## INTRODUCTION

Many of our clients are asking important questions about legal issues related to the COVID-19 pandemic. This issue of our Newsletter, like the last issue, continues to address these issues.

As always, please feel free to contact us with any questions you may have in relation to any of the topics covered in this Newsletter.

We wish everyone good health through the Holiday Season and all the best in the New Year.

CaleyWray is honoured to announce that the firm has been recognized this month by the Globe and Mail as one of Canada's top law firms for 2022.

## INSIDE THIS ISSUE:



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# A. EARLY DECISIONS REGARDING MANDATORY COVID-19 VACCINATION: *UNITED FEDERATION OF FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 333 V. PARAGON PROTECTION LTD.* AND *POWER WORKERS' UNION V ELECTRICAL SAFETY AUTHORITY*

Raymond Seelen

Since vaccinations against COVID-19 first became a possibility, employers across the country have been considering whether or not they are entitled to unilaterally implement a mandatory vaccination policy. Similarly, trade unions have been faced with requests by members seeking actions against such policies. Court and arbitral decisions about the implementation of these policies will be inevitable. The first two decisions on this topic have now been released - *United Federation of Food and Commercial Workers Canada, Local 333 v Paragon Protection Ltd* ("*Paragon*") and *Power Workers' Union v Electrical Safety Authority* ("*ESA*").

Interestingly, each decision reached a different conclusion with respect to the policies in question. In *Paragon*, Arbitrator Von Veh found the employer's policy to be permissible. In *ESA*, Arbitrator Stout ordered the employer's policy to be changed. It is important to understand the different facts underlying each decision.

*Paragon*

Paragon Security Ltd is a private security firm which contracts with clients for the provision of security services. Once vaccination became available, many of Paragon's clients began to specifically require that security guards be vaccinated.

Paragon's policy on vaccination includes a number of key features:

- Staff were required to file declarations that they were fully vaccinated by a certain deadline. Staff were not required to provide vaccination records, but the employer reserved the right to request such records in the future.

- Staff were given paid time off for the purpose of attending vaccination appointments.

- Staff who failed to provide the required declarations could be subject to disciplinary consequences.

- Exemptions for medical or religious reasons were available, but staff who received an exemption faced the risk of being reassigned to a separate worksite, increased testing requirements or being placed on an unpaid leave.

UFCW argued that Paragon's Policy was contrary to the *Health Care Consent Act*, the Collective Agreement and the *Human Rights Code*. UFCW also asserted that the Policy was an unreasonable rule that Paragon had unilaterally implemented.

Arbitrator Von Veh found that the employer's policy was reasonable. He relied on the following reasons:

- The policy struck an appropriate balance between protecting the rights of staff who did no wish to be vaccinated while also protecting Paragon's employees, the employees of Paragon's clients and members of the public with whom Paragon's employees interact.

- The policy is a reasonable precaution to protect workers and is in compliance with Paragon's obligations under the *Occupational Health and Safety Act*.

- The collective agreement between Paragon and UFCW contemplated that staff would be vaccinated where a client of Paragon required such vaccinations.

Most significantly, Arbitrator Von Veh considered the *Human Rights Code* and whether the requirement to be vaccinated was discriminatory. He endorsed the Ontario Human Rights Commission's policy on COVID-19 vaccinations. As set out in that policy, there is no *Code* based discrimination where a person suffers adverse treatment because of a personal preference not to be vaccinated. The *Code* provides protection only where the discrimination in question is linked to a protected ground such as disability, creed or religion. Personal preferences do not qualify as a "creed" for the purposes of the *Code*. Even where a legitimate exemption is made out, an employer is only obligated to accommodate to the point of undue hardship.

*ESA*

The Electrical Safety Authority's vaccination policy required all staff to become fully vaccinated or face disciplinary consequences. The Power Workers' Union grieved the policy on the basis that it was unreasonable and a significant over-reaching exercise of management rights, which could not be justified by any workplace dangers or hazards. In response, the ESA argued that the policy was necessary to fulfill their legal obligations to take every reasonable precaution to protect their workers and the public.

