INTRODUCTION

Many of our clients continue to ask important questions about legal issues related to the COVID-19 pandemic. This issue of our Newsletter, like the last issue, continues to be focused on 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.

It has been a very long two years of isolation from friends and colleagues due to the pandemic. We are hopeful that the coming months – and the welcome warmer weather - will see case counts drop and a return to something resembling normalcy. In the meantime, the administrative staff and lawyers at CaleyWray wish all of our clients and their loved ones good mental and physical health.

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A. TERMINATION VERSUS INDEFINITE LEAVE OF ABSENCE – IMPORTANT DISTINCTIONS IN COVID-19 VACCINATION POLICIES

Raymond Seelen

To many workers who have chosen not to become vaccinated, there is little practical difference between being placed on an indefinite leave of absence pending vaccination and being terminated outright. However, this issue has emerged as an important point of contention in litigation regarding vaccination policies. These cases have dealt with the question of whether or not a vaccination policy is "reasonable". Part of the answer has included a discussion of whether or not it is reasonable to terminate someone for the decision not to become vaccinated, or whether placing this person on a leave of absence is sufficient.

Numerous decisions on vaccination policies addressed whether the possibility of disciplinary sanctions would result in the policy itself being unreasonable.

This issue was first addressed in *Electrical Safety Authority,* 2022 CanLII 343. In that decision, Arbitrator John Stout directly states that disciplining an employee for failing to be vaccinated is not permissible where there is a reasonable alternative to the termination. The Arbitrator goes on to note that, where an employee is absent for an unreasonable amount of time, or where an employee refuses to comply with reasonable alternatives to vaccination, then disciplinary action may be warranted. Such discipline must be assessed on a just cause standard. It is notable that Arbitrator Stout specifically indicated that, in the circumstances of this particular employer, there were satisfactory alternatives available (specifically, remote work and rapid testing) to permit staff to work without creating a risk of spreading the virus. It is also important to note that Arbitrator Stout's award was released prior to the onset of the Omicron variant, which has substantially reduced the efficacy of rapid testing programs.

In *Bunge Hamilton Canada,* 2022 CanLII 43 Arbitrator Robert Herman held that a policy which held that employees who failed to meet the vaccination deadline would "not be allowed on the site and put on unpaid leave pending a final determination on their employment status (up to and including termination of employment)" was reasonable. On the issue of whether or not it was reasonable for the policy to contemplate the discipline of a non-vaccinated employee, Arbitrator Herman stressed that it may be reasonable to issue discipline in certain circumstances and that it was reasonable for the policy to warn employees of that fact. He also stressed that any such termination could be grieved and that the employer would be required to justify its discipline on a just cause standard and with reference to the circumstances known at the time of the termination. Arbitrator Herman went on to consider an FAQ document which indicated that termination was inevitable for unvaccinated staff. Arbitrator Herman held that this document was not

a proper part of the vaccination policy and that it was in fact contrary to the explicit wording of the policy. While Arbitrator Herman did not expressly say it, the implication seems to be that the policy would have been unreasonable had the FAQ document and its mandatory termination requirement been included.

In *Chartwell REIT*, 2022 CanLII 6832, Arbitrator Gail Misra considered a vaccination policy that indicated a non-compliant employee would be placed on an indefinite leave of absence or have their employment terminated. Notwithstanding the policy's language, at the time of the hearing, the Employer had already terminated 14 employees for a refusal to get the first two doses of the vaccine after placing them on leave of absence for only 2 months. The Employer requested a "bottom-line" decision on whether its prior terminations were reasonable. Arbitrator Misra found that the Employer was treating the policy as having an automatic termination provision and that such an automatic termination was unreasonable. Arbitrator Misra stressed that termination cannot be automatic and must occur with consideration of the circumstances of the employee, including the presence of reasonable alternatives.

In *Elexicon Energy Inc.,* 2022 CanLII 7228, Arbitrator Michael Mitchell briefly addressed this issue. The Elexicon policy indicated that unvaccinated employees would be placed on an indefinite leave of absence and could be subject to disciplinary action up to and including termination. While he did not indicate that the termination of an employee for non-compliance with the policy would be unreasonable per se, Arbitrator Mitchell did state that the policy would likely be unreasonable if applied to workers who were working exclusively from home. He also implied, but did not outright state, that a termination under the policy might be unreasonable if reasonable accommodations could be made to allow the employee to work safely.

