**CITATION:** Humber River Health v. Teamsters Local Union No. 419, 2025 ONSC 2270
**DIVISIONAL COURT FILE NO.:** 693/24
**DATE:** 20250506

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**DIVISIONAL COURT**

**Backhouse, Lococo and Mew JJ.**

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| **BETWEEN:** | ) | |
| | ) | |
| HUMBER RIVER HEALTH | ) | *Christopher Pigott* and *Rachel Counsell*, for the Applicant |
| | ) | |
| Applicant | ) | |
| **– and –** | ) | |
| | ) | |
| TEAMSTERS LOCAL UNION NO. 419 | ) | *Mike Biliski*, for the Respondent |
| | ) | |
| Respondent | ) | |
| | ) | |
| | ) | **HEARD at Toronto:** March 27, 2025 |

**Backhouse J.**

## REASONS FOR DECISION

### Overview

[1] Humber River Health ("Humber") seeks judicial review of a decision of Arbitrator Jasbir Parmar on March 11, 2024 (the "Decision"), reported at 2024 CanLII 19827 (ON LA), and October 10, 2024 (the "Remedy Decision"), reported at 2024 CanLII 98578 (ON LA). The Arbitrator upheld two grievances filed by the respondent, Teamsters Local Union No. 419 ("Teamsters"), on behalf of Stacy Hughes and Marisol Sanchez (the "Grievors") after Humber terminated their employment for cause in February 2022 for failing to comply with Humber's mandatory vaccination policy issued during the pandemic.

[2] The Arbitrator found that Humber's mandatory vaccination policy was reasonable and its enforcement a legitimate exercise of management rights. Nevertheless, the Arbitrator applied a general principle regarding medical consent rights reached in a different context to find that a hospital worker's refusal to provide proof of vaccination during the COVID-19 global health pandemic can never form the basis of a disciplinary response by the employer because it engaged

the employees' medical consent rights. The Arbitrator further found that the terminations could not be justified on non-culpable grounds because permitting the Grievors to remain on an unpaid leave of absence would have no meaningful impact on Humber and there was no basis to conclude at the time of the terminations that the Grievors would not be able to return to work in the foreseeable future. Ultimately, the Arbitrator's conclusion was that Humber could not terminate the Grievors' employment on disciplinary or on non-disciplinary grounds.

[3] Humber seeks an order quashing both decisions and dismissing the grievances in their entirety. In the alternative, it requests that the grievances be remitted to a different arbitrator for a fresh hearing and determination. Teamsters submits that the Decisions are reasonable and the application should be dismissed.

[4] For the reasons set out below, the application is dismissed.

[5] In summary, the Decision unreasonably decided that an employee can never be disciplined for failing to comply with a mandatory vaccination policy during a pandemic. Such a determination was not, however, necessary in this case. Whether discipline would be appropriate in the future for breach of a mandatory vaccination policy should be determined on the facts at the time the issue may arise. No practical purpose would be served in ordering a rehearing.

[6] It is not necessary to determine whether the Arbitrator erred in finding that termination could not be justified on non-culpable grounds because none of the authorities relied upon by Humber support that termination, culpable or otherwise, is appropriate after being put on unpaid leave for only two weeks. It follows that the decision to reinstate the Grievors was not unreasonable because they had only been on unpaid leave for two weeks when their employment was terminated.

## **Background**

[7] The applicant Humber is a major acute care hospital in Toronto, Ontario. It is a public hospital under the *Public Hospitals Act*, R.S.O. 1990, c. P.40.

[8] Teamsters is the trade union certified to represent part-time office and clerical employees at Humber.

[9] The Grievors, are employees of Humber who were terminated from their employment in February 2022 after failing to comply with Humber's mandatory COVID-19 vaccination policy.

[10] The parties did not present any *viva voce* evidence at the arbitration hearing. Rather, the parties agreed to proceed on the basis of the statement of facts asserted by Humber and an extensive documentary record filed by Humber. The statement of facts asserted:

**Background**

2. On March 11, 2020, the World Health Organization declared Coronavirus disease ("COVID-19") a pandemic. COVID-19 is an infectious disease caused by the SARS-CoV- 2 virus. COVID-19 infection may cause serious illness, long-term health effects, and even death in certain cases. COVID-19 is a hazard to the health and safety of employees and patients in the health care workplace.

