directly advised all employees of the new Policy through a Memorandum (the "October Memo"). The September Policy that had issued three days earlier had stipulated that November 5, 2021 was the date for compliance or

for possible termination. The November 5, 2021 date was amended, however, in the October Memo to October 29, 2021. Employees were thus notified by October 1, 2021 that if they were not fully vaccinated (i.e. two doses) by October 29, 2021, their employment might be terminated. They were also advised that terminations might start as early as one week after they had been placed on unpaid leaves of absence.

50. The fact that inconsistent dates for when terminations might commence were in the September Policy document as initially issued and in the October Memo does not appear to have had any concrete or prejudicial impact, nor does the Union assert that it did. No employee who had indicated an intent to be vaccinated was terminated by operation of the September Policy between October 29, 2021 and November 5, 2021; that is, if employees had not become vaccinated by October 29 but indicated by then that they intended to do so, the employees were not terminated and were given a reasonable time to get vaccinated. If they failed to follow through on their undertaking, they were then still terminated, but for any employees in this position, the terminations appear to have occurred after November 5, 2021.

51. The time intervals between placing unvaccinated employees on unpaid leaves of absence and their terminations varied from several days to three weeks. Lakeridge decided on such short intervals for several reasons, similar to its reasons for terminating employees who remained unvaccinated. Vaccines had been available to employees from the beginning of 2021. The Hospital had spent significant and continuing efforts to educate employees about the importance of getting vaccinated, and about the risks to staff and patients if they did not. It had supported employees in facilitating their ability to get vaccinated. Many unvaccinated employees had made it clear that they would not

get vaccinated regardless of Hospital policy or requirement, so the Hospital believed there was no good reason to delay terminations for a lengthier period in the hope that unvaccinated employees would change their mind. Staff subject to termination would already have been put on unpaid leaves, so they would realize the Hospital was serious about enforcing its September Policy. A significant number of employees were likely to be placed on unpaid leaves, so there would be many vacancies that the Hospital would need to fill as quickly as possible in order to maintain services.

52. By October 12, 2021 the employment of 11 CUPE members was terminated for non-compliance with the requirement to get RAT's done. These employees had not undergone a RAT since the requirement was introduced as of September 8, 2021. There is no objection to their terminations.

53. On or shortly after October 15, 2021, letters were sent to unvaccinated employees reminding them of the obligation to provide proof of a first dose by October 22, 2021 or they would be terminated on or after October 29, 2021.

54. On October 19, 2021 the Ontario COVID-19 Science Advisory Table recommended that the provincial government require all hospital workers to be vaccinated against COVID-19, citing the importance of protecting vulnerable patients, the importance of ensuring hospitals continue functioning with minimal disruptions due to staffing shortages associated with the impact of COVID-19, and the goal of protecting the health, safety and wellbeing of all those working in hospitals.

55. The College of Nurses of Ontario, the regulatory body for all RPNs represented by CUPE at Lakeridge Health, similarly strongly recommended all nurses get vaccinated.

56. By October 22, 2021, the percentage of fully vaccinated employees had risen to 93.68%, with a further 1.91% having received only their first dose. The status of 2.18% was unknown. This left a total of approximately 411 employees of Lakeridge's 6,496 employees at the time who were not fully vaccinated.

57. From around October 22 to October 29, 2021, Lakeridge Health began sending letters to employees who had not gotten vaccinated as required by the September Policy, informing them they would be placed on unpaid leave. Approximately 104 CUPE members were sent such letters and were placed on unpaid leaves during this time.

58. The Hospital did not treat the October 29, 2021 deadline as inflexible, as it was prepared to, and did in fact, extend the time for getting vaccinated for employees on unpaid leave who expressed a willingness to get vaccinated but who needed more time to do so.

59. When it became apparent to the Hospital that only 47 CUPE employees would be subject to termination if they remained unvaccinated, the Hospital did not decide to amend the Policy to allow these employees to remain on unpaid leaves. It did not do so for several reasons. It believed that the reduced numbers would still create staffing problems, some of the employees on unpaid leave objected to being on unpaid leave and unable to apply for unemployment benefits and preferred to immediately be

terminated, non-vaccinated employees appeared firm in their decisions not to get vaccinated so keeping them on unpaid leave did not make business sense, and if it was just a matter of employees requiring additional time to get vaccinated, the Hospital was in any event extending their unpaid leaves. The Hospital also felt that declining to enforce the termination provisions of the Policy would be unfair to those employees who had reluctantly gotten vaccinated because the September Policy required they do so. It concluded that to turn around and then cancel the pending terminations would have seriously undermined morale among those who had gotten vaccinated, and would seriously hamper the ability of the Hospital to impose enforcement for any policy breaches in the future. It would also have meant that the Hospital would have 47 positions in the CUPE bargaining unit, and 33 more position across all other groups of employees, that it would have to post or fill as temporary positions of indefinite length. As discussed above, the Hospital felt it would be harder to fill vacant positions when incumbent employees were only on indefinite leaves.

60. As with the employees who refused to get a RAT, some Lakeridge employees made clear from the start that they had no intention of becoming vaccinated. For employees who gave no indication they would get vaccinated, terminations appear to have started within days of the October 29, 2021 deadline.

61. From November 1, 2021 to November 17, 2021, anywhere from a few days to approximately three weeks after they were put on unpaid leaves of absence, Lakeridge terminated the employees who had not gotten vaccinated (and were not asking for extensions to get vaccinated, and were not claiming religious or medical exemptions). These employees were not first interviewed to consider factors that would generally be

considered relevant in other contexts, such as length of service, disciplinary record, reasons for the asserted misconduct (i.e. refusal to get vaccinated in breach of the Policy), and personal circumstances.

62. Of the 326 employees of the Hospital who were not fully vaccinated, 80 ultimately were terminated. Out of approximately 104 CUPE members who had been placed on unpaid leaves, 47 of them were terminated.

63. Of the employees who had been placed on unpaid leaves of absence, approximately 55% had provided proof of full vaccination or proof they had received at least one dose of vaccine, in which case they remained working, subject to continued testing obligations and subject to receiving their second dose when eligible.

64. Lakeridge continued to extend time periods for employees to get vaccinated. In one instance a member of the Union was terminated on November 8, 2021 for non-compliance with the September Policy, as she had failed to receive at least one dose of a vaccine. After her termination, the employee informed Lakeridge of her intention to receive her first dose. Upon receiving confirmation that the employee had in fact received her first dose on November 16, 2021, Lakeridge (through the Union) offered to reinstate her to her former position on the condition she would receive her second dose in January 2022. Ultimately, however, this employee declined this conditional offer of reinstatement.

65. Where an employee on unpaid leave was in the process of having either a medical or religious exemption request assessed by the Hospital, application of the termination component of the September Policy was put on hold. In the event an

exemption request was denied, employees were then given a further opportunity to comply by receiving their first dose of vaccine. In the case of employees who had requested medical exemptions but had to await the scheduling of specialist appointments to obtain the information required to support their requests, Lakeridge continued to permit them to work provided they complied with testing requirements and wore appropriate PPE.

66. By November 2, 2021, the day after Lakeridge began to terminate unvaccinated employees for non-compliance with the September Policy, the percentage of fully vaccinated employees had risen to 94.98%, with a further 2.29% having received only their first dose. The status of 1.16% remained unknown. This left a total of approximately 324 employees, out of the complement at the time of 6,453 employees, who were not fully vaccinated.

67. The September Policy stated that to remain fully vaccinated an individual must receive any boosters recommended by Health Canada or any other public health authority. However, while the Hospital encouraged employees to get additional shots when they became available, when Health Canada recommended getting them, Lakeridge did not in fact require employees to get additional shots in order to remain compliant with the Policy. By then, it felt that the workforce was exhausted and burned out. Staffing was at a critically low level and it felt that requiring boosters would potentially require the Hospital to place even more employees on unpaid leaves and then subsequently terminate them, and it was concerned that doing so would mean even more vacancies to fill, when it was already having considerable difficulty filling

vacant positions. Lakeridge concluded that insisting on this requirement would seriously compromise its ability to continue to provide heath care services.

The Scientific Evidence

68. Dr. Mark Loeb filed a Report and testified on behalf of the Hospital and Dr. Raywat Deonandan filed a Report and testified on behalf of the Union. In many respects, the two experts agreed. They agreed that RAT's do not measure if someone is disease free or if they are actually infected as they only measure viral load, that the testing results can be incorrect, and that RAT's have no effect on workplace transmission and do not prevent someone from getting infected, and that the results of RAT's can be deliberately undermined by the subject. They also agreed that when Delta was dominant, the evidence indicated that two doses materially curtailed both transmission and the severity of symptoms, and with Omicron, that two doses still provide some protection against transmission and significant protection against severity of symptoms.

69. Their main differences were with respect to the efficacy of RAT's in lieu of requiring vaccination several months after November 2021, and how much the protection against transmission of Omicron waned over time.