In *Revera Inc.,* 2022 CanLII 28657, Arbitrator White was directly asked to provide a ruling on whether or not non-compliance with a vaccination policy can reasonably result in a termination. Arbitrator White considered the *Electrical Safety Authority* decision from Arbitrator Stout and placed emphasis on his comment that an employee could not be disciplined where there was a reasonable alternative. As the employer before Arbitrator White operated both retirement and long-term care homes, Arbitrator White held that there was no reasonable alternative to vaccination for this specific group of employees. Arbitrator White also considered the *Chartwell REIT* decision and found that it was distinguishable on the basis that the policy before him was not an automatic termination. Arbitrator White went on to hold that typically, failure to comply with a reasonable vaccination policy will eventually merit termination. However, he stressed that the ultimate question of whether any specific termination was justified would depend on the facts of the termination.

Similarly, Arbitrator Mark Wright sought to reconcile the *Electrical Safety Authority* and the *Chartwell REIT* decisions with the other vaccination policy jurisprudence. In *Coca-Cola Bottling Company*, 2022 CanLII 25769, he held that a policy which contemplated

disciplinary consequences for unvaccinated employees was reasonable. Similar to Arbitrator White, he distinguished the *Electrical Safety Authority* case by finding that there was no reasonable alternative to vaccination for Coca-Cola employees. Unlike in *Electrical Safety Authority*, the workers at Coca-Cola could not work from home and the testing regime implemented by Coca-Cola had ultimately failed in the face of the Omicron variant. As with Arbitrator White, Wright declined to apply the *Chartwell REIT* decision on the basis that Coca-Cola did not have an automatic termination provision.

Taking all of the decisions above into consideration, several key principles emerge:

1. An indefinite leave of absence is an appropriate first step where an employee is not in compliance with a mandatory vaccination policy.

2. Termination or other disciplinary action can be a possible result of non-compliance with a vaccination policy; however, the right of an employer to terminate any employee in this way must be demonstrated on a just cause standard.

3. Employees should not be terminated where reasonable alternatives to termination – such as work from home – exist. Rapid antigen testing has been found not to be a reasonable alternative in multiple cases, including *Coca Cola Bottling Company*.

4. Termination cannot be an automatic result of the policy. Termination must follow a contemplation of the specific circumstances of the employee in question, including whether a reasonable alternative to termination exists.

5. Where termination is a possible result of the application of the policy, the policy can (and probably should) expressly say so.

A further point which bears repeating is Arbitrator White's finding that a termination following non-compliance with a vaccination policy will typically be reasonable. Arbitrator White made this comment in the context of a policy grievance and stressed that his ruling cannot and should not be applied mechanically. Ultimately, as individual grievances for terminated employees continue to be argued, we anticipate that further elaboration on this topic will be given.

B. WHO BEARS THE COST OF WORKPLACE COVID-19 TESTING REQUIREMENTS?

Erin Carr

The question of whether the cost of workplace COVID-19 testing requirements falls on employees or employers was addressed by Arbitrator Murray in a decision between Ontario Power Generation and the Power Workers Union.

In *Ontario Power Generation and the Power Workers' Union*, the policy at issue required employees to either be vaccinated for COVID-19 or participate in twice-weekly rapid antigen testing. Unvaccinated employees had to pay for their tests and were not paid for the time taking and reporting the test results. The penalty for non-participation was a six-week leave without pay, followed by termination of employment for cause.

The Union grieved the policy, arguing that it inflicted a disproportionate and unreasonable financial burden on employees, amounting to hundreds of dollars per month, in addition to the time spent performing and recording the test. The Union argued that the burden should be borne by the Company in accordance with its statutory obligations to maintain a safe workplace.