3. On March 17, 2020, the Government of Ontario declared an emergency under the *Emergency Management and Civil Protection Act* as result of the COVID-19 outbreak.

4. Since March 2020, the federal and provincial governments of Canada, as well as local public health units, have issued legislation, regulations, restrictions, orders and health measures in response to the pandemic with which employers were required to comply, sometimes on short notice.

5. Humber implemented health and safety measures to protect patients and employees against the hazard of COVID-19. Despite these measures, there were infections, outbreaks, and deaths among patients and employees as a result of COVID-19.

6. In late 2020 and early 2021, Health Canada approved the use of several COVID-19 vaccines. Vaccination was widely recommended by public health and government officials, and medical experts as the most effective measure against COVID-19, According to the Public Health Agency of Canada and other public health agency, the vaccines are very effective at preventing severe illness, hospitalization and death from COVID-19.

7. On August 17, 2021, the Chief Medical Officer of Health for Ontario issued Directive #6 for Public Hospitals under section 77.7 of the *Health Protection and Promotion Ac*t, RSO 1990 c H 7 ("Directive #6"). Directive #6 remained in effect until March 14, 2022.

8. Directive #6 required public hospitals within the meaning of the *Public Hospitals Act* and other covered organizations to establish, implement and ensure compliance with a COVID- 19 vaccination policy requiring employees, staff, contractors, volunteers, and students to provide:

(a) Proof of full vaccination against COVID-19

(b) Written proof of medical reasons that sets out (i) a documented medical reason for not being fully vaccinated against COVID-19, and (ii) the effective time period for the medical reasons; or

(c) Proof of completing an approved educational session about the benefits of COVID-19 vaccination prior to declining vaccination for any reason other than a medical reason.

9. Directive #6 also required public hospitals to implement regular antigen point-of-care testing for employees, staff, contractors, volunteers, and students who did not provide proof of being fully vaccinated.

10. Directive #6 specifically authorized hospitals to require all employees, staff, contractors, volunteers, and students to either provide proof of full vaccination or proof of medical contraindication without offering a third option of an approved educational course.

11. Full vaccination, according to Directive #6, means an individual has received the full series of a COVID-19 vaccine or a combination of COVID-19 vaccines approved by the World Health Organization, and has received the final dose of the COVID-19 vaccine at least 14 days prior.

12. Humber, as a public hospital, was required to comply with Directive #6.

**The Hospital's Vaccination Policy**

13. On August 26, 2021, Humber issued a COVID-19 Immunization Policy (the "**Policy**") effective September 7, 2021.

14. The Policy was to comply with Directive #6, protect patients who come to Humber for care, and to protect the health and safety of employees against the hazard of COVID-19 in compliance with Humber's obligations under the *Occupational Health and Safety Act*, RSO 1990 c O 1 and O. Reg. 67/93, Health Care and Residential Facilities.

15. Under the Policy, Humber staff, physicians, and volunteers ("**SPV**") were required to complete one of the following options:

(a) provide proof of full vaccination against COVID-19;

(b) provide written proof of a valid medical exemption, by a specialist physician that sets out:

(i) a documented medical reason for not being fully vaccinated againstCOVID-19, and

(ii) the effective period for the medical reason; or

> (c) in the absence of either of the above, provide proof of completing an educational session approved by Humber about the benefits of COVID-19 vaccination prior to declining vaccination for any reason other than a medical reason and completion of COVID-19 Education/Self Declaration Form.

16. SPV who were not fully vaccinated were required to submit to twice weekly point-of- care antigen testing.

17. The Policy specified that, effective September 27, 2021, any staff member not in compliance with the Policy would be placed on a two (2) week unpaid leave of absence. Failure to comply with the Policy during this two (2) week period of unpaid leave would result in disciplinary action including termination of employment.

18. The Policy was repeatedly communicated to all affected employees, in writing and verbally. On August 19, 2021, Humber met with the unions representing employees to communicate the requirements of Directive #6. That same day, Humber held a forum to announce the requirements of Directive #6 to all employees. By way of further example, on August 30, 2021, the Hospital sent an email memorandum to all staff, physician and volunteers about the requirements of Directive # 6. On September 3, 2021, another email was sent to all staff, physician and volunteers about the requirements of Directive # 6.