70. Dr. Loeb believes that protection against transmission of Omicron does wane several months after receiving a second dose, but that vaccination still continues to provide meaningful protection. In contrast, Dr. Deonandan believes that the protection against Omicron transmissions is not significant several months after the second dose. Given the levels of vaccination in the community, the numbers of people who have

already been infected, and are therefore reasonably protected against transmission risk, and alternative methods such as masking and RAT's, he believes that there was no longer a need for mandatory vaccination a number of months after October 2021.

71. For the most part, the studies referred to by both doctors with respect to diminishing protection against Omicron transmission of two doses all post-date the issuance of the Policy and its implementation. Thus, the Danish pre-print study (Exhibit 10-3) was published on December 23, 2021, the Dutch study (Ex. 10-2) on January 27, 2022, the study in the New England Journal of Medicine (Ex. 10-1) on March 2, 2022, and the Nature Medicine study (Ex. 10-4) on May 2022.

72. Neither expert was questioned about the COVID-19 situation as of June 2022. Neither was questioned about the extent of protection as of June 2022, or later, of two doses received by October 2021, or of the risks of unvaccinated employees being allowed to return to work at that time.

Effect of Pandemic on Lakeridge

73. By their very nature it is not possible to predict with a high degree of confidence the characteristics of new variants. Cases of Omicron, especially among vaccinated individuals, have typically (but not always) had less severe outcomes than did previous variants.

74. Even though the impact of Omicron is often more mild than prior variants, due to the sheer number of people contracting Omicron, it has caused some of the biggest spikes in cases and hospitalizations in the entire pandemic. At Lakeridge, from March

2020 to January, 2022, 2,229 patients had been admitted and diagnosed with COVID-19 across its five hospital sites. Admissions rose to 731 new cases in December 2021 and January 2022.

75. There were 58 outbreaks of COVID-19 at Lakeridge from January 2020 to May 21, 2022. In 2022 there were 18 outbreaks in the first part of the year, but as of May 21, 2022, there was only one active outbreak at the Hospital. Throughout Ontario hospitals, there were 87 outbreaks as of February 1, 2022 , and 103 as of May 9, 2022.

76. Under O. Reg. 74/20, as of January 18, 2021 a hospital was (until April 27, 2022) permitted to take any reasonably necessary measure with respect to work deployment and staffing to respond to, to prevent, and to alleviate the outbreak of COVID-19. This included the ability to redeploy staff within different locations and facilities of the Hospital, including outside the area they normally worked.

77. The need to deal with COVID-19 cases has, for substantial periods of time, meant the provision of other healthcare services provided by the Hospital was postponed or cancelled altogether, due in large part to the need to focus resources on dealing with COVID-19. This has meant that staff who would normally work, for instance, in the surgical unit (where dramatically fewer procedures could be performed), might have to be reassigned to COVID-19-related work.

78. In the third wave of the pandemic (between March 5, 2021 and July 22, 2021) Lakeridge had to redeploy 133 employees, some of whom were CUPE members. Some of the redeployments were of non-clinical staff. Managers who had employees who

worked exclusively from home were contacted about potentially redeploying their staff to onsite roles, although employees working from home were not in fact redeployed.

79. By the time of the Delta fourth wave, between July 23, 2021 and November 3, 2021, there were already serious problems of staff burnout and the Hospital's capacity to deal with the community's health care needs had been seriously strained. By the end of October 2021, 14 patients had become infected through exposure in the Hospital and had died as a result. About 250 employees had become infected, of which roughly 10% acquired COVID-19 at the Hospital. During the period when Omicron was dominant, more than 600 Hospital employees tested positive. The difficulties in providing health care to the Hospital's communities had taken a huge toll on staff, as had the previous need for regular redeployment of existing staff. While the need for redeployment was lower during this period than in the third wave, and while Lakeridge did not cancel surgeries or other procedures during the fourth wave, there were fewer employees available for redeployment and there continued to be staff shortages.

80. During the fifth wave of the pandemic, which began on November 4, 2021. Lakeridge again had to redeploy many employees, including CUPE members.

81. On March 14, 2022, Directive #6 was revoked by the Ontario Chief Medical Officer of Health.

82. Redeployments at Lakeridge continued until the government's termination of the redeployment Regulation on April 27, 2022.

83. As of June 6, 2022, the date of filing of the ASF, there were 2 active Union

members employed at Lakeridge that had not provided proof of full vaccination. Both had received their first doses and were claiming medical exemptions from receiving their second doses. Both employees were being temporarily accommodated while awaiting medical documentation to substantiate their claims.

84. With respect to staffing issues, Lakeridge employees move around the Hospital, regularly interacting with colleagues and patients in a number of scenarios. For example, if there is a unit that is short staffed, the Hospital will have to send staff to assist. The Hospital may have to redeploy staff to overflow units during times of high capacity (Influenza, COVID-19, etc.). An employee may need to get supplies from another unit, take a sample to the lab, or other tasks involving moving around the Hospital. A Nurse may be sent with patients to other sites on transfers, or may need to respond to a code blue (medical emergency for adult), which can happen in any unit. Staff also take breaks together and are generally unmasked while eating. Staff may have to be redeployed to non-traditional or different roles, such as delivering food trays. Employees usually working in one building may have to be redeployed to work in a different building. The need for redeployment was potentially constant, was significant in terms of numbers, and could arise on short notice.

85. All staff, including CUPE represented staff, may have to interact with service teams, including Occupational Health, Human Resources and IT. They may have to attend in-person training and wellness sessions, and they may have to interact with various other staff members in retail areas of the Hospital. An average RPN's day may include obtaining a Transfer of Accountability from a night nurse, discussing any

questions or issues concerning workloads with other nurses, attending patients' rooms for assessment (on average once every 4 hours), answering call bells to patient rooms, administering medication to patients, and attending in-person rounds with the entire clinical team. These duties and activities can involve daily interaction with many other staff, patients, and families of patients. The same requirement to interact daily and regularly with other staff and patients is also generally true for other positions in the CUPE bargaining unit, such as Clerks, Service Associates, PSW's, Secretaries, and Screeners.

86. Early on in the pandemic, the Hospital tried to limit the number of people coming into its facilities, and supported working remotely, but it concluded this was not feasible on an ongoing basis. Entirely remote work was not practical for almost all of the unvaccinated employees without relieving them of some of their duties and responsibilities, and in any event, generally employees working remotely still had to come to the Hospital on occasion, for training and in order to deal with other departments, like Occupational Health. As well, allowing employees to work exclusively remotely during the pandemic would effectively mean they would not be available for the ongoing need to redeploy them, which would further hamper the ability of the Hospital to provide hospital services. Additionally, unvaccinated employees working remotely were at higher risk than vaccinated employees of community infection and of suffering more severe symptoms if infected.

87. If there was an "outbreak" in a unit (defined as two or more COVID-19 infections incurred at the Hospital), Lakeridge would have to redeploy staff, keeping

some staff on the outbreak unit. Unvaccinated staff working in the unit where there was an outbreak would have to isolate for a period. If unvaccinated, and therefore with a higher risk of becoming infected because of significant exposure to infected persons, staff could not be reassigned elsewhere, in contrast to vaccinated staff with a relatively low risk of exposure, who could continue to work in the outbreak unit. As well as a higher risk of becoming infected, unvaccinated employees had a higher rate of transmission to others, and this too hampered the ability of Lakeridge to reassign unvaccinated employees to other units or services.

88. The Hospital has taken numerous steps to enhance its ability to recruit new staff, including streamlining its recruitment process, responding expeditiously to applicants and making recruitment decisions quickly, providing incentives such as development programs, working with educational institutions, using interns in order to attract them as staff when they graduate, bolstering advertising, and assessing whether part-time positions can be combined to form more full-time positions.

89. On any given day, the Hospital has 100's of vacancies or unfilled positions. It can take months for the Hospital to fill vacant positions with employees with the requisite skills, and even then, they may need additional training. Filling vacant positions was required by the Hospital in an environment where the competition amongst health care providers for qualified staff was intense, and where many, if not most, heath care providers were constantly short staffed. Burn out of staff, staff leaving in retirement or to work elsewhere, and a shortage of replacement staff resulted in significant turnover at the Hospital, and often resulted in more staff who were

relatively inexperienced. COVID-19 infections among staff were not uncommon. These factors presented ongoing problems for the capacity and quality of the Hospital's health care services, as well as for the work satisfaction and challenges for regular permanent staff. As noted, dealing with COVID-19 had required the postponement or cancellation of some Hospital services.

90. These were all factors the Hospital was entitled to take into account, and did take into account, in formulating the September Policy.

