HUNTER-LIBERATORE-LAW

Healthcare Update – July 2023

a) *Vaccination Mandate: The LHINs mandatory vaccination policy was a reasonable exercise of management rights in the face of the COVID-19 pandemic.*

- ***Central West Local Health Integration Network v Canadian Union of Public Employees, Local 966*** **(Goodfellow, June 29, 2023)**

The Central West, and Mississauga Halton Local Health Integration Networks (LHINs) implemented mandatory vaccination policies for employees in September 2021. Employees could establish a medical or human rights exemption. Otherwise, failure to comply would result in progressive discipline up to and including termination of employment. 43 employees were placed on an unpaid leave for non-compliance and 24 employees were subsequently terminated across both LHINs. The union filed policy grievances arguing that the vaccine mandate was unreasonable for several reasons: 1) it required progressive discipline (including unpaid leaves and/or termination) in all cases, 2) unpaid leaves and the automatic application of discipline were unnecessary to achieve the goals of the policy as the employer had less intrusive means to achieve those policies such as remote work and rapid antigen testing, 3) the employer failed to consider the waning effectiveness of the two-dose vaccine mandate, and 4) the policy violated a clause in the Mississauga Halton collective agreement, which preserved an employee's right to refuse an influenza vaccine and mandated reassignment for unvaccinated employees during a flu outbreak period.

Arbitrator Goodfellow found that mandatory vaccination was a reasonable means of protecting the health and safety of the employees and patients served by the LHINs:

> The health care system was in crisis. The LHINs are an important part of that system. The employees were needed to support it. Mandatory vaccination was meant to ensure the work would continue, safely. The "Work from home" arrangements were temporary, not permanent. It is not how the work is best accomplished. The Employers were planning to move to a hybrid model, with some at-home work and some in-office work. However, its introduction had to be delayed on account of the arrival of the Omicron variant. Further, not all of the work was remote in any event. The Employers submit the policy was reasonable when

> implemented. Given the undisputed safety and effectiveness of the vaccines, employees could reasonably be required to vaccinate in order to work. The Employers were not required to rely on less effective measures, such as RAT and masking, to achieve their important health and safety goals (at para 21).

Expert evidence also acknowledged the continued effectiveness of the two-dose vaccine in limiting the *severity* of illness, which the arbitrator concluded was a legitimate objective of the policy and provided sufficient basis for finding the vaccine mandate reasonable. Arbitrator Goodfellow further found that non-compliance with an otherwise reasonable COVID-19 mandatory vaccination policy was a disciplinary matter; placing non-complying employees on an indefinite unpaid leave of absence would have defeated the policy's goal of keeping employees safe and *working*. He declined to consider the reasonableness of the employer's alleged failure to consider the grievors individual circumstances before terminating them as that was a matter to be considered as part of the individual grievances. Lastly, the arbitrator found that the clause related to the flu vaccine in the Mississauga Halton collective agreement did not apply as COVID-19 was not the flu and the COVID-19 vaccinations were not "influenza vaccinations" as set out in the clause. The policy grievances were dismissed.

b) Vaccine Termination: The Hospital was entitled to suspend and to terminate an employee for noncompliance with the testing and vaccination requirements of a mandatory vaccination policy.

- ***Lakeridge Health v OPSEU, Local 348*** **(Herman, July 4, 2023)**

We previously reported on arbitrator Herman's decision finding the hospital's vaccination policy, including the possibility of disciplinary sanctions to be reasonable. That case did not adjudicate on any individual cases. In this follow up case involving OPSEU, arbitration Herman upheld the termination of a Lakeridge employee who refused to be vaccinated against COVID-19 or submit to Rapid Antigen Testing (RAT). The arbitrator found that the Hospital's policy requiring all unvaccinated employees be tested, was reasonable, consistent with Directive 6, and consistent with the Hospital's health and safety issues. The grievor was not entitled to treat his consent to the Hospital's policies as necessary before they could be applied to him. See our full summary of the case here.

c) *Wage Grid: There is no evidence in the collective agreement that the parties intended for total service and seniority in the bargaining unit to determine an employee's placement on the wage grid following a promotion.*

- ***Sinai Health System v NOWU*, (Misra, July 4, 2023)**

The union filed four individual and one policy grievance alleging that the employer had failed to recognize bargaining unit seniority for the purposes of placement on the wage grid when an employee from one classification successfully posted into higher classification. The parties agreed that the decision would address the policy grievance alone. The relevant collective agreement provisions read as follows:

> **Article 25 - Wages and Classification Premiums**
>
> **25.02** An employee who is promoted to a higher rated classification within the bargaining unit will be placed in the range of the higher rated classification so that they shall receive no less an increase in wage rate than the equivalent of one step in the wage rate of their previous classification (provided that they do not exceed the wage rate of the classification to which they have been promoted).
>
> **25.05** The Hospital agrees to pay and the Union agrees to accept for the term of this Agreement the wages as set out in Schedule "A" attached hereto and forming part of this agreement.