According to Stout, the ESA had no authority to impose threats of discipline or discharge in the absence of a government mandate applicable to ESA workplaces, unless such discharge was on the basis of a rule which could be reasonably imposed based on the current state of the pandemic. Arbitrator Stout considered the following factors, among others, in assessing the reasonableness of the policy:

- There is no government mandate that the ESA employees must be vaccinated.
- The ESA is not a workplace where the risks are high or where there are vulnerable populations, such as in healthcare settings or long-term care homes (where mandatory vaccination policies may be reasonable and necessary).
- The vast majority of work undertaken by the ESA was completed remotely, and many employees have the right to continue working remotely under the Collective Agreement.
- The ESA had not had a breakout in their workplace.
- The ESA had a prior voluntary disclosure and testing policy which the ESA judged to be reasonable and appropriate to protect employees and stakeholders.
- The vast majority of ESA employees had voluntarily been vaccinated and disclosed their status to the ESA. The employees who did not disclose their vaccination status agreed to be tested on a regular basis.
- The ESA could not prove a significant problem existed regarding third-party access or travel. The Union indicated that they would raise no objection to travel only being assigned to those employees who are fully vaccinated.
- The ESA had not previously required any employee to be vaccinated as a condition of employment.

Arbitrator Stout concluded that disciplining or discharging an employee for failing to be vaccinated, when it is not a requirement of being hired and where there is a reasonable alternative, was unjust in the circumstances.

In reaching his conclusion, Arbitrator Stout noted that context is extremely import when assessing the reasonableness of a workplace rule or policy that may infringe upon an individual employee's rights, stating at para. 17:

> In workplace settings where the risks are high and there are vulnerable populations (people who are sick or the elderly or children who cannot be vaccinated), then mandatory vaccination policies may not only be reasonable but may also be necessary and required to protect those vulnerable populations.

Arbitrator Stout added that the reasonableness of any vaccination policy may change as the circumstances of the pandemic change, and that what may be considered unreasonable today may become reasonable in the future, at para. 19:

> It must also be noted that the circumstances at play may not always be static. The one thing we have all learned about this pandemic is that the situation is fluid and continuing to evolve. What may have been unreasonable at one point in time is no longer unreasonable at a later point in time and vice versa.

Finally, Arbitrator Stout emphasized that his decision ought not be seen as "any form of vindication for those who chose, without a legal exemption under the Ontario Human Rights Code, not to get vaccinated." According to Stout, "the choice of individual employees not be vaccinated may result in consequences at a later date and in different circumstances. Those who continue to refuse to be vaccinated are not just endangering their health but may also placing their employment in jeopardy" (paras. 4, 42).

*Conclusion*

The ESA and Paragon decisions reach different conclusions, but the principles underlying each are perfectly compatible. Arbitrators Von Veh and Stout appear to agree that there is no clear cut rule with respect to the ability of employers to implement COVID-19 vaccination mandates. Rather, each case will be determined on the basis of the underlying facts.

In *Paragon*, Arbitrator Von Veh relied on the fact that the security guards dealt with the public and with clients who expected them to be vaccinated. He also relied on the fact that parties had considered mandatory vaccinations prior to the pandemic and had agreed that such a requirement was acceptable. In short, the policy reflected the very real risks faced by front-line staff interacting with the general public during a pandemic.

By contrast, in ESA, Arbitrator Stout was unable to find a similar level of pressing risk. He noted specifically that the vast majority of work was being performed remotely and regular testing would be sufficient to mitigate the risk under current conditions. Unlike in Paragon, the collective agreement between the ESA and the Power Workers' Union contained no language regarding vaccinations and there was no other governmental or statutory authority to require them.

The bottom line is that arbitrators will take a contextual approach in determining if a mandatory vaccine policy is reasonable. In high-risk workplaces with elderly or vulnerable populations, mandatory vaccination policies may not only be reasonable, but necessary to protect those vulnerable populations. At the same time, an employer cannot discharge an employee for refusing to vaccinate unless the requirement to vaccinate is proportionate in response to a real and demonstrated risk or business need.