<u>Individual Grievors</u>

Janice McRae

91. Janice McRae has worked as an RPN at the Hospital since November 2016, and for approximately the last three years, has worked in the Ambulatory Hemodialysis Unit at the Whitby Hospital, a specialty hospital that provides high quality, specialized care to residents who live in Whitby and Durham Region. Services provided include dialysis and kidney care, diabetes education, and complex continuing care. Some patients at or out of Whitby Hospital are particularly vulnerable. The unit provides dialysis treatments to patients in four hour time slots, six days per week. When dialysis patients arrive at the Hospital, they go through self-screening and have their temperature taken. If they answer 'yes' to any of the screening questions, or if they have a temperature above a set target temperature, they are treated as potentially COVID-19 positive. Because life sustaining care is being provided, the Hospital does not, and cannot, fail or refuse to treat a confirmed or suspected COVID-19 positive dialysis patient. In such situations, the patient is masked and the direct care staff

provider is required to don full PPE (for example, N95 respirator, face shield, gloves, gown, etc.). In every wave of COVID-19, including the Delta wave, the Ambulatory Hemodialysis Unit where McCrae worked treated known COVID-19 positive patients.

92. Prior to Ms. McRae's termination, there were no outbreaks in the Whitby Dialysis unit. However, the Whitby Dialysis unit is an outpatient unit, meaning patients attend at the hospital exclusively to receive a treatment and then leave the hospital. As such, the lack of an outbreak is not indicative of whether individuals with COVID-19 have attended at that location.

93. Ms. McRae is unvaccinated. When the Hospital announced that unvaccinated employees would be required to submit to RAT's once weekly in September 2021, she did so by travelling to Ontario Tech University's Oshawa campus on her own time. She submitted to once weekly tests for a period of approximately 6 or 7 weeks, before she was placed on unpaid leave in late October pursuant to the Policy. She was never required to test more than once per week. She was terminated on November 5, 2021. The Hospital relied exclusively on the fact that McRae was not fully vaccinated as required by the mandatory vaccination policy to justify her termination for cause.

Jeannie (Anna) Langdon

94. Jeannie Langdon has been an RPN since 1995. She first worked at Oshawa General Hospital, from approximately 1997 to 1999. She resumed her employment at the Oshawa site on a part-time basis in 2004, where she worked continuously until approximately 2015, at which point she transferred to the Bowmanville site. Ms.

Langdon has worked in general medical units for the duration of her career. Given the variety of patients admitted to general medical units, she had wide-ranging duties and responsibilities.

95. Bowmanville Hospital is a full-service community hospital, providing care to residents of the Municipality of Clarington. Services include emergency and critical care, inpatient and outpatient surgery, complex continuing care, inpatient and outpatient rehabilitation services, palliative care, diagnostic imaging, and laboratory services.

96. Ms. Langdon is unvaccinated. When the Hospital announced that unvaccinated employees would be required to submit to RAT's once weekly in September 2021, she did so by travelling to Ontario Tech University's Oshawa campus on her own time for a period of approximately 6 or 7 weeks before she was placed on unpaid leave on October 22, 2021. Ms. Langdon was never required to test more than once per week.

97. By letter dated November 2, 2021, Ms. Langdon was terminated for failure to bring herself into compliance with the September Policy. The Hospital asserted that the termination was "for cause based on willful misconduct, disobedience or willful neglect of duty."

98. In February 2022, there were COVID-19 outbreaks in two units at the Bowmanville site, 2 South (the complex continuing care unit) and the EMED (the second floor medical unit), the unit of the Bowmanville site where Langdon worked. There was also an outbreak on the Med/Surg (BE1MS Unit) in August and September 2021.

99. Ms. Langdon may need to go to another unit to attend and support a code blue, which can take place on any unit. There are also other points of potential contact, such as getting supplies from another unit, taking a sample to the lab, etc. Nurses are also sent with patients on transfers to other sites. Staff also break together unmasked while eating.

Catherine Schweyer

100. Catherine Schweyer worked as a part-time secretary in the Outpatient Mental Health Unit. She had accumulated 21,096 hours of seniority at the time of her termination. She began her employment with the Hospital in or around 2004. She worked primarily at the Ajax Pickering Hospital in the Outpatient Mental Health Unit. The Outpatient Mental Health Unit is staffed by three secretaries and five psychiatrists. Prior to the pandemic, patients attended the Unit for appointments with their doctors. The Unit includes a reception area and offices. From in or around March 2020 and continuing to present, the Hospital has scheduled most appointments by phone or virtually. Patients only attend the Unit to obtain paperwork or medication samples, as described further below.

101. In or around February 2020, Ms. Schweyer assumed a secretary position devoted to performing intake functions for the Unit. Her role was to receive psychiatric referrals from family physicians in the Durham Region and to schedule appointments with the Hospital's psychiatrists. She performed these duties using a computer and her phone in her own office.

102. Though the Hospital was able to move Ms. Schweyer into a separate space to facilitate distancing, she did interact with coworkers and patients. She traveled through the Hospital to get to her work space. Throughout the day, staff on the unit regularly interact with one another, whether to pull or return files, pick up or deliver referral information, discuss scheduling or other patient needs. Staff also need to travel to the inpatient area to pick up or deliver patient information (and whether that staff member is Ms. Schweyer or a colleague, whomever does so then interacts with their colleagues, including Ms. Schweyer).

103. There is also interaction between staff and patients in the Unit because not all appointments are done by the phone or virtually. Sometimes initial consultations are done in person, and any patient who requires the administration of medications by the Hospital must attend on site, resulting in up to roughly 18 patients attending on site on Thursdays. When patients arrive they need to check in at reception, provide their health card, etc., and thereby interact with staff on the Unit.

104. In or around March 2020, Ms. Schweyer took a leave of absence in order to care for her children after schools were closed as a result of the pandemic. In or around May 2020, Ms. Schweyer began working intermittently in the evenings because there was a growing backlog of intakes to be completed, and the existing secretarial staff did not have capacity to complete them. In or around September 2020, when schools reopened, Ms. Schweyer returned to work at the Hospital. In or around January 2021, schools closed again. As a result of her increased childcare responsibilities and consistent with the Hospital's duty to accommodate, Ms. Schweyer was permitted by the Hospital to work from home, and did so continuously until in or around September 2021. While

working from home, Ms. Schweyer was not able to perform the full scope of her duties but was able to complete 70-80 percent of her duties. The duties she was unable to complete included assembling, pulling and updating charts, faxing appointment confirmations to family doctors (although patients themselves were informed via telephone) and filing patient charts in the hospital paper filing system. She was also unable to fill in for full time staff, which is expected of part time staff. After she returned in September 2021, Ms. Schweyer worked from home again on at least one occasion in the fall of 2021, because her kids were sick and home from school.

105. Ms. Schweyer is unvaccinated. When the Hospital announced that unvaccinated employees would be required to submit to RAT's once weekly in September 2021, she did so by travelling to Ontario Tech University's Oshawa campus on her own time. She did so once weekly initially. She was subsequently told by a nurse in the testing centre to test twice per week, which she did for a period of several weeks, before she was placed on unpaid leave by letter dated November 1, 2021.

106. By letter dated November 8, 2021, the Hospital terminated Ms. Schweyer's employment for failure to bring herself into compliance with the vaccination policy. The Hospital asserted that the termination was for cause based on willful misconduct, disobedience or willful neglect of duty.

Linda Avery

107. Linda Avery has been a Health Information Management Professional in the position of Coding Specialist for the past 36 years. She started her career at the Centenary Hospital in Scarborough, and eventually moved to Ajax Pickering when the

two hospitals merged. Rouge Valley's Ajax Pickering site was merged with Lakeridge in 2016. Ms. Avery worked in the Health Records Department on site prior to the pandemic. Her role was fully clerical, with no patient interaction. As a Coding Specialist, Ms. Avery was responsible for capturing data from patient files, which was then submitted to CIHI for funding purposes. Ms. Avery was specifically responsible for data collection from the Emergency Department, Day Surgery, and Oncology units of the Hospital.

108. On March 13, 2020, as one of the two most senior Coding Specialists, Ms. Avery was offered the chance to work remotely on a permanent basis. The Hospital extended this offer because Ms. Avery's clinical areas had been fully integrated with other sites for coding and all cases were being made available online. This arrangement was negotiated with the Union, and Ms. Avery initially continued working on site as she had to wait for certain secure equipment to be ordered. During that time, she worked at her cubicle in the Health Records Department and wore a mask as required by the Hospital. An agreement between the Hospital and the Union for the remote work arrangement was reached on March 24, 2020. As of May 1, 2020, Ms. Avery had been working fully remotely in accordance with this arrangement, which was unrelated to the COVID- 19 pandemic.

109. Ms. Avery generally worked from home performing clerical work. However, this did not mean she was never required to be on site. For instance, in October and November of 2021 all employees in her classification were required to attend on site for in person training in relation to the implementation of a new clinical information

system. This training took place on October 29, 2021, November 4 and November 29, 2021. Each session was 4-5 hours in length during which employees were required to sit (appropriately distanced) in a classroom setting.

110. Ms. Avery is unvaccinated. When the Hospital announced in September 2021 that unvaccinated employees would be required to submit to RAT's once weekly, it was her understanding that, as a remote worker, she was required to submit to such testing only if she had to travel to site. She made arrangements for a RAT at Ontario Tech University's Oshawa campus on her own time on Tuesday October 26, 2021. She was placed on unpaid administrative leave on October 25, 2021. Ms. Avery was thus never required to test (cf. ASF, paragraph 172).

