

Challenge to vaccination policy not OHS issue

'It's almost as though the employees are trying to say that the vaccine itself is dangerous'



By [Jeffrey R. Smith](#)

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The Ontario Labour Relations Board has rejected an argument by four City of Toronto workers that occupational health and safety legislation permitted them to refuse to disclose their vaccination status and the resulting suspensions were illegal reprisals.



The decision isn't surprising given the nature of vaccination policies and the scope of occupational health and safety legislation, says Rishi Bandhu, an employment lawyer in Oakville, Ont.

“At the end of the day, it's about the reasonableness of the policy and this is not the proper forum for that,” he says. “They were trying to take that objection to the reasonableness of the policy and frame it as a reprisal issue – you're trying to fit a square peg into a round hole and it just doesn't fit as a reprisal.”

New policy brought in

In August 2021, the City of Toronto announced a COVID-19 vaccination policy that required all city employees to receive two doses of the vaccine by Oct. 30. Employees had to complete a disclosure form and upload proof of vaccination to an online portal. Any unvaccinated employees were required to undergo COVID-19 testing.

In October, shortly before the deadline, the city informed employees that anyone who didn't comply would be placed on unpaid leave. If they still hadn't complied by Dec. 13, their employment would be terminated for cause.

Four employees refused to reveal their vaccination status to the city, arguing that the Ontario Occupational Health and Safety Act protected them from revealing their health information. They referred to ss. 63(2) of the act, which states “No employer shall seek to gain access, except by an order of the court or other tribunal or in order to comply with another statute, to a health record concerning a worker without the worker's written consent.”

The city placed the four workers on unpaid disciplinary suspensions. They filed a complaint with the Ontario Labour Relations Board, alleging that they exercised their rights under the act in refusing to disclose their vaccination status, and the unpaid leave imposed by the city constituted a reprisal for exercising their rights under the act.



Section 50 of the act prohibits employers from dismissing, disciplining, suspending, or threatening to do any of those things because a worker is acting in compliance with the act or its regulations, or has sought enforcement of the act.

Connection between reprisal and exercise of rights

The board noted that jurisprudence had established that there must be a “causal connection between the reprisal and the worker’s exercise of rights under the act” for s. 50 to apply. Any discipline or dismissals unrelated to occupational health and safety rights weren’t covered.

The board found that occupational health and safety was not the area in which to challenge the reasonableness of a vaccination policy. The act’s protection of employee health records didn’t give workers “an unfettered right to refuse disclosure of medical information, free of any and all consequences,” said the board, noting that employers can request medical information in certain circumstances.

The board also found that the unpaid suspensions were not a reprisal against the particular workers. The suspensions were the application of a policy that applied to the city’s entire workforce in the context of a global pandemic, not related specifically to any exercise of rights under the act, the board concluded.

Bandhu says the workers’ attempt to frame their challenge of the city’s vaccination policy as a health and safety issue was flawed from the start.



“It's almost as though the employees are trying to say that the vaccine itself is dangerous, so the vaccine itself involves the employer creating unsafe conditions of work by requiring them to take a vaccine – almost like having them come into work without PPE, or a safety harness, and they're refusing that unsafe condition of work,” he says.

“But there's nothing in the act that says mandatory vaccination, or any sort of vaccination at all, or asking for proof of vaccination is unreasonable.”

The board, in dismissing the complaint, determined that the city's introduction and implementation of the vaccination policy was not connected to any exercise of rights under the act by the four employees, and there was no causal connection between the consequences of the workers' noncompliance with the policy and any activity under the act.

Bandhu says that reprisals are “a very powerful remedy” under health and safety legislation, but they are narrowly construed – there has to be a clear attempt to enforce a right under the legislation before a reprisal can happen.

“We see this a lot with human rights as well where employees make complaints and when you really boil the complaint down, it doesn't have that technical attachment to the act,” says Bandhu. “It's more about a complaint of unfairness or unreasonableness, and they're taking that generalized grievance and trying to force it into a particular avenue – but all these avenues are very specific.”

See *Francis v. Toronto (City)*, 2022 CarswellOnt 3073.

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