## B. ONTARIO SUPERIOR COURT DENIES INJUNCTION REQUEST THAT WOULD HAVE SUSPENDED MANDATORY VACCINE POLICIES PENDING THE RESULT OF GRIEVANCE PROCESSES

Erin Carr

In a joint decision dated November 20, 2021, Justice Jasmine Akbarali of the Ontario Superior Court dismissed two applications for interlocutory injunctions by Amalgamated Transit Union, Local 113 ("ATU") against the TTC, and National Organized Workers Union ("NOWU") against Sinai Health Authority, which would have restrained the employers from enforcing their mandatory vaccination policies pending the result of the grievance processes.

The policies in question require employees to be fully vaccinated against COVID-19 unless an approved exemption applies pursuant to Ontario's *Human Rights Code*. The policies provide that non-exempted employees who do not prove that they are fully vaccinated will be placed on unpaid leaves of absence or possibly dismissed.

The unions argued that the injunctions were necessary to preserve members' rights pending the completion of the grievance processes. They argued that without the injunctive relief, at least some unvaccinated members would be coerced into becoming vaccinated, contrary to principles of informed and voluntary consent. They also argued that if the injunction was denied and the members were forced to get vaccinated, the arbitration would become moot, as no remedy exists to undo a vaccine.

Justice Akbarali ultimately denied the injunction requests. First, NOWU's request was denied on the basis that the Court had no authority to deal with such an injunction once the labour arbitration process was already underway. The Court considered whether it ought to exercise its residual jurisdiction to issue relief in any event, ultimately concluding that there was no reason to intervene as the arbitration process was available to provide an adequate remedy.

Justice Akbarali then turned to the ATU's request, concluding that the ATU failed to meet the criteria for granting an injunction:

> [113] Considering all elements of the RJR-MacDonald test together, despite the existence of a serious issue to be tried, I find that it is in the interests of justice to dismiss the request for interim injunctive relief. The balance of convenience weighs strongly in favour of the TTC, and the harm which the applicant's members risk if the injunction is not granted is reparable.

Justice Akbarali considered Justice Dunphy's ruling in *Blake v. University Health Network*, 2021 ONSC 7139 ("*Blake*"), in which the Ontario Superior Court denied an injunction sought by a number of University Health Network ("UHN") employees which, if granted, would have prevented the UHN from terminating employees for refusing to be vaccinated against COVID-19.

As in Justice Akbarali's decisions dealing with NOWU and ATU, the UHN employees' injunction request was denied. Justice Dunphy ruled that the Court not have the authority to deal with the dispute because the essential character of the dispute fell within the exclusive jurisdiction of a labour arbitrator. The Court noted that the unions had already taken the appropriate action to challenge the policy, including a variety of grievances, and had made strategic choices in their capacity as collective bargaining agents. The Court therefore denied the requested injunction.

The bottom line is that in workplaces covered by a collective agreement, any challenge to a vaccination policy must be brought through the grievance arbitration process.

Citations:

> *Amalgamated Transit Union, Local 113 et al v. Toronto Transit Commission and National Organized Workers Union v. Sinai Health System*, 2021 ONSC 7658
>
> *Blake v. University Health Network*, 2021 ONSC 7139 (CanLII)

## C. COVID-19 INFECTIONS, VACCINATIONS AND WSIB CLAIMS

Sukhmani Virdi

This article serves as a follow up to an article in our Spring 2020 newsletter outlining the WSIB's adjudicative approach to COVID-19 infection claims.

In that article, we explained how the WSIB has adopted a highly fact-driven approach to adjudicating claims for COVID-19 infections. The WSIB considers both occupational risk factors (such as job requirements for travel on a regular basis, exposure to the public, workplace outbreaks, shared workspace, etc.) and non-occupational factors (such as home environment, social behaviour and non-work-related activities).

The WSIB will require medical documentation to confirm the COVID-19 diagnosis and will consider the timing of the diagnosis to the risk factors before deciding whether it was

more likely than not that the worker contracted COVID-19 in the course of their employment.

Since our previous article, the focus and concern for our clients (and workers generally) has shifted to two new issues – entitlement for long-haul COVID-19 and adverse reactions to COVID-19 infections required by an employer.