111. Ms. Avery retired on October 29, 2021. She was not terminated by the Hospital.

112. As of the last day of the hearing, in March 2023, all four individual grievors remain unvaccinated and indicated that they do not intend to get vaccinated.

Submissions

113. Some of the submissions the Hospital made during its final submissions in chief need not be set out, given the final position of the Union.

114. Lakeridge submits that the onus is on the Union to prove that the September Policy was unreasonable, and that the relevant time period for this assessment is when the Policy was issued and implemented, in October and November 2021. Alternatively,

the Hospital asserts that I must consider whether terminations would have been justifiable at any time prior to June 2022.

115. The Hospital asserts that the Policy meets the *KVP* principles, insofar as it was a reasonable policy in the circumstances confronting the Hospital at the time; see *Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co.,* 1965 CarswellOnt 618, CanLII1009 On LA ("*KVP*"); *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.* [2013] 2 S.C.R. 458. It submits that the management rights clauses in the Local Agreement entitled it to issue a policy that addressed health and safety in the workplace and the operation of the Hospital. Further, it relies upon the specific language in Article R.1(a) of the Local Agreement that stipulates that employees are entitled to a safe work environment, and that when faced with health and safety issues, the Hospital is directed not to await full scientific or absolute certainty before taking reasonable protective actions. Lakeridge relies as well on Section 25(2)(h) of the Act, which requires it to take all reasonable precautions to protect the safety of employees, and on the precautionary principle, as described, for example, in *ONA and Cambridge Memorial Hospital* 2021 CanLII 120378 (ON LA)(Mitchnick)(paragraphs 6 and 12).

116. The Hospital submits that vaccinations are clearly the most effective way of preventing transmission of COVID-19 to fellow employees and to patients, and against becoming infected and the serious consequences of becoming infected. It submits that both scientific experts agree on these points. They therefore agreed, maintains the Hospital, that vaccination was the most effective protective measure when Delta was the dominant variant, and it continued to be at least until June 2022. Lakeridge submits

that the Union effectively acknowledged this in conceding that placing unvaccinated employees on leave of absence was reasonable and appropriate until June 2022.

117. Lakeridge submits that it was reasonable to terminate unvaccinated employees after putting them on unpaid leaves of absence, both as a disciplinary response to non-compliance with the Policy and the refusal to get vaccinated, and in the alternative, on non-culpable grounds.

118. The Hospital maintains that terminations were justified for a number of reasons. Terminations reinforced for non-compliant employees the dire consequences of declining to get vaccinated, which in turn increased the likelihood that employees would get vaccinated, which was the goal of the Policy. Lakeridge submits that its operative needs justified the relatively quick terminations of employees on unpaid leaves, since it would have been unreasonably difficult in the circumstances to fill the vacancies created by their absence if the Hospital could only offer temporary positions of indeterminate length to prospective employees. The Hospital also believed that vaccinated employees, who had been the staff who carried the burden of providing health care during the pandemic, would feel unfairly treated if unvaccinated absent employees could later return to work.

119. The Hospital notes that there is no evidence that any terminated employee actually did get vaccinated after being terminated, nor that they would even now, and it points out that the four grievors have all indicated that they have not and will not get vaccinated. In these circumstances, submits the Hospital, it would have been reasonable for the Hospital to have terminated the unvaccinated employees long before

June 2022, and in any event, at least by that time. By June 2022, employees on unpaid leaves could not have worked for a lengthy period of time, and there would not have been any reasonable prospect that they could return to work in the foreseeable future. On non-culpable grounds based on the principle of frustration, the Hospital therefore asserts that it would have been justified in terminating their employment.

120. With respect to the alternatives asserted by the Union, Lakeridge submits that none of them were sufficiently protective against transmission risks or against the risks and consequences of infection, and/or were unworkable, and this continued to be true as of June 2022. RAT's had no preventative aspects, and given the large number of non-compliant employees at the Hospital, monitoring and administering who needed the tests and the results of the tests weekly, or more frequently, took extraordinary time and effort. Further, the Hospital submits, the unreliability of testing results was significantly high, and would be compounded both by the fact that asymptomatic people could still be infected and because there were always compliance issues.

121. With respect to other alternatives suggested by the Union, Lakeridge submits that they too were not reasonable in the circumstances. Considering every employee's specific circumstances and assessing whether they could continue to work in their regular position or could be redeployed or given reduced work was not feasible, since employees interacted regularly with both other employees and patients, or might be required to do so in order to allow the Hospital to redeploy employees as needed. Considering whether an employee worked in an area with a history of outbreaks is not material, the Hospital asserts, since the risk to others, and not only to the unvaccinated employee, was also a concern. Further, whether there have been outbreaks in a

particular area offers little guidance about whether another outbreak might occur in the same area. Considering whether an employee could work entirely remotely was not feasible, submits Lakeridge, because of the need for those employees to interact with others on occasion, and because the core work of almost all employees required their presence in the workplace. Temporary assignments did not protect vaccinated employees or patients from exposure to unvaccinated employees, so reassigning unvaccinated employees would just put others at greater risk. It was not practical to move significant numbers of employees to other assignments, asserts the Hospital, given stretched resources, the skill and training needed for specific jobs, and the needs of the Hospital. Temporary assignments would also counterproductively provide incentives to employees not to get vaccinated, submits the Hospital.

122. With respect to the expert evidence, the Hospital reviewed that evidence in detail. It maintains that the evidence of both Dr. Loeb and Dr. Deonandan indicate that they agree on a number of matters. They agree that there is no study that RAT's have any impact upon workplace transmission, that RAT's do not measure if someone is disease free, that there is no measurement of how much viral load an individual must have in order to be infectious, that a person can have sufficient viral load to infect someone but still not test positive, that RAT's can be undermined deliberately by those taking them, and that when Delta was dominant, there was strong evidence that vaccination curtailed transmission of COVID. They also agree, submits the Hospital, that two doses provides some level of protection against transmission even with Omicron, and that two doses provides strong protection against hospitalization and death for all variants, including Omicron, at work, at home, and in the community.

123. Where the experts disagree, submits Lakeridge, the evidence of Dr. Loeb is to be preferred, as it was by the arbitrator in *Toronto District School Board v. CUPE, Local 4400* 2022 CanLII 22110 (ON LA) (Kaplan). Amongst other reasons for preferring the evidence of Dr. Loeb, the Hospital submits that Dr. Loeb has himself conducted numerous studies, while Dr. Deonandan has not, Dr. Loeb has written 384 peer reviewed articles, one of Dr. Loeb's areas of expertise is as an epidemiologist whereas Dr. Deonandan's real area of expertise is as a Biostatistician, Dr. Loeb in his evidence convincingly challenged the relevance or usefulness of the information relied upon in some cases by Dr. Deonandan, and Dr. Loeb's analysis of various studies was more analytically sound and correct than was Dr. Deonandan's analysis in some cases.

124. The Hospital submits that Dr. Loeb's evidence established that two doses still provide significant protection against Omicron transmission, even months after the second dose, and that vaccination is by a significant margin the most protective measure that can be taken, particularly if combined with other protective measures such as wearing masks.

125. With respect to not requiring boosters even though the Policy stipulates that employees must get them when recommended, the Hospital first argues that this issue doesn't arise for determination, since boosters were not available when the terminations were implemented.

126. Alternatively, although a booster may be more effective than just two doses, two doses remains effective against transmission, infectiousness, and severity of symptoms. Since the Union concedes that placing employees on unpaid leaves was

reasonable up until June 2022, the Hospital asserts that it follows that the Union does not dispute that a two dose regime continued to be reasonable, and that a two-dose requirement still reasonably protected employees and others exposed to unvaccinated employees, and did so at least up until June 2022.

127. With respect to the period from June 2022 on, the Hospital submits that neither expert witness was asked any specific questions about risks of unvaccinated employees returning to work as of June 2022, so although the Union asserts that their return would then be justified, there is no evidence in support of this assertion.

128. In any event, Lakeridge submits, Dr. Loeb's evidence demonstrates that two doses received by November 2021 still provided significant protection after June 2022. While the protection against Omicron transmission wanes materially after several months, the amount of such protection continues to be significant, and remains the most effective protective mechanism. The Hospital submits that the scientific evidence also establishes that the protection provided by two doses against severe symptoms such as hospitalization and death continues to be significant, including against Omicron, as well as against Delta.

129. With respect to the individual grievor Linda Avery, the Hospital notes that she was not terminated but decided to retire. Since placing her on unpaid leave until June 2022 is conceded to be reasonable, and since she retired during this period, she has no claim that she has been terminated or wrongfully treated by the Hospital.

130. The Union responds that the onus lies upon the Hospital to establish that the September Policy and its application was justified, within the parameters set out in *KVP*.