Arbitrator Murray allowed the Union's grievance in part. He ruled that the costs associated with running and administering the testing program should be covered by the employer, but the testing must be self-administered on the employees' own time. In reaching his conclusion, Arbitrator Murray weighed the parties' legitimate business interests:

> With respect to self-administered rapid antigen testing, there are benefits to having this performed by employees on their own time. The employer will know before the employee reports to work if there is a positive test result. This fact favours self-administered testing because a positive result can lead to immediate employer action to isolate the employee prior to entry into the workplace. It is also more efficient. The time involved in rapid antigen testing process is minimal. Results can be obtained in 15 minutes by employees who are not in the workplace. In contrast it takes approximately 30 to 45 minutes on average for an employee to leave their post, take the test, and return. Additionally, to compensate employees for the time involved in self-administered tests (outside the workplace) may act as a disincentive for such employees to get vaccinated. This would

> not be consistent with OPG's rational objective to have as many employees vaccinated as is possible.
>
> In sum, the legitimate interests of both parties are balanced by granting the PWU an order that the tests for the unvaccinated shall be paid for by the employer and by refusing an order that OPG compensate employees for the time spent outside normal working hours in self-administering the rapid antigen test.

Arbitrator Murray concluded by noting that his reasons were without prejudice to any other workplace, as his decision reflects "the unique circumstances at this time."

Arbitrator Murray's ruling supports that employers most likely cannot require employees to pay for COVID-19 tests that are required under the employer's policies. Testing kits are likely to be considered akin to other health and safety equipment or PPE, for which the employer remains responsible.

On the other hand, time spent testing may be treated as a separate issue, which will likely turn on the state of the pandemic and the loosening of restrictions in the future. Employers can most likely require employees to undergo testing on their own time as long as the vaccination policy is necessary and justified to maintain workplace safety. If the level of risk associated with COVID-19 transmission in the workplace eventually drops to a level comparable to that of the seasonal flu or cold, it is possible that adjudicators may find that the burden rests entirely on the employer—both the cost and time spent testing. In other words, if public health indicators continue to improve and provincial restrictions lift, workplace mandatory testing policies that place any financial burden on the employee are less likely to be considered reasonable.

The government of Canada website states that businesses and other organizations can apply for free rapid antigen tests for their employees. Organizations with 200 or more employees can apply directly to the federal government, while organizations with less than 200 employees can apply through the provincial/territorial government. The availability of free rapid tests bolsters the position that, at the very least, employers ought to apply to receive free tests from the applicable government or distribution partner before burdening employees with the costs.

The bottom line is that employees' rights are balanced against the employer's need for policies to provide a safe workplace. For now, that means that the cost of running and

administering a testing program will generally fall on the employer, while the testing must be self-administered on the employees' own time.

C. THE DUTY OF FAIR REPRESENTATION IN THE FACE OF MANDATORY VACCINATION POLICIES

Sukhmani Virdi

Throughout 2021 and through 2022, in response to the COVID-19 pandemic, employers across a variety of sectors began to implement mandatory vaccination policies. For thousands of employees in these workplaces, this meant providing proof of vaccination in order to continue working.

The implementation of mandatory vaccination policies also meant that those who declined to comply and provide proof of vaccination would face an adverse employment consequence including in most instances, being placed on an unpaid leave of absence or being terminated.

As a result, several unvaccinated employees have filed complaints against their bargaining agents, requiring the Ontario Labour Relations Board to determine the scope of the duty of fair representation in the face of mandatory vaccination policies.

Since the start of the year, the OLRB has issued numerous decisions in the context of mandatory vaccination policies, and has held the following:

- There is no requirement on behalf of a union to file an individual or policy grievance in order to comply with the duty of fair representation, so long as the decision is not made arbitrarily, discriminatorily or in bad faith (*Bloomfield v SEIU* 2022 CanLII 2453);

- Section 74 imposes no obligation on a union with respect to its internally appointed coordinators or with respect to internal union events. The duty is owed to bargaining unit members only as it relates to the employment relationship (*Rakich v Unifor* 2022 CanLII 6792 and *Bloomfield*); and

- A complaint under section 74 is not a forum to debate the science of vaccination, government directions or complain about the nuances of an employer's mandatory vaccination policy (*Di Tommaso v OSSTF* 2021 CanLII 132009; *Harris v SEIU* 2022 CanLII 25826; *Mustari v CUPE* 2022 CanLII 2433; *Lewin v OSSTF* 2022 CanLII 21288; *Pasternak v SEIU* 2022 CanLII 6766; *Cavic v CUPE Local 905* 2022 CanLII 5015).