For long-haul COVID-19 claims, a worker initially tests positive but then later tests negative despite continuing to have symptoms longer than four weeks from their initial infection. Long-haul COVID-19 symptoms vary from person to person and can include physical, cognitive, psychological and emotional effects.

In the context of WSIB claims, once a worker has tested negative, it is difficult to correlate their persistent symptoms to their COVID-19 infection unless there is subsequent and supporting medical evidence that indicates that the long-haul COVID-19 symptoms are a direct result of the initial infection.

For physical symptoms, such as persistent coughing, chest pain or shortness of breath, it appears that the WSIB is more likely to accept that the worker continues to experience symptoms of the COVID-19 infection.

However, cognitive, psychological and emotional symptoms have proven to be more challenging in being considered as continuous symptoms of the original infection. Rather, these types of symptoms may be compensable as secondary conditions to the worker's COVID-19 infection. Such claims will likely require compelling medical evidence from an appropriate medical specialist clearly demonstrating the causal connection from the COVID-19 infection to the onset of the various symptoms.

With respect to the possibility of adverse reactions from COVID-19 vaccinations, prior to COVID-19, the WSIB had a policy granting entitlement to workers who experienced adverse reactions from compulsory immunization procedures.

In the context of COVID-19, a worker who is required to be vaccinated against COVID-19 as part of their employment and experiences an adverse rection to the vaccination may be granted entitlement to healthcare benefits.

It is important to note that the worker must have been vaccinated as part of a workplace requirement. Without any such requirement, it is likely that the WSIB will not consider the act of vaccination as being "work-related."

In the existing WSIB policy and in the available case law, there is no definition as to what constitutes an "adverse reaction" entitling a worker to benefits after vaccination. However, for all WSIB claims, in order to be entitled to Loss of Earnings benefits, a worker must be either totally disabled from working or be available for modified work and

have none offered by their employer. Given this, we expect that any eligible adverse reaction must completely prevent or greatly impair a worker from being able to perform their regular duties before the WSIB will provide Loss of Earnings benefits.

## D. NORTHERN REGIONAL AUTHORITY V. HORROCKS

Nick Ruhloff-Queiruga

On October 22, 2021, the Supreme Court of Canada released its decision in *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42. The decision, at its core, reaffirmed the state of the law with respect to the exclusive jurisdiction of labour arbitrators to determine disputes arising out of collective agreements between unions and employers.

### FACTS AND PROCEDURAL HISTORY

Linda Horrocks was suspended for attending work under the influence of alcohol. After she disclosed her alcohol addiction, she refused to enter into a "last chance agreement" requiring that she abstain from alcohol and receive addiction treatment. Her employment was terminated as a result. Her union filed a grievance which was then settled on substantially similar terms as the original last chance agreement. Shortly thereafter, Ms. Horrocks was terminated for allegedly breaching the terms of the settlement.

Following her termination, Ms. Horrocks filed a complaint with the Manitoba Human Rights Commission (the "Commission"). The Commission appointed an adjudicator to hear Ms. Horrocks' case. Her employer made a preliminary objection arguing that the Commission's adjudicator had no jurisdiction to hear the complaint in light of the SCC's decision in *Weber*. The adjudicator ruled in favour of Ms. Horrocks, stating that while *Weber* does stand for the proposition that disputes arising from the interpretation, application, administration or violation of the collective agreement of a collective agreement fall within the exclusive jurisdiction of labour arbitrators, the essential character of Ms. Horrocks' dispute was a human rights violation – not a violation of the collective agreement.

### SCC DECISION

In a 6-1 majority decision, the SCC disagreed with the Commission's adjudicator and allowed the appeal. The Court succinctly summarized its view of the law:

> Properly understood, the decided cases indicate that, where labour legislation provides for the final settlement of disputes arising from a collective agreement, the jurisdiction of the arbitrator or other decision-maker empowered by this legislation is exclusive.

> This applies irrespective of the nature of the competing forum, but is always subject to clearly expressed legislative intent to the contrary.