131. The Union acknowledges that unpaid leaves for employees who did not work remotely were appropriate until June 2022.

132. Reasonable alternatives to unpaid leaves were available for employees who could work remotely. For those employees reasonably placed on leaves, the Hospital has not established any valid reason for then terminating these employees. Alternatives to termination, such as keeping the employees on leave, were available, and as of June 2022, there was no reason to even keep them on unpaid leaves. The Hospital's failure to employ or apply any of those alternatives as of June 2022 rendered the September Policy and its application unreasonable. While acknowledging that a requirement of getting two doses was a reasonable requirement in the context of the Delta variant for those actively employed, CUPE submits there was no reasonable basis for terminating the four grievors or any other employee.

133. The Union submits that the Hospital should have reconvened the VEWG before proceeding with its recommendation in the September Policy that unpaid leaves and terminations be part of an amended COVID-19 policy. It also asserts that there is no direct evidence about the Lakeridge Board's deliberations over the proposed Policy, and therefore no evidence of what the Hospital actually considered in approving the September Policy.

134. CUPE acknowledges that the purpose of preventing transmission in the workplace was a legitimate health and safety purpose for the Policy, but placing employees on unpaid leaves achieved this purpose (except for remote workers, where even this was not necessary). The Union submits that after June 2022, the Hospital should have started to bring employees back to work, as by then the waning efficacy of a two-dose cycle against transmission of Omicron no longer justified keeping them out of the workplace.

135. The Union acknowledges that the precautionary principle is incorporated into the Collective Agreement, and that the Hospital was entitled to act before the scientific evidence about COVID-19 risks and infections was clear. As of June 2022, however, the scientific evidence established that unvaccinated employees did not pose a materially greater risk of transmission of Omicron than did employees who had obtained two doses more than eight months earlier. Alternative measures then existed that ensured a safe workplace, such as RAT's, masks, temporary reassignments during outbreaks, and short-term leaves as needed during outbreaks in the event temporary reassignments were not feasible.

136. The Union submits that an employee's rights to bodily autonomy and integrity and privacy rights must be measured against the need to require an employee to receive two doses of a vaccine or be terminated. In assessing this, asserts CUPE, it is the Hospital's stated objectives in issuing the Policy and in the Policy itself that are to be considered, and not justifications the Hospital has only raised after the fact during this proceeding in an attempt to justify the Policy. CUPE submits that the Hospital's objective when the Policy was issued was to prevent the transmission of COVID-19,

not to protect employees from the more serious consequences of becoming infected, as is evident from the text of the Policy itself.

137. By the time the mandate was adopted in late September 2021, submits CUPE, the Hospital had achieved its stated vaccination target of 80%, and by September 30, 2021, the rate had dramatically risen to 92.74% of employees who were fully and partially vaccinated. The Union disputes that the rate of vaccination rose because of notice from the Hospital in early September that a mandate was coming, arguing that the more likely cause was the imposition of a RAT's protocol.

138. Many factors mitigate against permanent terminations, the Union argues, including that the vaccination mandate was only recently introduced, the ongoing vaccine misinformation believed by some employees, and the constantly changing pandemic scenarios.

139. With respect to the Hospital argument that operational needs justified the terminations, the Union acknowledges that the Hospital was concerned about the impact of the Policy on its staffing shortage and that it considered the impact on staffing of creating vacancies because of enforcement of the Policy. However, the Union submits, there is no evidence that the Hospital at the time actually considered the different effects on staffing of leaves of absence or of terminations, or took account at the time of whether filling temporary vacancies would be more difficult than filling vacancies created by terminations. Rather, asserts the Union, the Hospital is simply attempting to justify the terminations now on a basis that was never part of its actual justification. CUPE also submits that in any event the relatively small number of

employees on unpaid leaves as of the times of the terminations would not have seriously impaired the Hospital's ability to operate had they been allowed to remain on unpaid leaves.

140. The Union submits that the Policy failed to apply the just cause standard or consider the individual circumstances of the employees subject to termination, and it was required to have done so before terminating for cause. Numerous factors should have been considered but were not, such as ability to work remotely, temporary reassignments or continued leaves, seniority and service, an employee's reasons for not getting vaccinated, and personal circumstances. The Union asserts that being flexible with some employees who proactively indicated they would get vaccinated, before or after they were terminated, does not constitute taking account of individual circumstances, which must be done before a decision to terminate is taken. CUPE maintains that there was no process whereby employees would have had their individual circumstances taken into account by the Hospital before it decided to terminate them, and that employees were instead automatically terminated without regard to relevant factors. The Union submits that employees should have been given the opportunity to raise relevant circumstances and factors before their terminations.

141. The case law is clear, asserts the Union, that employees cannot be disciplined for refusing medical treatments or for refusing to disclose medical information. In support of this proposition, CUPE refers, for example, to *Complex Services Inc. v Ontario Public Service Employees Union, Local 278,* 2012 CANLII 8645 (ON LA) (Surdykowski). This principle also applies, the Union submits, if the discharges are based on the non-culpable doctrine of frustration.

142. The Union submits that after June 2022 keeping employees on unpaid leaves would not have been reasonable, since by that time the two doses required by November under the September Policy no longer provided meaningful protection against workplace transmission. This is particularly so, it asserts, given the availability of less intrusive means of protection. Since the Hospital has not required that employees get booster shots, even though the Policy requires this, CUPE submits that the Policy terms have not been applied. The reasonableness of the Policy must be assessed as of June 2022, it maintains, in the context of the circumstances as then existed, and as of the last day submissions were received, as is reflected in the decisions in *TDSB and CUPE Local 4400* (above), and *City of Toronto and Toronto Civic Employees' Union, CUPE Local 416,* 2022 CanLII 109503 (ON LA)(Herman).

143. The Union also reviewed in detail the expert evidence. It submits there is no dispute between the experts that the protection of two doses with respect to the Omicron variant becomes substantially reduced over time, asserting that the dispute is over the amount of the decline and the period over which the decline occurs. Where the evidence of Dr. Deonandan and Dr. Loeb conflict, CUPE submits, the evidence of Dr. Deonandan is to be preferred for a number of reasons. Much of Dr. Loeb's conclusions were based on studies that pre-dated the dominance of the Omicron variant, and with respect to the two studies that did relate to Omicron, his conclusions were flawed and not justifiable based on the studies. Dr. Deonandan's conclusions were based on an accurate analysis of the various studies upon which he relied, and those studies support his conclusions and assessments. Dr. Deonandan successfully responded to criticisms from Dr. Loeb that asserted deficiencies in some studies, by

pointing out points missed or misapplied by Dr. Loeb. CUPE submits that Dr. Loeb inconsistently relied on the same types of some studies that he criticized Dr. Deonandan for relying upon, demonstrating how inconsistent Dr. Loeb was in his analyses. Dr. Deonandan candidly acknowledged he had formerly been heavily in favour of vaccination, but that his view had changed somewhat with changing circumstances and changing scientific evidence, an approach that clearly makes sense.

144. With respect to the interpretation and application of Section 25(2) (h) of the Act, CUPE asserts that the Act requires an employer to take every "reasonable" precaution to protect an employee's health and safety, and "reasonableness" requires a balancing of interests in the circumstances, just as it does in applying the *KVP* test. When Delta was the prominent variant, the Union acknowledges, vaccination provided a high degree of protection against workers transmitting COVID-19 to one another, and requiring vaccination in order to attend the workplace was reasonable. However, when Omicron became the dominant variant and when many months have passed since a second dose was received, vaccination as the only method of protecting employees from not becoming sick or hospitalized has only a tenuous connection to a workplace health and safety objective. This is particularly so, submits the Union, where the evidence demonstrated that 90% of infections among employees prior to the adoption of the Policy were acquired outside the Hospital. There is not a strong enough nexus with the workplace, the Union asserts, to make the vaccination mandate reasonable in all the circumstances. It cannot be maintained, submits CUPE, that the Hospital would have been in breach of Section 25(2)(h) of the Act had it not required vaccinations of all employees.

145. The Union submits that the Hospital also had to have taken account of whether individual employees had already been infected, since prior infection provides significant protection against transmission, but it failed to do so.

146. Alternatively, should I conclude that unpaid leaves continue to be reasonable after June 2022, terminated employees should be placed back on unpaid leaves, as it would have been premature at that point to have terminated them. It cannot be maintained, asserts the Union, that employees terminated pursuant to the Policy will not in the foreseeable future be in positions to fully fulfill their duties. The pandemic is incredibly fluid, and an arbitrator is simply not in the position to make a final determination about return to work at this time. The science is simply too uncertain, CUPE submits, about the effect of two doses received over a year ago.

147. With respect to the individual grievance of Ms. Avery, the Union reserves the right to provide evidence of how Ms. Avery arrived at her decision to retire and how that decision would have differed had the Hospital's Policy been reasonable or reasonably applied.

Decision

148. The Union acknowledges that the September Policy was reasonable insofar as it placed unvaccinated employees (who did not work remotely) on unpaid leaves of absence, and acknowledges that the Hospital could reasonably have placed employees on leave from October 2021 until June 2022. Since the Union asserts that the only basis the Hospital was entitled to rely upon in justifying putting employees on unpaid leaves was the risk of transmission, it follows that the Union does not dispute that there

was a material risk of transmission for a number of months after October 2021, and that the risk remained sufficient to justify the continued exclusion of employees from the workplace until June 2022.