In almost all instances, the Board has dismissed the section 74 complaints at the preliminary stage. The Board has declined to do so where the Applicant has pled facts that could demonstrate arbitrary, discriminatory or bad faith conduct on the part of the union.

For example, in *Wong v CUPE Local 4948* 2022 CanLII 8091, the Board declined to dismiss the application for failing to make out a *prima facie* case as the Applicant had alleged the Union failed to communicate with her in a timely fashion with respect to her grievance. The Board noted at the preliminary stage, it was required to accept the Applicant's pleadings as true and if so, her allegations could establish a breach of the duty of fair representation. Accordingly, the Board directed the matter to be scheduled for a hearing.

While the Board appears reluctant to delve into the vaccination debate, it continues to require unions to fully discharge their duty of fair representation. Unions are required to communicate with affected members in a timely manner in order to avoid findings of neglect, something the Board has held could be considered arbitrary conduct.

D. *EXTENDICARE LYNDE CREEK RETIREMENT RESIDENCE V UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 175* – REASONABLENESS OF VACCINE POLICIES IN A POST-MANDATE WORLD

Raymond Seelen

Until very recently, the provincial government required employees of all long-term care homes in the province to be fully vaccinated against the COVID-19 virus. Pursuant to a Ministerial Directive issued under the *Long-Term Care Homes Act*, the Province required that all staff at long-term care homes in the province receive two does of the vaccine before July 1, 2021. As of March 14, 2022, that directive has been revoked and is no longer of force or effect.

In the absence of a provincial mandate, most (in not, all) long-term care homes – including large chains like Sienna, Chartwell and Extendicare - have maintained their own vaccination policies and the Ministry of Health has issued a statement indicating that, in its view, it would be appropriate for homes to maintain their policies. In addition to the rollback of this mandate, numerous other public health measures related to the pandemic – including vaccine passports, capacity limits and indoor mask mandates – have also been eliminated. This gives rise to an interesting question – If the province is no longer maintaining substantial public health measures related to the pandemic, is it still reasonable for employers to expect employees to be vaccinated?

This issue was recently addressed head-on in *Extendicare Lynde Creek Retirement Residence v United Food and Commercial Workers Canada, Local 175*. In this case, the UFCW challenged the employer's mandatory vaccination policy. Said policy required all employees to be fully vaccinated (including any recommended booster shots), placed unvaccinated employees on unpaid leaves of absence and contemplated termination as a possible result of continued non-compliance.

The parties to this case asked Arbitrator Raymond to provide a "bottom line" decision. As such, the Arbitrator does not recount the specific details of each party's position, nor does he set out the precedents that he has relied upon. That being said, Arbitrator Raymond does note that the parties requested he specifically consider the reasonableness of the policy in light of drastically reduced public health protocols related to both the pandemic generally or vaccination specifically.

Arbitrator Raymond was direct in his position on this issue:

> Having carefully considered the evidence, arguments and authorities, it is my view that the Policy has been and remains a reasonable workplace rule, consistent with the Collective Agreement, the Occupational Health and Safety Act, Retirement Homes Act, 2010 and the related regulations and requirements, and the relevant authorities. More specifically, this is my view even in the context of the Ontario Government and other public health authorities recently reducing or eliminating various vaccination and other COVID-19 related requirements for staff, contractors and visitors in the context of retirements homes, long-term care homes and, more generally, other facilities and venues.

The decision is unequivocal. The implementation of a mandatory vaccination policy, at least in the context of a retirement home, remains a reasonable precaution to protect both workers and residents. This fact is not altered by the decisions of the provincial government and other public health authorities to roll-back their own measures against COVID-19.

While the precedential value of this decision is somewhat limited due to the nature of the "bottom-line" result, we anticipate that it will nonetheless form the starting point on this issue in future cases.

E. COVID-19 MANDATORY VACCINATION POLICIES AND HUMAN RIGHTS/MEDICAL EXEMPTIONS

Robert M. Church

As the COVID-19 pandemic entered its third year in March and April 2022, a number of long-awaited arbitration decisions have begun to shed more light on how mandatory vaccination policies will be assessed by labour arbitrators, and how narrowly (or not) arbitrators may view requests for exemptions under those policies.