The SCC went on to say that the mere existence of a competing statutory scheme is not enough to displace the labour arbitrator as the sole forum for disputes arising out of a collective agreement. In order to establish that the legislature intended concurrent jurisdiction between statutory tribunals and labour arbitrators, "some positive expression of the legislature's will is necessary to achieve that effect." Accordingly, the SCC summarized that resolving jurisdictional contests between labour arbitrators and statutory tribunals requires a two-step "test." The first step is determining whether legislation grants the labour arbitrator exclusive jurisdiction. This will also require determining whether legislation empowering a competing statutory tribunal grants it concurrent jurisdiction with the labour arbitrator. If at the first step it is found that the labour arbitrator has exclusive jurisdiction, the second step is to determine whether the particular dispute falls within the scope of that exclusive jurisdiction.

At the first step, the SCC found that *The Human Rights Code* of Manitoba did not contain an express displacement of labour arbitrators' exclusive jurisdiction to determine collective agreement disputes found Section 78 of *The Labour Relations Act* of Manitoba. Accordingly, the next step was to determine whether the essential character of Ms. Horrock's fell within the labour arbitrator's exclusive jurisdiction. The SCC found that, at its core, Ms. Horrocks' complaint was "that her employer exercised its management rights in a way that was inconsistent with their express and implicit limits." The SCC concluded that such a dispute "falls solely to the arbitrator to adjudicate."

Critically, the decision in *Horrocks* dealt with Manitoba legislation. The SCC made clear that the two-step "test" may very well lead to different results depending on the particular wording of a statute. The SCC pointed to BC's *Human Rights Code*, the *Canada Labour Code* and the *Canadian Human Rights Act* as examples of statutes that necessarily imply that tribunals have concurrent jurisdiction by virtue of the fact that they allow adjudicators to defer consideration of human rights complaints if it can be dealt with in the grievance process. Sections 45 and 45.1 of the Ontario *Human Rights Code* arguably achieve the same necessary implication by allowing the Tribunal to defer or dismiss applications in accordance with the Tribunal's Rules or where the Tribunal is of the opinion that "another proceeding has appropriately dealt with the substance of the application." The Tribunal has regularly interpreted "proceeding" as including grievance arbitrations under collective agreements. The Ontario Court of Appeal, relying on predecessor provisions to sections 45 and 45.1, has previously found that the Tribunal has concurrent jurisdiction with labour arbitrators (*Ontario (Human Rights Commission) v. Naraine*, 2001 CanLII 21234 (ONCA)).

**SUMMARY**

The SCC's decision in *Horrocks* specifically dealt with labour relations and human rights statutes in Manitoba. In Ontario, for example, the applicable statutes are different and already contemplate concurrent jurisdiction. In practice, the Human Rights Tribunal of Ontario regularly defers or dismisses applications that disclose human rights complaints that are underway or have already been dealt with at arbitration. This decision will not likely impact this practice. Moving forward, the *Horrocks* decision reaffirms that labour arbitration will continue to be the primary forum for the enforcement of human rights in unionized workplaces.

## E. WORKING FOR WORKERS ACT

Nick Ruhloff-Queiruga

On October 25, 2021, the Ontario Government tabled Bill 27, short-titled the *Working for Workers Act, 2021* (the "*Act").* The *Act* contains a number of amendments to different pieces of legislation affecting workers and workplaces, including the *Employment Standards Act, 2000* (the "*ESA*"), the *Occupational Health and Safety Act* (the "*OHSA*") and the *Workplace Safety and Insurance Act, 1997* (the "*WSIA*"), among others. Some of the main components of the *Act* are described below.

**Disconnecting from work policies**

The *Act* is amending the *ESA* to require that employers that employ 25 or more workers must pass a "disconnecting from work" policy. The *Act* defines "disconnecting from work" as "not engaging in work-related communications, including emails, telephone calls, video calls or the sending or reviewing of other messages, so as to be free from the performance of work."

The *Act* does not contain any substantive provisions regarding what must be included in a disconnecting from work policy. While the *Act* requires that all policies shall include "such information as may be prescribed", no regulations have been passed to that effect as of yet.

