

Arbitrators Consider Vaccination Policies

By: Christopher Munroe and Katelin Dueck

In the past few weeks, arbitrators have begun to issue decisions considering the reasonableness of COVID-19 vaccination policies in unionized workplaces. The following three decisions out of Ontario provide some key takeaways for employers.

1. ***United Food and Commercial Workers, Canada, Local 333 and Paragon Protection Ltd. (Arbitrator Fred von Veh, Q.C.) (heard October 8, 2021)***

Paragon Protection, a security company, implemented a COVID-19 Vaccination Policy that required all Paragon staff to be fully vaccinated within approximately six weeks. Paragon's policy reserved the right for the company to ask staff for proof of vaccination status and stated that Paragon would consider accommodation requests on grounds protected by the Human Rights Code. Paragon's policy also stated that accommodations might include working at a different site (which could involve a different rate of pay or position), increased COVID-19 testing requirements, or an unpaid leave of absence.

Notably, the parties' collective agreement specifically required vaccinations for staff to work at client sites if the client required it.

Paragon considered vaccination to be an operational and health and safety necessity and relied on a public health order that required full vaccination for its staff to provide security services at some health care locations. Paragon also provided evidence that some clients (not subject to any public health order) required security staff to be vaccinated at their site.

The union grieved the policy, alleging that it was unreasonable.

Arbitrator von Veh concluded that Paragon's policy was reasonable, enforceable, and compliant with human rights and occupational health and safety legislation. Arbitrator von Veh found the policy and options for accommodations "strike a balance" to "respect the rights of employees who have not, or do not wish to be vaccinated, while respecting a safe workplace" for staff, clients, and the public. The arbitrator noted that implementing the policy met Paragon's obligation under occupational health and safety regulations to take "every precaution reasonable in the circumstances for protection of its worker." Arbitrator von Veh also found that "personal subjective perceptions of employees to be exempted from vaccinations cannot override and displace available scientific considerations."

2. ***Electrical Safety Authority and Power Workers' Union (Arbitrator John Stout) (heard November 7, 2021)***

The union grieved Electrical Safety Authority's (ESA) COVID-19 vaccination policy. The policy required all employees to be vaccinated unless exempted on the basis of a ground protected by the Human Rights Code. Employees who refused vaccination were subject to discipline, up to and including termination of employment.



Arbitrator Stout found that the policy was unreasonable to the extent that employees may be disciplined or discharged for failing to get fully vaccinated. Arbitrator Stout also found it unreasonable at the time of the decision to place employees on an unpaid leave if they were not fully vaccinated. The arbitrator found that it was reasonable for ESA to require employees to confirm vaccination status and that employees needed to be cognizant of the fact that they may be required to disclose vaccination status to gain entry to third party premises and the ESA offices.

Arbitrator Stout noted that where a rule or policy involves health and safety, it was necessary to consider occupational health and safety obligations, including the employer's obligation to "take every precaution reasonable in the circumstances for the protection of the worker." The arbitrator noted that in a workplace where risks are high and there are vulnerable populations, a mandatory vaccination policy may not only be reasonable but may also be necessary, but the arbitrator found that the ESA was not such a workplace.

Arbitrator Stout relied on the fact that the employer did not submit any evidence about how vaccination was an operational necessity or that the employer had any issue with past outbreaks. Further, 90% of employees had already been vaccinated without a policy. Arbitrator Stout also noted that employees could work remotely. In these specific circumstances, the arbitrator found that a reasonable less intrusive alternative, such as a voluntary vaccination disclosure and testing policy, was adequate to address risks. Arbitrator Stout did note that circumstances can evolve and what may be unreasonable at one point in time may not remain that way. In other words, a vaccination policy might be reasonable in the future.

In our view, this decision was strongly influenced by the fact that the ESA did not provide service to vulnerable populations and had been successful in protecting their employees to date. Prior to October 5, 2021, the ESA had a voluntary vaccination and testing policy, which had apparently proved effective. Even though some of the ESA's clients had implemented mandatory vaccination policies, the arbitrator noted that this did not require the ESA to implement the same given that the vast majority of ESA workers were already vaccinated, so the ESA could still provide services to those clients.

**3. *Ontario Power Generation and Power Workers Union (Arbitrator John C. Murray)*
(heard November 8, 2021)**

Ontario Power Generation's policy did not require vaccination for everyone, but required that unvaccinated workers complete rapid antigen testing twice per week, on their own time and at their own expense (\$25 per test). Unvaccinated workers who refused to test would be placed on an unpaid leave for 6 weeks. If they still refused to agree to testing, they would be terminated for cause.

Arbitrator Murray addressed two primary issues related to Ontario Power Generation's mandatory COVID-19 testing policy:

1. Should the cost of COVID testing for unvaccinated employees be paid for by the employer and should such testing occur during working hours?



2. Should unvaccinated workers who refuse to test be fired?

With regards to the first issue, the Union argued that it was not reasonable for the costs of COVID-19 testing to be placed upon the employee, and the employee should be paid for their time to test. Arbitrator Murray concluded that OPG had an obligation to take “every precaution reasonable in the circumstances for the protection of a worker” and that testing unvaccinated workers was reasonable. Arbitrator Murray found that the cost of testing should be borne by the employer, not the employee, but that OPG did not need to pay employees for that time. Arbitrator Murray noted that compensating employees for the time involved in self-administered tests may act as a disincentive for such employees to get vaccinated, which would be inconsistent with OPG’s rational objective to have as many employees vaccinated as is possible.

With regards to the second issue, Arbitrator Murray concluded that employees who were refusing to participate in the testing program were “refusing to take the necessary and reasonable step of taking a minimally intrusive test that would demonstrate they are fit to work and do not present an unnecessary risk to their co-workers”. Because OPG’s policy was found to be reasonable the arbitrator found that employees refusing testing were making the decision to end their careers with OPG.

Takeaways

In all of these decisions, arbitrators acknowledge that employers must take precautions to protect their workers and that vaccinations are effective at reducing the risk from COVID-19. The decisions also confirm that unilateral employer policies must be reasonable in the specific circumstances of each workplace.

In general, these decisions demonstrate that a vaccination policy is easier to prove reasonable if:

1. the employer has done a risk assessment and can provide expert evidence at hearing about the health and safety risks of COVID-19 in the workplace and the efficacy of vaccination at reducing those risks;
2. the policy provides for alternatives to vaccination, such as alternative or remote work or mandatory testing, or, if there are no alternatives to vaccination, the employer presents evidence that remote work is not possible or has had a negative effect on the workplace;
3. an employer has suffered outbreaks amongst its employees in the past, or where workers or clients are particularly susceptible to COVID-19; and/or
4. government regulations or customer/client rules impose a vaccination requirement on employees.

We expect that more decisions will be issued shortly on this important topic.



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