A number of arbitration decisions upholding mandatory COVID-19 vaccination policies were released in March 2022, including:

- *Unifor Local 973 v Coca-Cola Canada Bottling Limited*, 2022 CanLII 25769 (March 17, 2022), in which Arbitrator Mark Wright held that the mandatory vaccination policy in question showed "a reasonable balance between an employee's interest to privacy and bodily integrity, and the Employer's interest in maintaining the health and safety of the workplace."

- *Toronto District School Board v CUPE, Local 4400*, 2022 CanLII 22110, in which Arbitrator William Kaplan held that the mandatory vaccination policy was a reasonable exercise of management rights and did not violate the guarantee under section 7 of the *Charter* to life, liberty and security of the person (March 22, 2022).

- *Maple Leaf Foods Inc., Brantford Facility v UFCW, Local 175*, 2022 CanLII 28285 (April 10, 2022), in which Arbitrator Peter Chauvin held that the employer's mandatory vaccination policy was reasonable and fell within management's rights to implement (applying the longstanding 6-factor *KVP* test).

However, in most of these and similar decisions, arbitrators also recognized that the personal circumstances of each grievor's case are important, and that any discipline imposed for an alleged breach of these policies can be challenged via grievance on a "just cause" standard. In other words, not being vaccinated does not mean automatic discipline or discharge.

While the case law is beginning to give greater guidance to mandatory vaccination policies generally, there remains a lack of case law on whether requests for *individual* accommodations or exemptions under COVID-19 vaccination policies will be successful. Employees may request an exemption from mandatory vaccination policies on medical grounds or protected grounds under human rights legislation (such as religion or creed). Most policies we have reviewed explicitly state that members may request accommodation for these reasons; even if a policy did not explicitly state this, it would still be required under human rights legislation on a case-by-case basis.

Since many of these vaccination policies were only introduced in mid- to late-2021, very few grievances specific to COVID-19 human rights exemptions have reached the stage where an arbitrator has issued a reported decision.

However, some decisions with respect to mandatory *masking* policies give some guidance on the accommodation factors.

In *Unifor Local 333 v Moore Packaging Corporation*, 2021 CanLII 117560*,* the employer had implemented a mandatory masking policy, and the grievor had provided a note to her employer which stated that she "cannot wear masks for extended period of time due to medical conditions," and subsequently produced another medical note stating that the grievor "cannot wear a mask, face shield or any face covering due to medical reasons". The stated reason from her doctor was that it was related to an accommodation for Post-Traumatic Stress Disorder. The employer decided that she would be reverted to the position of General Labour, and moved around the plant to perform such tasks as were available. The employer ultimately took the position the grievor had failed to follow the accommodation plan and her employment was "frustrated" and terminated her.

Arbitrator Mitchnick ultimately found that the employer had failed to exhaust all possible accommodations, and reinstated the grievor to "enable consideration and discussion of the possible options" for accommodation. This decision shows that employers must be able to show that they exhausted *all* reasonable requests for accommodation before termination. This decision also shows the importance of union involvement, since the union in this case was integral in suggesting possible accommodations where the grievor could work alone.

In a non-labour Alberta human rights case*, Pelletier v. 1226309 Alberta Ltd. o/a Community Natural Foods*, 2021 AHRC 192, a customer challenged a store's mandatory masking policy arguing that he was "medically exempt" and that wearing a face mask infringed his religious beliefs. The Tribunal decision provided guidance on the assessment

of religious exemptions and the information that would be required to support these exemptions:

> I also acknowledge that the complainant asserts that he believes that it is sacrilege to cover one's face, but apart from that assertion, he does not explain how that belief is tied to any particular religion, how it is religious in nature, or that the requirement to cover his face restricts his ability to practice his religious faith….
>
> It is clear from all of the above that an individual must do more than identify a particular belief, claim that it is sincerely held, and claim that it is religious in nature. This is not sufficient to assert discrimination under the *Act*. They must provide a sufficient objective basis to establish that the belief is a tenet of a religious faith (whether or not it is widely adopted by others of the faith), and that it is a fundamental or important part of expressing that faith.
>
> (paras. 35 and 38)

The Tribunal did accept that the question of religious beliefs does not require adherence to a "mainstream" religious faith, or to demonstrate that all persons of that faith share the same beliefs.