**The Hospital's Mandatory Vaccination Policy**

19. Despite the implementation of Directive #6, there continued to be patient and staff infections. As COVID-19 continued to threaten the well-being and safety of staff and patients, with the emergence of the more transmissible Omicron variant and surging case counts, and difficulties with the test or vaccinate policy, Humber amended the Policy on December 16, 2021 to remove the option of attending an educational session and submitting to regular antigen testing (the "Amended Policy"). This meant that all SPV were required to be fully vaccinated, unless medically exempt.

20. Under the terms of the Amended Policy, SPV, students, and medical learners were required to:

> (a) have at least a first dose of a COVID-19 vaccine along with a booked appointment for a second dose by January 17, 2022, unless medically exempted; and
>
> (b) be fully vaccinated against COVID-19 by February 7, 2022, unless medically exempted. 21. The Amended Policy clearly stated that failure to

comply could result in discipline, up to and including termination of employment.

22. The Amended Policy was repeatedly communicated to staff, physician and volunteers, including in staff forums on December 15, 2021 and January 13, 2022, emails on December 17, 24, and 31, 2021, and a memorandum on January 14, 2022.

23. On January 27, 2022, a decision was made to extend the deadline for the second dose to March 9, 2022. The Amended Policy was amended to reflect the extension.

**Termination of the Individual Grievors**

24. On January 20, 2022, Humber determined that Marisol Sanchez and Stacy Hughes were not in compliance with the Amended Policy. Specifically, neither had received the first dose of a COVID-19 vaccine, or been approved for an exemption from receiving a COVID- 19 vaccine. In separate meetings and by separate letters dated January 20, 2022, Ms. Sanchez and Ms. Hughes were placed on unpaid two week leaves of absence. Both were informed they could return to work during this unpaid leave of absence upon receipt of proof of vaccination along with information demonstrating a booked appointment for a second dose. Both were specifically warned that the failure to comply with the Amended Policy by February 3, 2021 could result in termination for cause.

25. On February 3, 2022, Humber determined that Ms. Sanchez and Ms. Hughes were not in compliance with the Amended Policy. In fact, neither had received their first dose of a vaccine. In separate meetings and by separate letters dated February 3, 2022, Ms. Sanchez and Ms. Hughes were advised of the termination of her employment for cause.

26. The decision to terminate was made based on their repeated failure to comply with reasonable and necessary health and safety rules to control the risk that COVID-19 presents to patients and staff despite warnings, and considering all relevant factors, including their service and prior record.

**Arbitration Decision – March 11, 2024**

[11] The gri-*evances were heard on January 24, 2024. In the Decision released March 11, 2024, the Arbitrator upheld the grievances, finding that Humber did not have cause to terminate the Grievors' employment either on a disciplinary basis or on non-culpable grounds.

***No disciplinary grounds for termination***

[12] The Arbitrator noted that to comply with Humber's mandatory vaccination policy requirement, the Grievors would necessarily have to consent to receiving the COVID-19 vaccine

and disclose their medical information to Humber. The policy therefore engaged the issue of medical consent. She went on to find that arbitrators have consistently affirmed that an employer may not take disciplinary action against an employee for refusing to provide medical disclosure or undergoing treatment:

> [47] … As part of the fundamental right of control over one's own bodily integrity, every employee still has the right to choose whether to be vaccinated. While a result of the grievors' exercise of their right not to be vaccinated meant they were not in compliance with the Hospital's policy, the mere fact that the grievors were unwilling to have a vaccine injected into their bodies cannot fairly be characterized as an act of insubordination, or some other culpable conduct. Consent to medical procedures or disclosure of private medical information is not an area that falls under the employer's sphere of authority. Whether or not to be vaccinated is the individual's decision to make. To respond to an employee's exercise of that individual right with discipline is to say that they are deserving of censure for having exercised their choice in a manner differently than that directed by the employer. The jurisprudence is clear - that is not a permissible employer response to the exercise of this right.[1]

[13] The Arbitrator concluded that an employer can never discipline an employee for refusing to exercise their consent to medical treatment and/or disclosure of medical information in a particular way. She held that the reasonableness of an employer's request is "essentially irrelevant" to the issue of discipline because "it does not eliminate the employee's right to consent".[2]

[14] The Arbitrator rejected a more recent line of arbitral case law that examined employers' mandatory vaccination policies in the context of the COVID-19 pandemic, including several awards rendered in the healthcare setting. She rejected Humber's argument that there was arbitral consensus that non-compliance with an employer's reasonable mandatory vaccination policy is a basis for discipline, finding that none of the decisions sufficiently considered or gave primacy to employees' right to medical consent[3]. She held:

> [60] For the above reasons, I do not find the caselaw upon which the Hospital relies as providing a persuasive authority to go against the well-established principles in the *NAV Canada* line of cases, and conclude that discipline is now an appropriate response to an employee's exercise of the right to determine whether to consent to medical treatment or disclosure of medical information. Such a conclusion would be a significant departure from long-standing arbitral principles and, in my view,

[1] Decision, at para. 47, referencing *Shell Canada Products Ltd. and C.A.I.M.A.W. Loc. 12 (Re)*, 1990 CanLII 12731 (BC LA); *Nav Canada at C.A.T.C.A. (Medical Examinations) (Re)*, 1998 CanLII 30171 (CA LA); *United Food & Commercial Workers, Local 206 v. G & K Services Canada Inc*, 2013 CanLII 34202 (ON LA); *Masterfeeds, Div. of AGP Inc. and U.F.C.W., Loc. 1518 (Re)*, 2000 CanLII 50149 (BC LA).
[2] Decision, at para. 45.
[3] Decision, at paras. 48-61.

> would require a fulsome analysis directly addressing the issue of medical consent to be persuasive.
>
> [61] In the case at hand, I find the Hospital did not have just cause to discipline the grievors for failing to get vaccinated and/or for failing to disclose private medical information. While there is no dispute that it was reasonable for the Hospital to require both of those things in order for the grievors to be able to work in the workplace, the reasonableness of that requirement did not eliminate the grievors' right to choose whether to be vaccinated. Whatever one may think of the wisdom of the employees' choice, it was theirs to make, and that is not conduct for which the Hospital may impose discipline.

[15] Accordingly, the Arbitrator concluded that the Grievors' termination from employment could not be justified on disciplinary grounds.

***Non-culpable grounds for termination***

[16] The Arbitrator justified her position that discipline could never flow from non-compliance with a mandatory vaccination policy on the basis that this did not render Humber's vaccine requirement unenforceable. She stated:

> [48] This does not mean that the Hospital's requirement that employees be vaccinated in order to work is not enforceable. Just because the Hospital cannot invoke its disciplinary powers to suspend or terminate an employee does not mean that they must allow an employee who has failed to provide the necessary proof of vaccination to be present in the workplace. That too is something arbitrators have repeatedly stated – employees must accept the consequences of their choices. An employer retains the power to address the situation resulting from the employee's choice if it renders the employee unable to safely work in the workplace. The employer can take other forms of action that are not disciplinary in nature, and these other actions may, if justified in the specific circumstances, include non-disciplinary termination: see for example *Fraser Health Authority and Hospital Employees Union* (London), *supra*.

[17] The Arbitrator then went on to conclude that the Grievors' termination from employment could not be justified on non-culpable grounds. In coming to this conclusion, the Arbitrator found that:

> (a) there was "no evidence" to suggest that permitting the Grievors to remain on an unpaid leave of absence from the Hospital past February 3, 2022 would have "any impact" on the Hospital's staffing burden[4]; and

[4] Decision, at para. 73.

> (b) the Grievors' employment had not been frustrated, because "there was no reason to presume" that Humber would need a mandatory COVID-19 vaccination policy for an extended period of time after February 3, 2022 and the Grievors may have changed their minds if they continued on unpaid leaves of absence for longer than two weeks[5].

[18] For these reasons, the Arbitrator found that Humber failed to meet its onus of showing justifiable non-culpable grounds as well.

**Remedy Decision – October 10, 2024**

[19] No issue is taken with the Remedy Decision, which was rendered after Humber had rescinded the Policy, effective July 1, 2024. The Arbitrator ordered the reinstatement of the Grievors without loss of seniority, but without compensation for lost wages. The Arbitrator indicated that the Grievors had twice indicated their intention not to return to work at the Hospital, and ordered that if they failed to notify the Hospital of their intention to return to work within seven days of the Remedy Decision, they would be deemed to have resigned.