149. In assessing the reasonableness of the Policy, the circumstances existing in the months before the issuance of the Policy and those existing when it issued are relevant. Lakeridge is a hospital offering acute care, ambulatory care and long-term care services at five locations, four Emergency Departments, and more than 20 community health care facilities. CUPE represents approximately 2,600 to 3,000 employees of the approximately 6,600 employees who work for the Hospital.

150. COVID-19 had been present for over a year and a half as of the fall of 2021, and presented serious and continuing health risks for employees and patients. From July 23 to November 3, 2021, the Delta variant was dominant. It was more transmissible and carried more severe symptoms than had previous variants. Effective and safe vaccines were available to frontline health care sector employees as early as March 2021, and were readily available to all Hospital employees as of June 2021. When the Policy issued, vaccines were the best protective measure against transmission, against becoming infected, and against severe symptoms.

151. The Hospital engaged in numerous actions to protect employees and patients and to encourage employees to get vaccinated, and did so over a considerable period of time. It provided education and information sessions or publications, it provided PPE’s, masks, RAT’s, and redeployed employees. It also facilitated arrangements to assist employees in getting vaccinated.

152. Lakeridge did not rush to require that employees be vaccinated in order to work. In June 2021, the Hospital issued the June Policy, which only required employees to attest to their vaccination status, and to take specified protective measures if they were not vaccinated, but did not require that they be vaccinated.

153. On August 17, 2021 Directive #6 was issued by Ontario's Chief Medical Officer of Health, effective as of September 7, 2021. The Directive required all hospitals to establish vaccination policies that required employees to be vaccinated, to provide written proof of a medical exemption, or to attend educational sessions about vaccination.

154. During the period leading up to September 2021, the Hospital was experiencing serious staffing issues, including a significant number of vacancies, and was having to redeploy staff and reduce, delay, or curtail some services. Numerous employees were getting infected with COVID-19, which further compounded the difficulties of being able to continue to provide essential health care services.

155. As of August 23, 2021, approximately 17% of Hospital employees were unvaccinated or their vaccination status was unknown. On September 1, 2021, other hospitals in the area announced mandatory vaccination policies. Most, if not all, other hospitals were experiencing similar staffing difficulties at the time, and at least some of these hospitals would have been in competition with Lakeridge for recruitment of new staff.

156. As of September 8, 2021, the Hospital had required unvaccinated employees to have weekly RAT's done, and this requirement applied to about 1300 employees. The

workload demands in a given week on Hospital staff to monitor employees who needed testing, and to ensure that all such employees had timely tests or had provided a negative test result, were significant. These additional workload demands occurred when Hospital staffing was already inadequate to meet the demand for hospital services. While unable to predict when a new variant might appear, the Hospital understood that this was likely to occur, a view subsequently proven correct when Omicron became the dominant variable within a month or so of the issuance of the September Policy.

157. It was in this context that the Hospital decided to impose a mandatory vaccination policy, and to enforce it through unpaid leaves of absence and subsequent terminations. The scientific evidence available to the Hospital at the time was clear and unequivocal that vaccination provided significant protection against transmission and becoming infected with respect to Delta, and against severity of symptoms. The protection provided by two doses of a vaccine was significantly greater than any combination of other protective measures, such as masking or RAT's. Public Health authorities were urging people to get vaccinated for safety reasons. It was clearly reasonable for the Hospital to issue the September Policy that required two doses in order to be able to continue to work. Except for employees working remotely, this proposition is not disputed by the Union.

158. The Union does assert that the failure to canvass the VEWG before approving the September Policy was problematic, but it is difficult to see how that remains a relevant issue insofar as the unpaid leave component of the Policy is concerned. With respect to other aspects of the Policy, the failure to reconvene that group prior to

approval of the September Policy does not render the process for approving the Policy, nor the Policy itself, unreasonable. The VEWG was an advisory group set up by the Hospital, and the Hospital was entitled to choose to look to it for advice or recommendation or to choose to proceed without inviting its input.

159. The Union argues that the purpose of the Policy was only to deal with transmission risks. The fact that the Policy itself does not expressly indicate a purpose that includes the protection of employees and patients from becoming infected and from suffering more severe symptoms does not mean that such factors were not considered by the Hospital in developing the Policy. The Hospital wanted a policy that would align with mandatory vaccination policies imposed by other hospitals in the area, in order to reduce recruitment and retention issues at Lakeridge and to present a common approach to staffing and patient access and safety issues. It wanted to maximize its ability to continue to provide services to the public, and to minimize staff illnesses or absences because of COVID-19 or related matters. I am satisfied that the extent of staff absences due to infections or exposure was considered by the Hospital, and that the Hospital was concerned that unvaccinated employees would likely experience more severe symptoms, which would in turn exacerbate staff absences and further reduce the Hospital's ability to continue to provide service to the community. These factors were considered at the relevant time and they are appropriately considered in assessing the reasonableness of the Policy.

160. While subsequent scientific evidence indicated that the protection against transmission of Omicron begins to wane some months after a second dose, that evidence was not available as of the time of the issuance of the Policy or at the time of

the terminations. Throughout November 2021, there was no scientific reason (on the evidence before me) to assume two doses would not be of continuing significant effect against transmission risks, infectiousness of the new variant, and severity of symptoms. The existing evidence continued to demonstrate that vaccination was the most effective protection for all these purposes.

161. Dr. Loeb and Dr. Deonandan are both experts in their fields, and I have no doubt both were to the best of their considerable expertise and abilities trying to assist me in understanding the details of the various studies relied upon, their strengths and weaknesses, and the impact and significance of their findings. Nevertheless, where in conflict, as did the arbitrator in *TDSB v CUPE, Local 4400* (above), I accept Dr. Loeb's views as more accurate and more reliable. His evidence provided a more logical and rational analysis of some of the studies, and he was better able to explain the problems or deficiencies asserted by Dr. Deonandan and the Union with some of his conclusions, than was Dr. Deonandan able to explain the problems or deficiencies asserted by Dr. Loeb and Lakeridge with some of his conclusions. Dr. Loeb was also better able to explain and support his analyses and conclusions in a way that was logical and analytically sound, and appeared to make more sense. For example, with respect to the efficacy of RAT's in lieu of required vaccinations several months after October 2021, Dr. Deonandan's assertions were not persuasive. The ultimate Union position that unpaid leaves were appropriate until June 2022 is further support for Dr. Loeb's conclusion, and not Dr. Deonandan's, that a two-dose regime still provides material protection against transmission of Omicron for many months after the second dose.

162. Both Dr. Loeb and Dr. Deonandan agree that a two-dose treatment, even during the Omicron era, materially reduced the chances of suffering severe symptoms, such as hospitalization, ICU stays, and death. Although its effectiveness against transmission is reduced over time, I find that a two-dose treatment also continues to materially protect against transmission of Omicron many months after the second dose.

163. Section 25(2)(h) of the Act requires that the Hospital take all reasonable steps to protect the health and safety of employees. A mandatory vaccination policy was a reasonable step.

164. In addition to this statutory requirement, Article R.1(a) of the Local Agreement states that employees have the right to a safe and healthy work environment and that health and safety is of the utmost importance. This stipulation surely applies to the protection of all employees, including the protection of vaccinated employees against exposure to unvaccinated employees. The Article also requires that Lakeridge not wait until full scientific certainty exists before taking action. The precautionary principle also mitigates in favour of taking swift protective action to best protect staff, and thereby also protect patients.

165. One of the anticipated effects of the Policy was that it would incentivize employees to get fully vaccinated, and this appears to have happened. As of September 30, 2021, 602 out of 6,491 employees were not fully vaccinated. As of October 22, 2021, the deadline for having received at least the first dose, the number of not fully vaccinated employees had dropped to 411. While 104 CUPE represented employees were place on leaves, only 47 continued to remain unvaccinated and were terminated.

166. The Union argues that there is insufficient nexus between the need or desire to protect employees away from work and the need to protect employees at work. Apart from the few employees who worked remotely, and for whom the Policy was therefore attempting to regulate their remote workplace conduct, the need to protect all employees and patients from being exposed at the Hospital to unvaccinated fellow employees did provide sufficient nexus to the workplace to require employees to get vaccinated.

167. The Hospital was justified in requiring that employees be vaccinated with two doses as a condition of continuing to work, and justified in placing unvaccinated employees on unpaid leaves of absence.

168. Numerous other decisions have reached similar conclusions; see, for example, *Power Workers' Union v Elexicon Energy Inc.,* 2022 CanLII 7228 (ON LA)(Mitchell); *Unifor Local 973 v Coca-Cola Canada Bottling Limited,* 2022 CanLII 25769 (ON LA)(Wright); *Elementary Teachers' Federation of Ontario v Ottawa-Carleton District School Board,* 2022 CanLII 53799 (ON LA) (Flaherty); *Coca-Cola Canada Bottling Limited v United Food and Commercial Workers Union Canada, Local 175,* 2022 CanLII 83353 (ON LA) (Herman); *Toronto Professional Fire Fighters' Association, I.A.A.F. Local 3888 v Toronto (City)*, 2022 CanLII 78809 (ON LA)(Rogers); *Coast Mountain Bus Company v Unifor, Local 111*, 2022 CanLII 94447 (BC LA) (de Aguayo).