While trade unions continue to wait for further case law guidance on specific exemptions in the workplace, these cases demonstrate that the expectations on both sides – employee and employer – must go beyond mere assertions and surface accommodations.

F. WINNING A CONSTRUCTION INDUSTRY JURISDICTIONAL DISPUTE AND GETTING DAMAGES – THE *BOMANITE* CASE

Doug Wray

The Board's practice is to adjourn a Section 133 grievance arbitration in the construction industry, if an affected employer or another trade union whose members were assigned the work in dispute agrees to file a Notice of Jurisdictional Dispute. Even if the grieving union "wins" the jurisdictional dispute, and the grievance/arbitration is re-listed, the Board generally does not award damages. The JD win may provide an important precedent on a go-forward basis, but usually does not result in damages being awarded.

The case of Carpenters Local 27, Bomanite and Labourers Local 183 represents an exception to this general rule.

The Carpenters' Union had an ICI sector collective agreement with Bomanite. Bomanite was bound to Labourers Local 183 collective agreements, but not in the ICI sector. The project was a municipal park. The work in dispute was the carpentry portion of exterior concrete formwork. Bomanite assigned all (or most) of the concrete formwork to members of Labourers Local 183. Local 27 grieved. Bomanite did not file a Notice of Intent to Defend or any response. The grievance/arbitration was adjourned when Labourers Local 183 agreed to file a JD. The JD proceeded before the Board. Bomanite ignored the JD; it filed no response and did not participate in the JD. It filed no brief and no evidence. The Labourers did not file any evidence from Bomanite as part of their Brief or Book of Documents.

Local 27 was successful in the JD. Two factors were critical. First, the work was conceded to be in the ICI sector (consistent with a number of prior cases) and, therefore, only the Carpenters had collective agreement claim to the work. Secondly, the Board emphasized that there was no evidence, explanation or justification provided by the company to explain its decision to assign the work in dispute to Local 183 members.

The Carpenters then requested that the Board re-list its grievance/arbitration. Bomanite continued to ignore the Board's process. The Carpenters requested and obtained a "default" judgment from the Board. The Board held that the Carpenters were entitled to damages and only the amount of damages remained to be determined.

It was only on the evening before the Board hearing that a lawyer for Bomanite contacted the Board and requested the opportunity to request reconsideration of the Board's default decision. The Board permitted Bomanite the opportunity to do so, but later dismissed the reconsideration request. The Board noted that the company had ignored all the Board's processes.

Bomanite then sought to challenge the Board's default decision and its reconsideration decision in Court. In a Decision dated February 16, 2022, the Divisional Court dismissed Bomanite's application. It also upheld the Board's decision that after losing the JD, Labourers' Local 183 did not have status to intervene and participate in the Carpenters' reconvened grievance/arbitration. In upholding the Board's default decision, the Court emphasized the company's failure to participate in the JD proceeding where they could have attempted to explain or justify its work assignment. The company's failure to do so, and also its failure to respond to the Section 133 referral and its failure to respond to the Carpenters' request to re-list the arbitration following the Board's JD decision, meant that the Board's default judgment – accepting the Carpenters' claim that damages should be awarded – was not unreasonable.

The case illustrates that at least in some cases, it is possible to obtain damages after winning a JD. It also emphasizes the importance of companies participating in the JD process (or certainly the risk of not doing so).

G. WSIAT, HRTO OR ARBITRATION - THE *GREEN V. NATIONAL STEEL CAR* DECISION

Micheil Russell

This decision was made in the context of an employee who made an application with the Human Rights Tribunal of Ontario (the HRTO), as well as filing a grievance and pursuing an appeal before the Workplace Safety and Insurance Appeals Tribunal (the WSIAT).

The grievance was settled and did not proceed to arbitration. The case before the WSIAT proceeded to a hearing and the WSIAT issued a decision concluding that the employee could not be accommodated with suitable modified work and awarded employee loss of earnings benefits.

The employee filed an application with the HRTO, and the employer objected to the proceeding and requested its summary dismissal. The employer argued that the substance of the application had been appropriately dealt with in the prior proceedings before the WSIAT as well as the grievance procedure. It argued that the application should be dismissed.