**Humber's Position**

[20] Humber submits that the Decision is unreasonable for the following reasons:

> 1. The Decision is incoherent and irrational in its finding that non-compliance with Humber's vaccination policy was not just cause for discipline.
>
> 2. The Arbitrator overlooked arbitral and judicial decisions arising in the context of the pandemic that underlined that mandatory vaccination policies did not engage an employee's medical consent;
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> 3. The Arbitrator ignored the legislative and regulatory regime that governed mandatory vaccinations in hospital settings during the pandemic.
>
> 4. The Arbitrator ignored the factual matrix in December 2021 when Humber amended its vaccination policy to remove the third option and clearly stated that failure to comply with vaccination would result in discipline, up to and including termination of employment and the facts on the ground when the Grievors were terminated on February 3, 2022.
>
> 5. The Arbitrator's reasons for finding that there were no non-culpable grounds for termination have no basis in the evidence.

**Teamsters' Position**

[5] Decision, at para. 74.

[21] Teamsters submits that there was nothing unreasonable in the Arbitrator's reliance on a long line of case law regarding employees' medical consent rights to find that not following a reasonable mandatory vaccination policy was not culpable and did not attract discipline. It was reasonable for the arbitrator to hold that this does not render a policy unenforceable, only that a different standard must be met by the employer to enforce the policy-- an employee may be denied work and have their employment terminated for non-culpable reasons.

[22] In terms of non-culpable termination, Teamsters submits that as the Grievors were not going onto Humber's property, being on an unpaid leave of absence, the safety of patients and employees would not be impacted by having the Grievors remain longer at home. As well, Humber led no evidence of the impact on its operations of the Grievors' inability to work.

[23] Teamsters submits that the Decision was reasonable and the applications should be dismissed.

**Court's Jurisdiction**

[24] The Court has jurisdiction to hear this application pursuant to ss. 2(1) and 6(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

**Standard of Review**

[25] The parties agree that the applicable standard of review for the Arbitrator's Decision is reasonableness. This is consistent with the long-standing jurisprudential commitment to affording decision-makers in the labour relations area the highest degree of deference: *Thomas v. United Food*, 2021 ONSC 3015, at para. 12.

[26] The starting point of reasonableness review is judicial restraint and "respect for the distinct role of administrative decision makers": *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 13. The reviewing court should recognize and respect the specialized expertise of administrative decision makers: *Turkiewicz (Tomasz Turkiewicz Custom Masonry Homes) v. Bricklayers, Masons Independent Union of Canada, Local 1*, 2022 ONCA 780, 476 D.L.R. (4th) 421, at para. 55, leave to appeal refused, [2023] S.C.C.A. No. 131.

[27] Nevertheless, reasonableness is a "robust form of review" requiring decisions to be "transparent, intelligible and justified." As *Vavilov* tells us, courts must consider all relevant circumstances and seek to gain an understanding of the reasoning in order to determine if a decision is reasonable. Even though a court may disagree with a decision, that does not make it unreasonable. Rather, a decision may be unreasonable if the reasoning is illogical, incoherent, circular, makes unfounded generalizations or has an absurd premise. A decision which has an "unreasonable chain of analysis" or a "fundamental gap" in the reasoning is often a mark of unreasonableness. Ignoring the text, context or purpose of a statute, or failing to consider a crucial

element of a statute, recognizing that a tribunal's interpretation of its own statute is to be given much deference, may also be an indication of unreasonableness: *Vavilov*, at paras. 13, 15, 96-104.

[28] Findings of fact are to be given a high degree of deference; however, a decision may be found to be unreasonable if it is not supported by the facts or the tribunal misapprehended the evidence. If a tribunal departs from existing authority or longstanding practices, that may also raise concerns about reasonableness: *Vavilov*, at paras. 111-112.

[29] A court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome. This was reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, at para. 12, as referenced in *Vavilov*, at para. 87.

**Discussion**

[30] The seminal cases for the approach to take in determining the reasonableness of an employer's policy to which it attaches disciplinary consequences are *Re Lumber & Sawmill Workers' Union, Local 2537 and KVP Co,* 16 L.A.C. 73, 1965 CanLII 1009 ("*KVP*"), and the post *KVP* case of *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458 ("*Irving*").

[31] A *KVP* case is one in which an employer adopts a workplace rule to which it attaches disciplinary consequences. *KVP* holds that in order for the rule to be relied on as a basis for discipline, certain requirements must be met. One of those is that the rule must not be "inconsistent with the collective agreement"; another is that it must be "reasonable": *Central West LHIN v. CUPE, Local 966*, 2023 CanLII 58388 (ON LA), at para. 10) ("*Central West*").