Despite the Ontario Government's attempts to persuade the voting public that they have introduced a "right to disconnect from work", the law falls well short of establishing any such thing. The law simply requires that employers have a policy on disconnecting from work. At the time of writing, the government has not passed any regulations that require any specific contents in these policies - including a "right" to disconnect. At present, the

Ontario government is leaving it up to employers to define how and when their employees might disconnect from work.

**Prohibition on non-compete agreements**

The *Act* is also adding a section to the *ESA* generally banning non-compete agreements. A non-compete agreement is defined as "an agreement, or any part of an agreement, between an employer and an employee that prohibits the employee from engaging in any business, work, occupation, profession, project or other activity that is in competition with the employer's business after the employment relationship between the employee and the employer ends." The Act makes an exception for non-compete agreements entered into as part of a sale of business in limited circumstances.

**New licensing regime for temp agencies and recruiters**

The *Act* is introducing a new licensing regime for temp agencies and recruiters under the *ESA*. The *Act* prohibits persons from operating a temp agency or acting as a recruiter unless they have been licensed. The *Act* also provides for a regime of applying for licenses and sets out the rules and regulations for what license applications shall contain, when licenses will be issued, how licenses may be revoked and the appeal process for refusals or revocations of licenses.

**Requiring businesses to provide delivery workers washroom access**

The *Act* is amending the *OHSA* to require owners of workplaces to "ensure that access to a washroom is provided, on request, to a worker who is present at the workplace to deliver anything to the workplace, or to collect anything from the workplace for delivery elsewhere." This general rule is subject to a number of broad exceptions, including whether providing access would not be reasonable or practical for "reasons relating to the health or safety of any person at the workplace" or if providing access would not be reasonable or practical "having regard to all the circumstances" including the nature of the workplace, the type of work at the workplace, the conditions of the workplace, the security of any person at the workplace and the location of the washroom within the workplace.

**Employer-friendly amendments to the *WSIA***

The Act proposes to amend the *WSIA* by allowing the Workplace Safety and Insurance Board (the "WSIB") to redistribute funds in its surplus reserve to employers that meet certain "prescribed" criteria. No regulations have been passed to this effect yet but a government press release has said that surplus funds will be distributed to "safe" employers. Subject to the contents of any new regulations defining what "safe" might mean, the new regime of surplus distribution may work to undermine injured workers by providing employers with another incentive to challenge employee claims. The *Act* also

proposes to amend the *WSIA* to allow the Board to enter into an agreement with "any person or entity" for the purpose of administering the *WSIA*. The same government press release referred to above has described this proposed amendment as a way to streamline payroll deductions for Ontario employers by empowering the WSIB to enter into an agreement with the Canada Revenue Agency.

## F. FEDERAL COURT DISMISSES INJUNCTION REQUEST THAT WOULD HAVE SUSPENDED VACCINATION REQUIREMENTS FOR FEDERAL SUPPLIER PERSONNEL

Erin Carr

In a decision dated November 13, 2021, Justice McHaffie of the Federal Court dismissed a motion for an interlocutory injunction that would have suspended the Federal Government's COVID-19 vaccination requirement for "supplier personnel" until a challenge was heard on the lawfulness of the policy.

Under the Government's policy, federal government employees who are unwilling to be fully vaccinated or to disclose their vaccination status will be placed on leave without pay starting on November 15, 2021, absent a human right to refuse the vaccine.

The Applicant, Mr. Lavergne-Poitras, is an employee of PMG Technologies Inc., a supplier to the federal government. Mr. Lavergne-Poitras argued that the Court should grant the injunction so that unvaccinated employees of government suppliers would not have their *Charter* rights infringed before a challenge on the merits of the policy could be heard.

