

# Vaccine Hesitancy Still Not Just Cause to Terminate

*Refusal to follow vaccination policy not a reason for summary dismissal, but such policies could be constructive dismissal*

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On the heels of widespread vaccination over the past several months, many employers have sought to end remote work. With safety in mind, many of those employers implemented vaccination as a condition of employment, with dismissal as a consequence for refusal.

On the heels of widespread vaccination and dwindling COVID-19 case counts, employers sought to end remote work. With safety in mind, many of those employers implemented vaccination as a condition of employment, with dismissal as a consequence for refusal.

In the non-union context, employees may allege that a requirement to vaccinate represents a constructive dismissal on the basis that it introduces a substantial term of employment that did not previously exist. Employers dismissing employees without notice for failing to vaccinate will face courts actions for wrongful dismissal.

We haven't heard from a court on these issues, yet. There have, however, been arbitration and court decisions from the unionized world in the fall of 2021. Non-unionized employers may glean some guidance from these decisions.

They undoubtedly sound approval for employer efforts to vaccinate the workforce and mitigate the risk of spreading COVID-19. No decision suggests, however, that an employee's refusal to vaccinate would be considered misconduct justifying dismissal without notice. Further, none suggest that mandatory vaccination policies would be considered a minor alteration of employment that avoids a finding of constructive dismissal.

## Arbitration Decisions

The fall of 2021 saw 2 arbitration decisions in Ontario in respect of mandatory vaccine policies. The legal issue was whether these policies represented a reasonable exercise of the employer's management rights. To determine that issue, arbitrators apply what is referred to as the "KVP Test". Reflecting 6 criteria, the most important consider whether or not the employer's justification for the policy outweighs the alleged harm to employees. The assessment of reasonableness essentially involves balancing interests and harm.

In *UFCW v. Paragon Protection*, the arbitrator considered a mandatory vaccination policy in the context of security services. The employer introduced its policy because its clients required vaccination for anyone accessing its properties. Failing proof of vaccination, the policy mandated a leave of absence or reassignment.

Arbitrator Von Veh agreed that Paragon's policy was reasonable, particularly given the employer's health and safety obligations. The arbitrator held that "*personal subjective perceptions of employees to be exempted from vaccinations cannot override and displace available scientific considerations*".

In *Paragon*, a key factor for the arbitrator was the fact that the employer was required to comply with its clients' policies in order to provide its services. Further, the collective agreement contemplated a vaccine policy, but not termination as a consequence for refusing to comply.

In *Power Workers Union v. Electrical Safety Authority*, Arbitrator Stout found otherwise. Much of the employer's workforce was remote and its safety and testing policies were effective in avoiding any COVID-19 outbreaks. Unlike the *Paragon Protection* decision, no significant issue had arisen with respect to accessing 3<sup>rd</sup> party facilities.

On the employee side though, mandating vaccination in the absence of a prior established right to do so represented significant harm to employees. The arbitrator found:

*"...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, is unjust. Employees do not park their individual rights at the door"*

The ESA decision indicates that the right of employees to determine their own medical treatments is a significant consideration when evaluating the reasonableness of an employee's compliance with a mandatory vaccination policy.

### Court Decisions

Matters that arise in a unionized workplace must be heard by an arbitrator. Courts will rarely intervene in a union related matter, and only where necessary to provide a remedy that an arbitrator cannot provide.

In *Amalgamated Transit Union, Local 113 ("ATU") v Toronto Transit Commission ("TTC")*, the ATU sought a court injunction to restrain the TTC from enforcing its mandatory vaccine policy.

The TTC's policy mandated a suspension of employment, followed by termination if employees could not provide proof of vaccination. The injunction request was intended to halt implementation of the policy until an arbitrator could determine whether or not it was a reasonable exercise of its management rights.

Approximately 12% of the TTC's employees did not disclose their vaccination status. Most of if not all simply refused to vaccinate. The ATU submitted evidence from employees indicating a fear of adverse long term side effects. The reasons did not qualify for an exemption on human rights grounds. The ATU argued that the TTC's policy coerced vaccination against the will of the refusing employees.

Akbarali J. declined to issue the injunction.

First, she was unconvinced that the policy would create harm to members that an arbitrator could not remedy. She disagreed that employees were being forced to vaccinate. Rather, employees were simply making a difficult choice, between remaining unvaccinated or getting the shot(s) and continuing employment.

Second, the Court held that the TTC would suffer greater harm than the employees if the vaccination policy was suspended.

Ultimately, there was no basis for the court to stop the TTC from enforcing its vaccination policy. An arbitrator would determine what if any remedy should flow to an employee adversely impacted by the TTC's vaccination policy.

### *Is it Just Cause?*

There is no indication from the above noted decisions, or any other decision to date, that refusing to vaccinate would be considered just cause to terminate an employment relationship. On the other hand, the decisions support the position that the introduction of a mandatory vaccination policy in the employment relationship would be considered a significant change and grounds for constructive dismissal. While mandatory vaccine policies may not compel vaccination against a person's will, they do require a difficult personal choice to be made; that choice was not required at the outset of the relationship.

Widespread vaccine uptake appears to be the only viable exit strategy out of this pandemic. Employers play a key role in facilitating compliance by requiring employees to make a difficult decision that pits a fundamental personal health decision against ongoing employment. Many employees will choose the former, but it does not mean that the employer's notice and severance requirements will be negated.

### *Further Reading:*

- *Re: UFCW and Paragon Protection Ltd.*, Decision of Arbitrator Von Veh, November 9, 2021
- *Re: Electrical Safety Authority and Power Workers' Union*, Decision of Arbitrator Stout, November 11, 2021
- *Amalgamated Transit Union, Local 113 et al v. Toronto Transit Commission et al*, 2021 ONSC 7658