The employee had argued that the remedies available in the different proceedings were very different, and that the WSIAT proceedings made an award for lost wages, but did not have jurisdiction to provide general damages for human rights violations.

The HRTO concluded that the differences in remedy were inconsequential. It focused on the issue of whether or not the human rights claims in the application raised and addressed in the WSIAT proceeding. The HRTO concluded that the substance of the issues in the grievance and those decided by the WSIAT were the same as the issues in the application before the HRTO. It concluded that the decision of the WSIAT appropriately dealt with the substance of the application and accordingly dismissed the application.

The significance of this decision for unions is that in advising members, it is important for members to understand that making decisions with respect to pursuing issues in one forum, such as through WSIB and WSIAT, may impact their ability to pursue same issues in a different forum such as before the HRTO.

H. INFLATION, COST OF LIVING AND COLLECTIVE BARGAINING

Doug Wray

For many years now, the rate of inflation has been low and the increase in the cost of living as reflected in the Consumer Price Index (CPI) has been minimal. The result is that these factors have not been a major concern in collective bargaining (including interest arbitration, where applicable) and even modest increases in total compensation have resulted in "real" gains for union members.

That has now clearly changed.

As announced by Statistics Canada on April 20, 2022, in March 2022, the CPI increased 6.7% year over year, one point higher than the gain in February 2022 (+5.7%). This was the largest increase in over thirty (30) years – since January 1991 (+6.9%). On a monthly basis, the CPI rose 1.4% in March, following a 1.0% gain in February. This is the largest increase since January 1991, when the goods and services tax was introduced. On a seasonably adjusted monthly basis, the CPI rose 0.9% in March, matching the largest increase on record. Costs for food, transportation and shelter are up significantly.

Economic forecasting is always difficult, but there appears to be some consensus that the rate of inflation is likely to remain elevated for the next two years or more. For example, in early 2022, the Bank of Canada's outlook for inflation in 2022 was 4.2%. The chartered bank forecasts range from 3.1% to 4.3%.

This means that trade unions for the first time in many years need to be prepared to address the significant increases in the CPI in collective bargaining. It is reasonable to assert that increases in total compensation must match increases in the cost of living just to maintain previously negotiated financial gains. See, for example, the interest arbitration award in the University of Toronto case, [2010] O.L.A.A. No. 708 (Teplitsky). It is also reasonable to expect employers will strongly fight against such increases. Employers will likely argue that it is too early to predict whether recent increases in the cost of living are a temporary phenomenon or whether they will be maintained. As mentioned above, there appears to be a growing consensus that the current increases are likely to continue for the next year or two at least.

Trade unions now have to strategize on how to deal with the increase in the cost of living in collective bargaining.

"Total compensation" reflects not only wages, but other monetary terms. Some monetary terms are tied to wages (such as overtime pay, vacation pay, holiday pay, etc.); these terms will be automatically increased when wages are increased. Other monetary terms are fixed amounts which will need to be specifically addressed and negotiated upward to

keep abreast of cost of living increases (such as shift premiums, uniform allowances, meal allowances, transportation allowances, etc.).

Of course, the first priority should be to propose increases in total compensation that meet or exceed the CPI increase. We note that recruitment and retention considerations should strengthen the Union's bargaining position, at least in some sectors of the economy.

Other suggestions based on experience from the 1970s and 1980s, when significant cost of living increases were the norm, include:

1. Shorter terms for collective agreements are safer, given the uncertain economic future;

2. Negotiate terms in collective agreements that address the possibility of increases in cost of living during the term of the collective agreement such as:

   (a) a Cost of Living Adjustment (or "COLA") clause that triggers specific wage increases in the event the CPI increases above a certain level; or

   (b) a wage re-opener that is triggered in the event of specific CPI increases (the term of the collective agreement is not affected; a certain CPI increase requires the parties to negotiate a wage increase, with binding arbitration in the event they cannot agree).

Trade unions will need to keep a careful eye on economic indicators to ensure they are responding to new and changed economic conditions in the preparation of collective agreement proposals and in pursuing, and perhaps revising, those proposals during collective bargaining.

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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