Justice McHaffie dismissed the motion on the basis that Mr. Lavergne-Poitras failed to meet the three requirements to issue an injunction:

- First, Mr. Lavergne-Poitras failed to demonstrate that there was a "serious issue" to be decided on the merits of the vaccine policy. According to Justice McHaffie, there was no question as to the Government's authority to implement the policy, as the policy was validly issued, and further, the evidence on file did not show that any deprivation of *Charter* rights was contrary to the principles of fundamental justice;

- Second, Mr. Lavergne-Poitras failed to establish that he would suffer "irreparable harm" if the injunction was not granted. The harm Mr. Lavergne-Poitras faced was the loss of his job, which could be compensated in money damages, and therefore was not considered "irreparable" in the sense required to obtain an injunction; and

- Third, the "balance of convenience" did not favour granting the injunction. In other words, the material harm to the public interest if the injunction was granted significantly outweighed the harms identified by Mr. Lavergne-Poitras.

Justice McHaffie also rejected Mr. Lavergne-Poitras's argument that his *Charter* challenge addressed "arbitrary decisions of the Government that are not based on scientific evidence and lack transparency," stating (para. 96):

> The evidence shows that COVID-19 poses, and continues to pose, a significant health risk to Canadians, including federal government employees. The Government of Canada is justified in taking steps to protect the health and safety of its employees by reducing their exposure to the risk of infection. The evidence that vaccines reduce the likelihood of transmission is not contested. Requiring supplier personnel who will come in contact with government employees at their place of work is a rational measure to reduce exposure and promote the health and safety of employees. In the words of Justice Pentney in rejecting an interlocutory injunction in respect of COVID-19 quarantine measures, "the challenged measures are a rational response to a real and imminent threat to public health, and any temporary suspension of them would inevitably reduce the effectiveness of this additional layer of protection": *Spencer v Canada (Attorney General)*, 2021 FC 361 at para 114.

Finally, Justice McHaffie considered Mr. Lavergne-Poitras's alternative argument that his workplace was "low risk" for COVID-19 transmission and therefore, the policy should be suspended in his workplace in particular. Justice McHaffie dismissed Mr. Lavergne-Poitras's request, finding that his reasons applied equally to both the broader and narrower requested relief (para. 101):

> I also agree with the Attorney General that the positive impact of the policy is weakened by any attempt to apply a piecemeal approach to its implementation. The risks of COVID-19 transmission may well be higher or lower in different federal workplaces. But it is simply unfeasible to adopt as many different policies as there are federal workplaces.

In the result, both of Mr. Lavergne-Poitras's requested injunctions were denied.

Although the Court did not deal with the merits of the Government's vaccine policy, the decision is notable because it shows that courts will not interfere with government action taken pursuant to a validly issued policy that complies with human rights legislation. If unvaccinated employees continue to wait for a decision on the merits of the policy without

getting vaccinated, they will likely be placed on an unpaid leave or face dismissal on the basis that they failed to comply with the vaccine policy.

## G. EMPLOYMENT MINISTER ANNOUNCES THOSE WHO LOSE THEIR JOBS BECAUSE THEY REFUSE TO BE VACCINATED MAY BE INELIGIBLE FOR E.I.

Erin Carr

On October 22, 2021, Employment and Social Development Canada issued a notice to employers enforcing vaccine mandates with guidance on filling out a record of employment ("ROE"), which will impact an employee's eligibility for E.I. benefits, the amount of E.I. benefits, and how long E.I. benefits will be paid.

Employment Minister Carla Qualtrough confirmed that if an employee does not report to work, is suspended, or is dismissed for refusing to comply with a vaccine mandate, the employer should indicate on the ROE that the employee quit, took a leave of absence, or was dismissed—potentially disqualifying them for E.I.

The move has not been considered Parliament, so its precise impact is not yet known, and the information subject to change. However, it seems likely that the assessment of E.I. eligibility will still be completed on a case-by-case basis, in light of the factors of that individual's employment, including whether or not COVID-19 vaccination was a necessary condition of employment.

In any event, the rule should not affect people with a legitimate human right to refuse the COVID-19 vaccine, including those with a pre-existing religious belief or medical condition that prevents them from being vaccinated. In other words, those who experience an interruption of earnings due to their inability to be vaccinated based on a human rights ground will still be eligible for E.I. benefits.

***Note:*** *The information contained in this Newsletter is not intended to constitute legal advice. If you have any questions concerning any particular fact situation, we invite you to contact one of our lawyers.*

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