The union argued that article 25.02 was a protective provision meant to ensure that bargaining unit members saw a minimal wage increase upon promotion. An employee promoted to a higher classified job in the bargaining unit was to be assigned to the wage rate that corresponded to their years of service in the bargaining unit. The Hospital argued that a plain reading of article 25.02 obligated the employer to place promoted employees on the new wage grid that ensured they received no less an increase in wage rate than the equivalent of one step on the previous wage grid; there was no implication that an employee's total service or seniority in the bargaining unit determined their placement on the new wage grid following promotion.

Arbitrator Misra found that nothing in article 25.05 suggested that seniority or service in the bargaining unit were considerations respecting Schedule A. Where the parties wanted seniority to be a consideration throughout the collective agreement, they expressly stated so. However, there was no similar language regarding seniority (or service) in article 25. There was also nothing in the collective agreement to support the union's position that the parties had reached a common understanding on the issue and nothing in the entire collective agreement stating that placement on Schedule A was based on cumulative seniority or service in the bargaining unit. Accepting the union's argument would have rendered article 25.02 meaningless and conferred a greater economic benefit on promoted employees than what the parties had agreed to in that provision. The policy grievance was dismissed.

d) Written Submissions: Under the HLDAA, a board of arbitration has the authority to decide whether to proceed by oral or written submissions.

- ***Service Employee's International Union, Local 1 v Hospice Niagara*** **(Stienberg, Wood, Caley, July 5, 2023)**

The union requested the board of arbitration reconvene to review the previous interest arbitration decision as Bill 124 had been ruled unconstitutional. The union proposed that the hearing proceed by written submissions arguing that 1) an oral hearing was not necessary or an efficient use of resources, 2) that the six outstanding items were typical compensation issues and 3) that it had reopener issues with 17 other employers and its resources were spread very thin. The employer refused, arguing that s. 6(16) of the *Hospital Labour Disputes Arbitration Act* (HLDAA) did not empower the board to dispense with an oral hearing and proceed only with written submissions. The employer further argued that the union was exaggerating the costs associated with an oral hearing and the savings to be gained from written submissions. The relevant provision of the HLDAA reads as follows:

> 6 (16) Subject to the other provisions of this section, a board of arbitration shall determine its own procedure but shall give full opportunity to the parties to present their evidence and make their submissions.

The board found that s.6(16) of the HLDAA gives the board the authority to determine its own procedure subject to relevant objections by either party. In

this case, the board found that the employer had not made any relevant arguments that proceeding by way of written submissions prevented it from presenting evidence. While most cases, absent agreement of the parties, did proceed by oral submissions, the board was not compelled to do so; it was a matter of discretion. The employer's argument equated statutory references to a "hearing" as a requirement for an oral hearing however, no provision in the HLDAA defined a hearing or required that a hearing proceed in a particular way. The board exercised its discretion to proceed by written submissions because the number of issues to be dealt with were small, the parties would have produced written briefs in the normal course of events, and the employer would not be prejudiced.

e) Dismissal of Application: An Application to the HRTO will be dismissed where there is a civil proceeding relying on the same underlying facts as the Application and is essentially seeking damages for the same violations of the Code.

- ***Kendall v. Sinai Health System*** **(HRTO, July 5, 2023)**

The Applicant filed an Application with the HRTO in February 2019 alleging discrimination in employment because of disability, gender identity, sex, and reprisal contrary to the *Human Rights Code*. The Applicant also filed a civil claim in May 2021 alleging her employer engaged in a pattern of bad faith conduct, particular in the manner of the termination of her employment. The employer brought a motion to dismiss the application under s. 34(11) of the Code due to the civil proceeding:

> A person who believes that one of his or her rights under Part I has been infringed may not make an application under subsection (1) with respect to that right if:
>
> (a) A civil proceeding has been commenced in a court in which the person is seeking an order under section 46.1 with respect to the alleged infringement and the proceeding has not been finally determined or withdrawn; or...

The Tribunal found that both the Application and the Statement of Claim relied on the same underlying facts and overlapped in the allegations and remedies sought – namely $75,000 for injury to dignity, feelings and self respect in the Application, and the same amount claimed as punitive damages in the Claim.

The Applicant argued that a dismissal of her application would result in the risk of not having her Code rights addressed in either forum as her Statement of Claim did not contain allegations of discrimination. The Tribunal concluded that the remedies sought in the civil proceeding for "intentional infliction of mental distress...for (the employer's) inappropriate, cavalier, harsh, malicious, reckless, outrageous, and highhanded conduct" showed that they encompassed the Code based allegations in the Application, even through they were not explicitly set out in the Claim. The Application was therefore barred by section 34(11) and dismissed.

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