169. The Union asserts that employees who worked remotely, such as Ms. Avery, did not need to be placed on unpaid leaves, as they presented no real risk of transmission to

other employees or patients. This assertion is made apart from any grounds under the *Ontario Human Right Code (*the "*Code*"), for no general claim for "accommodation" (within the meaning under the *Code*) is asserted for employees working remotely. Individual employees may have made such claims, but those matters are not before me.

170. For several reasons, I conclude that the Policy was reasonable in its application to all employees, including those who worked remotely. Employees who generally or typically worked remotely still might have to come into a Hospital site from time to time, for workshops, training, meetings, or other purposes. Even if some of these interactions could also have been done through remote connection, the Hospital needed to be able to redeploy employees to other work locations and assignments, as needs demanded. Preserving an exception from application of the Policy for employees who worked remotely, or could perform most of their duties remotely, would reduce the employee complement available to the Hospital for redeployment to onsite work, at a time when the Hospital was already struggling to be able to continue to provide service or to avoid further reductions in service. Allowing unvaccinated employees to continue to work remotely would also materially increase the likelihood that they would get infected from community or household transmission or exposure, and if they did, that they would suffer more severe symptoms, and therefore be unable to work for longer periods, matters other than transmission risk that were also of concern to the Hospital.

171. The Union argues that the case law establishes that discipline is never appropriate for the failure to take medicine or to be vaccinated. That may generally be accurate in the contexts in which the jurisprudence relied upon by the Union arose.

Again, this is not a normal scenario. The September Policy was issued in the context of a pandemic that had already caused significant numbers of deaths and life-threatening illnesses, both of patients and staff who worked in hospitals, and continued to do so. Unvaccinated employees presented greater risks for all employees and patients, not only for themselves. The Policy was designed to protect the health and safety of both employees and patients, when vaccinations were the most effective protective measure, against transmission, against becoming infected and against the potentially life-threatening consequences of becoming infected. Employees were already required to be vaccinated by the Hospital for numerous diseases, so being required to get vaccinated for health and safety reasons would not be a new Hospital requirement.

172. The line of authority that follows after *KVP* does not stipulate that breach of a unilaterally issued policy cannot be grounds for discipline. Rather, the cases generally conclude that discipline may in fact be appropriate for breach of a unilaterally imposed company policy or rule; see, for example, *Chartwell Housing REIT v. Healthcare, Office and Professional Employees Union, Local 2220, UBCJA (Mandato),* 2022 CanLII 6832 (ON LA)(Misra); *Unifor Local 973 v Coca-Cola Canada Bottling Limited*,(Wright)(above); *Coca-Cola Canada Bottling Limited v United Food and Commercial Workers Union Canada, Local 175*(Herman)(above); *Toronto Professional Fire Fighters' Association, I.A.A.F. Local 3888 v Toronto (City)*, (Rogers)(above).

173. The importance of the subject matter of the Policy and its purposes justified requiring employees to comply with the terms of the Policy, and justified the Hospital's treatment of non-compliance as disciplinable misconduct. As noted, 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 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.

174. 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.

175. A key issue is whether the terminations of employees who remained unvaccinated were reasonable and justified in the circumstances, and were reasonably implemented. In respect of this issue, the Hospital argues that it is no longer necessary to determine whether the terminations were reasonable when they were implemented in November 2021, but only whether they were reasonable and justified at any time up until June 2022, since it is now acknowledged that it was reasonable to have placed unvaccinated employees on leave up until then.

176. It was stated in the October Memo that employees who remained unvaccinated might be terminated as of October 29, 2021, and terminations in fact began not long

after that date. The reasonableness of the Policy as published and implemented, remains in dispute. It is also unclear (and not agreed) that any change in the dates of termination will have no employment ramifications for the terminated employees. It therefore remains appropriate to consider the reasonableness of the terminations as of the time the terminations were actually implemented pursuant to the Policy. If the conclusion should be that terminations were not reasonable in November 2021, it may then be necessary to consider whether they would have been reasonable at any time up until June 2022.

177. Again, the reasonableness of terminating unvaccinated employees, as with the overall Policy, must be assessed in context, a large hospital that provided essential health care services to the community, including acute care, ambulatory care, and long-term care services, 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. On any given day, the Hospital had 100's of vacancies. COVID-19 infections continued to have a serious impact upon 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.

178. The Union asserts that it was unreasonable that the Hospital did not amend the Policy to no longer terminate employees once it realized that only 47 employees in the bargaining unit remained unvaccinated and would be subject to termination. While 47 vacancies was itself a significant number of vacancies to fill, the Hospital had to consider not only the 47 vacancies created by terminating CUPE employees, but all 80 vacancies that resulted because unvaccinated employees were to be terminated.

179. The Hospital reasonably concluded that it would likely have far more vacancies to fill if employees were kept on unpaid leaves and not terminated, as employees would try to find work elsewhere while waiting to be allowed to return to Lakeridge, and because the incentives to get vaccinated would therefore be lower. The data supports this conclusion, for in the CUPE bargaining unit alone, while 104 employees had been placed on unpaid leaves, only 47 had to be terminated. The Hospital also believed that its ability to fill the resulting vacancies would be materially more difficult if it could only offer potential new employees temporary positions of indeterminate length, which it would have to do if the unvaccinated employees were only on unpaid leaves.

180. Lakeridge was likely correct, and was certainly reasonable, in its conclusions in this respect. Generally speaking, employees looking for work will be more attracted to offers of permanent positions than to offers of temporary positions of uncertain length, where they know they could be let go at any time. And generally speaking, an employee in a temporary position of uncertain length, with a risk that the incumbent employee might return at any time, is more likely to seek permanent work elsewhere if

it is available. Many other local hospitals, if not all, were looking for additional staff at the time, so it is likely that permanent positions might be available elsewhere over time.

181. Lakeridge therefore reasonably concluded that keeping employees on leaves of absence of unknown length would increase the number of vacancies to fill and materially hamper its ability to recruit and retain employees, and accordingly, to continue to provide services at their current level. Not being able to fill vacancies quickly with skilled workers would also increase the likelihood that more vaccinated employees would burn out from stress and overwork and seek work elsewhere.

182. The situation confronting Lakeridge was not like the situation described in *Chartwell Housing REIT v. Healthcare, Office and Professional Employees Union, Local 2220, UBCJA (Mandato)*(Misra)(above). In that case, the arbitrator noted that the evidence fell short of establishing potential problems with recruitment or retention should employees be left on indefinite leaves of absence (at paragraph 226). Here, to the contrary, the evidence established the extensive and ongoing efforts made by the Hospital to attract and retain staff during the pandemic, and the considerable time and effort this took, that other hospitals and health care providers were competing for scarce staff, and that it would have been materially more difficult to attract replacement staff had the Hospital been limited to seeking to fill vacancies of employees on indefinite, temporary leaves, rather than filling vacancies for permanent positions. In turn, delays in filling vacancies with qualified, skilled employees would have compromised the ability of the Hospital to continue to provide its critical health care services to the community. The Hospital's conclusion that terminating unvaccinated employees

would materially enhance its ability to continue to provide its essential services to the public was well grounded, and was in any event reasonable in the circumstances.

183. The circumstances at play are also distinguishable in material respects from the circumstances addressed in other decisions that have considered the reasonableness of automatic termination as part of a vaccination policy. In most of the cases, this issue arose in the abstract, where it was only the potential for later termination that had to be considered. Critically, those other cases did not arise in the context of a hospital providing essential, potentially life-saving, health care services to the public during the pandemic, when there were already significant staff shortages, and when there would likely have been significant difficulties in attracting new employees and in retaining existing employees, and where the failure to fill vacant positions would likely further aggravate existing reductions or delays in offered services, and would therefore have significantly impeded the Hospital in its ability to provide health care services.

184. The need to protect the health of its employees and patients, and to act in a way that enabled the Hospital to continue to provide its services in a relatively safe manner, outweighed the rights of individual employees to preserve their employment status when they declined to get vaccinated.

185. Other arbitrators have indicated that terminations for continued unwillingness to get vaccinated may be reasonable after a period of time on unpaid leave: see, for example, *Revera Inc. (Brierwood Gardens et al.) v Christian Labour Association of Canada*, 2022 CanLII 28657 (ON LA) (White), *Maple Leaf Foods Inc., Brantford Facility v United Food and Commercial Workers Canada, Local 175*, 2022 CanLII 28285 (ON LA) (Chauvin), *Unifor Local 973 v Coca-Cola Canada Bottling Limited*,

(Wright)(above), *Chartwell Housing REIT v. Healthcare, Office and Professional Employees Union, Local 2220, UBCJA (Mandato)*(Misra)(above).