[32] In *Irving*, the employer policy at issue contained a universal random alcohol testing component, whereby a small percentage of employees in safety sensitive positions were to be randomly selected for unannounced breathalyser testing over the course of a year. A positive test result for the presence of alcohol attracted disciplinary action, including dismissal. Failure to submit to testing was grounds for immediate dismissal. The majority of a labour board found the policy unjustified when weighing the employer's interests in random alcohol testing as a workplace safety measure against the harm to employees' privacy interests. The Supreme Court of Canada ultimately upheld the board's determination as reasonable.

[33] The application of *Irving* involves a balancing of interests in determining reasonableness of the employer's policy which requires labour arbitrators to assess things such as "the nature of the employer's interests, any less intrusive means available to address the employer's concerns, and the policy impact on employees": *Irving*, at para. 27. The impact on employees' privacy interests, including their interests in personal autonomy and bodily integrity, forms part of the assessment.

[34] Employer COVID-19 mandatory vaccination policies have now been the subject of many arbitral awards. All have applied *KVP*. Most have done so with the assistance of the "balancing of interests" approach to reasonableness identified in *Irving*: *Central West*, *supra*, at para. 11.

[35] In this case, Teamsters accepted that the Amended Policy was reasonable. Humber accepts that the Arbitrator correctly observed that a *KVP* analysis of whether an employer policy is reasonable is separate from the analysis of whether there is just cause to discipline for breach of the policy. Humber submits, however, that the Arbitrator unreasonably held that the reasonableness and necessity of an employer policy – and, therefore, all of the *facts* underpinning its reasonableness and necessity– are *irrelevant* to the analysis of whether there is just cause to discipline for breach of the policy.[6] It submits that the principle articulated by the Arbitrator is fundamentally flawed and without legal support.

[36] Humber submits that on the basis of this flawed principle, the Arbitrator concluded that even the "significant" and "exceptional" circumstances of the COVID-19 pandemic that the Amended Policy was designed to address, and Humber's corresponding need to enforce the Amended Policy, could not justify discipline because it "did not eliminate" the Grievors' right of medical consent.[7]

[37] Humber submits that the Arbitrator failed to engage in *any* balancing of Humber's duty to protect its patients and staff against the significant health and safety risks associated with the COVID-19 pandemic and its employees' privacy interests.

**Issues**

[38] Humber's submissions raise the following issues:

1. Is the Decision incoherent and irrational for relying on general arbitral authority on medical consent determined in a different context to find that discipline could never follow non-compliance with a health authority's mandatory vaccination policy during a pandemic?

2. In finding that non-compliance with Humber's vaccination policy was not just cause for discipline, did the Arbitrator ignore relevant legal and factual constraints imposed by:

   a. arbitral precedent;

   b. judicial precedent; and/or

   c. the legislative regime?

[6] See Decision, at para. 45.

[7] Decision at paras. 58-61.

3**.** Did the Arbitrator err in finding that termination could not be justified on non-culpable grounds?

**Analysis**

**1. Is the Decision incoherent and irrational?**

[39] Directive #6 issued by the Chief Medical Officer of Health for Ontario for Public Hospitals required Humber as a public hospital within the meaning of the *Public Hospitals Act* and other covered organizations not only to establish and implement a COVID- 19 vaccination policy but to ensure compliance with it. The introduction to Directive #6 provides in part:

> There are many health care workers (HCW) in higher risk settings (e.g., public hospitals, home or community service settings, paramedics in ambulances, etc.) who remain unvaccinated and are posing risks to patients and other HCWs as well as to the health care system capacity due to the potential (re) introduction of COVID-19 in those settings. In addition to these concerns, the prevalence of the Delta variant of concern globally and within Ontario, has increased transmissibility and disease severity than previous COVID-19 virus strains. There is, therefore, an immediate risk to patients within hospitals and home and community care settings who are more vulnerable and medically complex than the general population, and therefore more susceptible to infection and severe outcomes from COVID-19.

[40] Despite Humber's implementation of the Policy under Directive #6 which provided the option to employees of complying by proof of completing an educational session and submitting to regular antigen testing (the "third option"), at the time Humber amended the Policy, case counts were surging among patients and staff. With the emergence of the more transmissible Omicron variant counts, and difficulties with the test and policy, Humber amended the Policy to remove the third option. This meant that all staff, patients and visitors were required to be fully vaccinated, unless medically exempt. The Amended Policy clearly stated that failure to comply could result in discipline, up to and including termination of employment.

