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Healthcare Update – June 2022

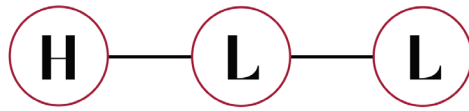
This month's update brings us the first two cases about creed related accommodation requests under a mandatory vaccination policy and another case about premium pay for extra shifts.

a) Disclosure: Grievors' vaccination records are arguably relevant to the grievance and limited disclosure must be provided to the employer

- ***Victorian Order of Nurses - Brant v Ontario Nurses' Association, (Bernhardt, May 3, 2022)***

The employer, a home healthcare service, implemented a mandatory vaccination policy in September 2021. The two grievors requested and were denied exemptions from the policy based on religious grounds. They were placed on unpaid leaves of absences and terminated for violating the vaccination policy. The union filed individual grievances and the employer requested production of the grievors' vaccination records dating back from the date they first subscribed to their religious beliefs. The employer argued that the medical records were arguably relevant to the issues in dispute since the grievors claimed opposition to all vaccination based on creed. The employer was therefore entitled to cross-examine the grievors regarding inconsistencies between their religious beliefs and their historical vaccination practice. The union argued that disclosure of decades of vaccination records would compromise the grievors' right to privacy and their personal health information.

Arbitrator Bernhardt found that vaccination records were medical documents arguably relevant, "for the purpose of determining whether there are any inconsistencies between the beliefs that they asserted at the time that they requested their accommodations... and their behaviours regarding vaccinations during the period proximate to the September 2021 Policy" (at para 46). Still, the grievors' had a right to expect privacy with respect to their personal health information. The arbitrator balanced the employer's interest in determining the sincerity of the grievors' religious beliefs, against the need to ensure that the grievors' *current* beliefs were at issue, and ordered production of the vaccination records from one year prior to March 11, 2020 (the date the pandemic was proclaimed), until the date the grievors' requested an exemption from the vaccination policy.



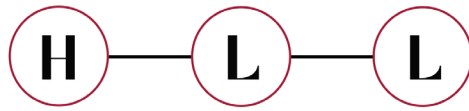
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b) Vaccination Creed Exemption: Despite inconsistencies in her conduct, an employee who holds a sincere belief, with sufficient nexus to her creed, is entitled to a vaccination exemption under the Human Rights Code

- ***Public Health Sudbury & Districts v Ontario Nurses' Association, (Herman, June 7, 2022)***

The employer issued a mandatory vaccination policy requiring all staff to be vaccinated against COVID-19 subject to medical or human rights exemptions. The grievor, a public health nurse and devout Roman Catholic, claimed an exemption on the basis of creed and was denied. The union grieved the denial, arguing that the employer had discriminated against the grievor in its refusal to allow her requested exemption, and in her subsequent suspension and termination of employment. The basis of the grievor's creed-based objection to the COVID-19 vaccines was that they used fetal cell lines in their research; she believed that receiving one of the vaccines in these circumstances would be to "condone, cooperate with, or participate in abortion." The grievor's pastor submitted a letter to the employer advising that the majority of the Latin Mass congregation, of which the grievor was a member, opposed vaccination and this opposition was in accordance with the precepts of the faith.

The union argued that the grievor had a sincerely held belief in a creed that prevented her from getting vaccinated. The grievor's belief was shared by many in her religious community, as verified by her pastor and although the Catholic Church held a different view regarding vaccines, the Church permitted individual choice about taking vaccines. The employer argued that despite the grievor's devout Catholicism, her actions in every other context were inconsistent with her claim that her faith required her to decline to be vaccinated. In particular, the grievor took no steps to inquire whether other medicines or products she and her family ingested were connected to fetal cell lines; she had herself taken vaccines in the past with connections to research using fetal cell lines; and she had administered such vaccines to others. The employer argued that the grievor was skeptical about the efficacy of the vaccines and made the decision not to be vaccinated before she was aware of any connection between the vaccines and fetal cell lines. She subsequently, latched on to the "faith-based" rationale once she realized it could help her succeed in obtaining an exemption.