186. In the circumstances, I am satisfied that it was reasonable to include termination of unvaccinated employees on unpaid leaves as a component of the Policy.

187. The Union asserts that employees should have been provided with an opportunity to present their views and circumstances before being placed on leave or terminated. Typically, the individual circumstances of employees being disciplined, such as length of service, discipline record, or reasons for the employee's conduct, are generally to be considered before discipline is imposed. This case does not arise, however, in a typical disciplinary context. The customary right of an employee to have personal circumstances considered in determining the justness of discipline or discharge has significantly less applicability, if any, in a context where placing an employee on leave or termination, because they decline to get vaccinated, is justified on the basis that it is necessary for them to be vaccinated in order for the Hospital to be able to continue provide its core services.

188. No circumstance or explanation from an individual employee has been suggested that might justify an exemption from the requirement to get vaccinated, other than a religious or medical exemption, or a request for an extension of time to get vaccinated. Where any of these reasons were raised by employees, the Hospital delayed leaves or terminations until the exemption claim had been determined or until the employee requesting an extension either got vaccinated or indicted that s/he would not be doing so.

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.

190. The Union argues that one reason employees' individual circumstances should have been considered was that unvaccinated employees already infected had considerable protection from future transmission and future infections, and that there was accordingly no justifiable reason for excluding previously infected employees from the workplace. In support of this assertion, the Union relies on Dr. Deonandan's evidence and an Israeli study (Ex. 11A).

191. Since it was reasonable to have placed employees on leave until June 2022, any employees who might have been previously infected were in any event also properly placed on leaves. And since the Israeli study was published in November 2022, at the time the terminations were imposed (or as of June 2022), it does not appear that the available scientific evidence indicated that the protective aspect of an unvaccinated employee who had been infected was equivalent to the protective aspect of being vaccinated, nor in any event did scientific evidence provide a time line for how long

any such protection would last. At the relevant time, therefore, providing employees with an opportunity to advise if they had already been infected would not have been reason to not terminate them, and would not appear to have made any practical difference to the Hospital's enforcement of its Policy.

192. I am satisfied that the Policy and its application did not become unreasonable or cannot stand because the Hospital provided no opportunity for employees to raise individual circumstances before placing them on unpaid leaves or terminating them.

193. I turn now to the question of whether it was reasonable for the Hospital to have terminated employees on the dates that it did so.

194. The Policy was not precise in terms of describing the interval between placing employees on leave and terminating them. In practice, it appears that terminations took place at variable intervals from several days to about three weeks after an unvaccinated employee was placed on unpaid leave. Part of the proffered reason for the relatively short interval is the same reason for imposing terminations in the first place, to enable the Hospital to move relatively quickly to replace vacant positions. It is not clear from the evidence, however, on what basis the differing lengths of some intervals were determined by the Hospital.

195. In the absence of a sustainable justification, I am not persuaded that it was reasonable to have different intervals between when employees were placed on unpaid leaves and when they were terminated.

196. As well, the length of the interval was not reasonable. The purpose of providing an interval between unpaid leave and termination was in large part to incentivize

employees to get vaccinated, to provide them with one last chance to decide to get vaccinated, in a context where they were on notice that a failure to do so would result in their termination. Providing as little as several days or one week for an employee not working and without income from the Hospital to internalize this and make the extremely difficult decision about whether to finally get vaccinated was not a reasonably sufficient time. An interval this short did not provide employees sufficient time on unpaid leave to fully evaluate their situation, and to make an informed decision that would have such serious employment consequences. It is one thing to be told you will no longer be working or paid, it is another to actually experience it.

197. Other cases have addressed the appropriate interval between placing employees on unpaid leave and termination; see, for example, *Maple Leaf Foods Inc., Brantford Facility v United Food and Commercial Workers Canada, Local 175* (Chauvin) (above), and *Unifor Local 973 v Coca-Cola Canada Bottling Limited* (Wright) (above).

198. The length of the period on unpaid leave involves a balancing of the need to terminate employees relatively quickly in order to restaff vacant positions, and the entitlement of employees to have a reasonable period of reflection before termination occurs. In balancing these interests, I conclude that employees should have been provided with a period of four weeks on unpaid leave. Unpaid leaves of this length would not have unduly hampered the Hospital for an extended period in its need and ability to operate and provide services to the public, while providing ample time for employees to consider their positions.

199. The Policy was accordingly unreasonable to the extent it did not provide for a four week interval before an employee on leave was terminated. The Hospital could

reasonably have terminated unvaccinated employees pursuant to a mandatory vaccination policy four weeks after placing them on unpaid leaves of absence.

200. Since terminations would have been reasonable under the Policy as of four weeks after an employee was placed on unpaid leave, it follows that all employees placed on leave could reasonably have been terminated as of (approximately) the end of the third week of December, 2021.

201. The Union maintains that other less harsh measures than leaves or terminations were available as of June 2022, such as redeployment to other parts of the Hospital, or being permitted to work remotely, or being placed only on short-term leaves while an outbreak continued, or other protective measures such as regular RAT's. Again, since the leaves were reasonable at least until June 2022 and since I have concluded that it was reasonable to have terminated employees long before then, this issue is moot. Employees would reasonably have been terminated many months before June 2022 and the issue of whether alternative measures might have been available at that time would never have arisen.

202. In any event, none of the suggested alternatives, individually or in concert with the others, was sufficient to deal with the health and safety and staffing issues confronting the Hospital over COVID-19, either as of the time of implementation of the Policy or as of the time of the terminations.

203. RAT's were not appropriate in lieu of getting vaccinated, for the reasons discussed earlier.

204. With respect to redeploying or utilizing unvaccinated employees in different ways, it would not have been operationally feasible for the Hospital to consider individually for each unvaccinated employee whether there were other positions s/he could perform, or whether s/he could be redeployed where they wouldn't be in contact with other employees or patients. To do so would have created unreasonable further staffing problems and further challenges to providing services.

205. The Union argues that the failure of the Hospital to enforce the part of the Policy that required boosters demonstrates that the Hospital can and did find ways to allow employees who were not fully vaccinated to continue to work. However, the Hospital was entitled to terminate employees before boosters became available or recommended. This issue would also have arisen in a different factual context, whatever circumstances were at hand when boosters were available and recommended for staff, circumstances that are not addressed in the evidence. The stated requirement in the Policy to get additional vaccinations at a later uncertain date and the failure of the Hospital to enforce that aspect of the Policy is not a reason to nullify those other parts of the Policy that have been found to be reasonable, whether as written or as amended in this Award.

206. Turning to the individual grievances, all four grievors did not get vaccinated and therefore could have been justifiably dismissed as of four weeks after they were placed on unpaid leaves. For the grievors other than Ms. Avery, they continued to be in breach of the requirement to get vaccinated when they were actually terminated, or would have been terminated four weeks after being placed on leave. The three grievors who were terminated continue to decline to get vaccinated, and given the findings herein, there is

no reason to exercise my discretion to substitute a lesser penalty. The very reason that their leaves and terminations were justified remains applicable.

207. Ms. Avery was not terminated, as she resigned prior to termination of her employment. The Union in effect asks that I now consider whether Ms. Avery's resignation should not be treated as a resignation. But this is an issue already determined by the parties themselves, for they expressly agreed that Ms. Avery resigned her employment (ASF, paragraph 173). She was not therefore terminated. In the face of this evidence and at this stage of the proceedings, Ms. Avery is not now entitled to argue, by asserting that it is a remedial issue, that the agreed fact that she retired on October 29, 2021 is not factually correct. She was appropriately placed on leave and then she resigned, and she has no valid claim to an order reinstating her to an unpaid leave.

208. Alternatively, if I am incorrect in this conclusion, then Ms. Avery would have been terminated in any event at some point in late November or December 2021, for refusing to get vaccinated. On the same basis as with the other three grievors, an order reinstating her employment is not warranted.

209. As I have concluded that disciplinary terminations were justified four weeks after placing employees on leaves, it is unnecessary to address whether disciplinary terminations would in any event have been justified by late May 2022 or June 2022.

210. With respect to whether discharges on non-culpable grounds would have been justified, whether as of June 2022 or at any time, it is not clear that consideration of this issue is within the scope of the policy grievance, as the Policy did not speak to terminations on this basis and employees were not in fact terminated on this basis. In

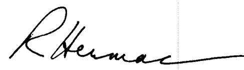
any event, given the findings above, it is unnecessary to consider this ground of termination.

211. In the result, I conclude that the September Policy was reasonable in all the respects it is challenged, except that the terminations should not have been imposed earlier than four weeks after an employee was placed on unpaid leave.

212. Since employees who were placed on unpaid leaves would still have been on those leaves when they would have been terminated four weeks later, it does not appear that any remedial relief is required.

213. In case I am mistaken in this respect, I remain seized should there be any asserted remedy that flows from my determinations. I also remain seized of any other matters the parties have deferred until the issuance of this decision. This matter is remitted to the parties.

Dated at Toronto, this 26th day of April, 2023



Robert J. Herman - Arbitrator