

WINTER 2022

## 2022 HICKS MORLEY MOOT COMPETITION

### **BACKGROUND: MANDATORY VACCINATION**

In response to the ongoing COVID-19 pandemic, employers have undertaken a number of steps to try to ensure the health and safety of their employees, customers and other visitors to their workplaces.

While many employers have been able to meet these obligations by transitioning to remote work arrangements, many other employers (e.g. employers in the health care, manufacturing and retail sectors) have continued to operate within the workplace subject to a range of measures imposed by public health officials and provincial regulations. Examples of those measures include masking, daily COVID screening and distancing requirements.

As vaccinations became more widely available, employers considered whether to implement vaccination policies and, if so, what form such a policy would take.

In certain sectors in Ontario – e.g. hospitals and long term care, school boards and post-secondary – the government required employers to implement vaccination policies through a series of directives issued by government ministries and mandatory instructions issued by the Office of the Chief Medical Officer of Health. While the details vary from sector to sector, the policies include several key features:

- i. a requirement for employees to disclose their vaccination status by a specified date;
- ii. a requirement that employees be vaccinated by a specified date;
- iii. an exception from requirement (ii) for employees with medical conditions preventing vaccination; and
- iv. mandatory regular testing for employees who are not vaccinated.

With respect to mandatory testing, it would apply both to employees who are not able to vaccinate under item (iii), above, and to employees who choose not to get vaccinated. In some sectors, employers were expressly permitted not to offer testing to employees who choose not to get tested, meaning that those employees could not report to the workplace. As a general rule, the directives and instructions were silent on what sanctions, if any, an employer could or should impose on employees who did not comply with the policy.

Notwithstanding the directives and instructions, some employers in these sectors have chosen to implement stricter mandatory vaccination policies by

relying on their management rights as employers. In some cases, failure to vaccinate will result in an employee being placed on an unpaid leave of absence and/or being terminated from employment, subject to valid claims for exemptions under the *Human Rights Code*. In response, some trade unions have challenged the reasonableness of such policies and the authority of employers to sanction employees who are not vaccinated.

The directives and mandatory instructions referenced above do not apply to the private sector more generally. However, many local medical officers of health have issued recommendations for employers within their jurisdictions to put in place a vaccination policy, although employers will often have a significant discretion on the details of the policy and consequences for non-compliance. Provided certain prescribed conditions are met, employers must comply with these recommendations. As a result, many employers in the private sector have also developed vaccination policies of varying degrees of strictness.

## SCENARIO

ABC Company is a small manufacturing company in central Ontario that manufactures widgets. ABC Co. has generally operated throughout the pandemic as permitted under Ontario's various regulations.

ABC Co. employees a total of 75 employees. Approximately 60 employees are employed within the plant in ABC Co.'s manufacturing, packaging and shipping operations. These employees are represented by the Widget Manufacturers Workers' Union under the terms of a collective agreement between ABC Co. and the Union. The remaining 15 employees are employed in managerial, sales and administrative roles, and are not represented by a trade union.

ABC Co. has implemented a range of health and safety measures to protect its employees. For example, employees are required to wear masks at all times while working, including in areas where the employees can maintain distancing of greater than 2 metres. ABC Co. prides itself on not only meeting the requirements of the government's COVID-19 regulations, but has strived to go beyond them where reasonably possible. The Company has implemented remote work for many of its non-union employees, but the work of the unionized employees can only be performed at the workplace.

Notwithstanding its health and safety measures, there have been several outbreaks of COVID-19 at the ABC Co. workplace. Fortunately, no employees have died, but on each occasion a number of employees took ill with COVID-19, and two had to be hospitalized for a short period of time. During each outbreak, the Company was required to shut down production for several days to undertake appropriate cleaning measures. It has lost one major customer as a result of these shutdowns.

After vaccination became widely available, ABC Co. decided that it would implement a mandatory vaccination policy. Consistent with its focus on health and safety and in an attempt to avoid future production shutdowns,

ABC Co. determined that it would only employ fully vaccinated employees in its workplace with very few exceptions.

All ABC Co. employees were required to disclose their vaccination status to the Company's Director of Human Resources by October 15, 2021. Unless they had a bona fide human rights exemption from the vaccination requirement, all employees were required to be fully vaccinated by December 15, 2021. Any employee not fully vaccinated by that date without an approved exemption would be placed on a 30-day unpaid leave of absence. If they were not fully vaccinated by the end of that 30-day period, their employment would be terminated.

A copy of the ABC Co. mandatory vaccination policy is attached as an Appendix.

The Union immediately objected to the Company's mandatory vaccination policy, initially arguing that it was overly intrusive of its members' privacy rights and violated their bodily integrity. The Union strongly objected to the sanctions that could be imposed on its members. It filed a grievance under the collective agreement and reserved the right to grieve any consequences imposed on individual employees under the policy. Notwithstanding the Union's objections to the policy, it advised its members that they should consider complying with the policy while the grievance process was underway.

All 75 ABC Co. employees reported their vaccination status by the deadline specified in the policy. All but 3 employees verified that they were fully vaccinated. Of the three employees who were not fully vaccinated, two claimed and were granted medical exemptions from the vaccination requirement. As those employees were already working remotely, the exemptions did not impact their ability to continue their work.