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Arbitrator Herman was tasked with determining whether the employer had *prima facie* discriminated against the grievor. He found that the grievor was a member of the Latin Mass community which was a religion or creed which opposed abortion and contraception. That the community allowed personal choice regarding vaccination did not render the decision a “preference or singular belief, separate and apart from the overarching doctrine of the Latin Mass community” (at para 48). He then examined whether the grievor’s refusal to get vaccinated was sincerely based upon or connected to her faith. He noted that,

There can be multiple reasons for objecting to getting vaccinated, but as long as one of the reasons is sincerely and legitimately based upon one’s creed, as subjectively interpreted and applied, an applicant would be entitled to an exception under the Code and the vaccine policy itself. Once the grievor learned about the fetal cell line connection with the vaccines, even if that connection is factually and objectively quite remote, if the grievor sincerely believes that her faith does not allow her to get vaccinated, that would be sufficient grounds for granting her request for an exemption (at para 50).

Arbitrator Herman noted that the grievor took no steps to inquire whether the medicines she and her family were then taking had any connections to fetal cell lines and that the grievor had administered vaccines that used fetal cell lines in their development. These factors raised questions about the grievor’s sincerity in claiming that her faith prevented her from getting vaccinated. Nevertheless, he concluded that the grievor’s evidence about her religious beliefs and how she had conducted her life in accordance with her faith, was credible:

Despite the inconsistencies discussed above, it is unlikely that the grievor has fabricated or simply “latched” on to a creed-based claim for an exemption in order to avoid getting vaccinated. It is unlikely that a long-standing devout member of the Latin Mass community has in effect fabricated the assertion that her faith requires this of her. To do so would require a substantial repudiation of the grievor’s long-standing system of beliefs and how she exercises her faith (para 58).

Since the grievor held a sincere belief, with sufficient nexus to her creed, she was entitled to an exemption based on the provisions of the *Human Rights Code*. The grievor had been *prima facie* discriminated against when the



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employer denied her exemption under its vaccination policy. The matter was remitted to the parties as the employer had reserved the right to call evidence and make arguments regarding whether and/or how the grievor could be accommodated in all the circumstances.

c) Voluntary Shifts: An employee who is offered and accepts a shift that results in their working more than six (6) consecutive days is entitled to the overtime rate for hours worked on consecutive days in excess of six (6) days

- ***Ottawa Hospital v Canadian Union of Public Employees, (Flaherty, May 30, 2022)***

The grievances involved employees who were offered and voluntarily accepted shifts, which resulted in them working more than six (6) consecutive days. The union argued that shifts worked after six (6) consecutive days should be paid at the applicable overtime rate of pay, including if appropriate, double-time, under article L.5.1(e). The Hospital argued that the offer and acceptance of voluntary shifts does not trigger the requirement of Article L.5.1(e) which provided as follows:

No full-time or regular part-time employee shall work more than six (6) consecutive days. If however, exigency requires that he works more than six (6) consecutive days he shall be paid at the overtime rate for hours worked on consecutive days in excess of six (6) days. This shall not apply where a regular part-time employee is offered and voluntarily accepts an additional shift in accordance with L.5.2(a).

Most of the grievors are full-time employees, although some were regular part-time employees who were working temporarily in full-time positions. Arbitrator Flaherty found that shifts offered and accepted voluntarily were not excluded from Article L.5.1(e) as the parties did not use the word “scheduled” in paragraph (e) as they had in other articles in L.5.1. The arbitrator also found that the plain and ordinary definition of the term “exigency” can include a sudden or urgent need for overtime work that arises after the schedule is released. L.5.1(e) was not limited to pre-scheduled work and was triggered where the Hospital required work to be done and that work was performed by an employee who worked more than six consecutive days. This was the case whether the shifts were scheduled, otherwise imposed by the Hospital, or voluntarily accepted by the employee.



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