The third employee – John Smith – is a member of the bargaining unit, employed in a manufacturing role. He has claimed an exemption from the policy based on his creed and religious beliefs. When asked for more information to justify his claim, Mr. Smith provided a declaration from the Liberty Coalition Canada. A copy of the declaration he submitted is attached as an Appendix.

ABC Co. was not persuaded by the declaration and asked for more information from Mr. Smith to justify his request. He refused to provide any additional information, but stated that his creed and religious beliefs were fully reflected in the declaration he had already provided and that he sincerely believed in what was set out in the declaration.

ABC Co. rejected Mr. Smith's claim, and placed him on an unpaid leave of absence under the mandatory vaccination policy. Thirty days later, ABC Co. terminated his employment as he remained unvaccinated and had not provided any additional information to support his claim for an exemption.

The Union filed a grievance on Mr. Smith's behalf and the parties agreed to consolidate it with the general challenge to the policy that was already underway.

### ISSUES

The matter has now proceeded to an arbitration, and there are two issues that are to be addressed before the panel:

1. Is the ABC Co. mandatory vaccination policy a reasonable exercise of management rights?
2. Was John Smith's termination justified? Or, should ABC Co. have granted an exemption from the vaccination requirement based on creed?

### SOME LEGAL BACKGROUND

As a general rule in unionized environments, employer policies must meet the test set out in *Re KVP Co. Ltd.* (1965), 16 L.A.C. 73 (Wren), which requires that a policy or program must satisfy each of the following conditions:

- (i) the policy must not be inconsistent with the express terms of the collective agreement;
- (ii) the policy must not be unreasonable;
- (iii) the policy's terms must be clear and unambiguous;
- (iv) the policy must be brought to the attention of the employees;
- (v) the policy must outline any disciplinary or other action that can be taken by management if the policy is not followed; and
- (vi) the policy must be consistently enforced after its implementation.

Historically, arbitrators have considered vaccination policies within the context of seasonal influenza outbreaks. Several arbitrators have considered these issues within the context of the pandemic. Two recent examples include:

*Electrical Safety Authority v Power Workers' Union*, 2022 CanLII 343 (ON LA) (Stout)

*Teamsters Local Union 847 v Maple Leaf Sports and Entertainment*, 2022 CanLII 544 (ON LA) (Jesin)

The question of an employer's duty to accommodate an employee's religious beliefs or creed has arisen in numerous cases over the years. The seminal

case on religious accommodation is *Syndicat Northcrest v. Amselem*, 2004 SCC 47 (CanLII). A good discussion of the notion of “creed” under the *Human Rights Code* within the context of the COVID-19 pandemic can be found in *Sharma v. Toronto (City)*, 2020 HRTO 949 (CanLII).

You are not limited to the cases noted in this section, but this discussion should assist your research efforts.

#### **NOTES TO PARTICIPANTS:**

Participants will be presenting arguments before an arbitration board based on the information set out above and in the Appendices. While you may research any issue relevant to the issues raised in the scenario, participants are limited to the facts that have been provided in this document and the Appendices.

Throughout the pandemic, official government restrictions have come from a range of sources. Originally, a number of orders and regulations were promulgated under the *Emergency Management and Civil Protection Act*. More recently, the restrictions are found in regulations under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, as well as under a variety of public health measures issued by the Office of the Chief Medical Officer of Health, local medical officers of health and municipalities. You are not expected to look at any of these requirements, and can assume that ABC Co. is complying with all such requirements that apply to its operations.

For the second issue to be argued – the creed exemption request – you should focus your arguments primarily on the legal issues as reflected in case law. You should confine your factual material to the contents of the declaration provided in the Appendix as much as possible.

## GROUND RULES

1. Teams of two will argue for the Union and the Employer.
2. Each team will have 30 minutes for argument. The Union team will go first and present its arguments for no more than 25 minutes. The Employer team will go second and present its arguments for 30 minutes. The Union team will then have 5 minutes for reply.

**NOTE:** The Union team may choose to reduce its reply time to allocate more time for their initial argument, and should inform the judges prior to the start of the moot if they are doing so.

3. The time taken to answer questions from the arbitration panel will be part of the 30 minutes allotted to each team. Be precise and concise in your answers.
4. No written material (e.g. facta or written argument) will be submitted by either team.
5. As the Moot is likely to be virtual this year, participants should be prepared to submit any cases they wish to rely on through online means. Where possible, participants should highlight those passages to which they will refer. While you are not limited in how many cases you use, keep in mind the limited time available to present both aspects of your argument. Specific details of how to submit your cases will be shared closer to the date of the Moot.
6. Judges will score the competitors on the following basis:
  - Quality of Legal Argument 50%
    - including organization, clarity, research, persuasiveness and elegance
  - Presentation 50%
    - including presence, style, ability to respond well to questions, and familiarity with facts and legal policy issues
7. The judges will select the best Union team and the best Employer team from the preliminary round. These two teams will compete in the championship round at the end of the afternoon.
8. **The winner from each school will go on to participate in the Hicks Morley Moot finals, which will be held on Friday, March 25, 2022.**