[41] The principle that non-compliance with an employer's mandatory vaccination policy in the context of the pandemic is a basis for discipline was summarized most concisely by Arbitrator Robert Herman in *Lakeridge Health v. CUPE, Local 6364*, 2023 CanLII 33942 (ON LA) ("*Lakeridge")* and Arbitrator Russell Goodfellow in his 2023 decision in *Central West*. Both awards have been followed numerous times since they were released in 2023, and *Central West* has been described as a "resounding" precedent.[8] Most importantly, both awards were decided in the healthcare setting and in factual circumstances directly analogous to this case.

[8] *Corporation of the City of North Bay v. Canadian Union of Public Employees, Local 122-1*, 2023 CanLII83430 (ON LA), (*North Bay*) at para. 5; *National Organized Workers Union (NOWU) v. Humber River Hospital*, 2024 CanLII 52386 (ON LA) ("*NOWU*"), at paras. 135-139; see also *Ottawa (City) v. Ottawa-Carleton Public Employees' Union, Local 503*, 2024 CanLII 67071 (ON LA); *Ontario Public Service Employees Union (Titley) v. Ontario (Public and Business Service Delivery)*, 2024 CanLII 52279 (ON GSB); *Finnegan v. Lower Lakes Towing Ltd*. 2024 CIRB 1140.

[42] In *Lakeridge*, Arbitrator Herman upheld the reasonableness of a hospital's decision to place unvaccinated employees on an unpaid leave and then terminate their employment for non-compliance with its mandatory COVID-19 vaccination policy. In doing so, he addressed the argument (raised by the union in that case) that discipline is never an appropriate response to an employee's exercise of their right to refuse medical treatment. Arbitrator Herman explained that the exigent circumstances of the COVID-19 pandemic required a balancing of the safety risks posed to the hospital's patients and staff against the individual employee's privacy interest:

> [171] The Union argues that the case law establishes that discipline is never appropriate for the failure to take medicine or to be vaccinated. That may generally be accurate in the contexts in which the jurisprudence relied upon by the Union arose. Again, this is not a normal scenario. The September Policy was issued in the context of a pandemic that had already caused significant numbers of deaths and life-threatening illnesses, both of patients and staff who worked in hospitals, and continued to do so. Unvaccinated employees presented greater risks for all employees and patients, not only for themselves…
>
> [172] The line of authority that follows after *KVP* does not stipulate that breach of a unilaterally issued policy cannot be grounds for discipline. Rather, the cases generally conclude that discipline may in fact be appropriate for breach of a unilaterally imposed company policy or rule; see for example, *Chartwell Housing REIT v. Healthcare, Office and Professional Employees Union, Local 2200,UBCJA*, 2022 CanLII 6832 (ON LA) (Misra); *Unifor Local 973 v. Coca-Cola Canada Bottling Limited* (Wright), 2022 CanII 25769 (ON LA) (full citation added); *Coca-Cola Canada Bottling Limited v United Food and Commercial Workers Union Canada, Local 175* (Herman), 2022 CanLII 83353 (ON LA) (full citation added); *Toronto Professional Fire Fighters' Association, I.A.A.F. Local 3888 v. Toronto(City)* (Rogers), 2022 CanLII 78809 (full citation added).
>
> [173] The importance of the subject matter of the Policy and its purposes justified requiring employees to comply with the terms of the Policy, and justified the Hospital's treatment of non-compliance as disciplinable misconduct. As noted, the Policy did not serve to protect only the employees who got vaccinated, but also vaccinated employees and patients and their families who might be exposed to unvaccinated employees. Cases that stand for the principle that employees who refuse or decline to take medicine do not engage in disciplinable conduct have limited application in this context. This is particularly so where the Act requires that employers take reasonable steps to protect the health and safety of employees and where the Local Agreement stipulates that employees have the right to a safe and healthy work environment and directs the Hospital not to wait until there is scientific certainty before taking reasonable actions to reduce the risks to employees.

> [174] It is a legitimate response to a breach of the Policy to discipline employees who refused to comply with the reasonable requirement that they be vaccinated in order to protect other employees, patients and Hospital visitors. Employees were not forced to get vaccinated, they were required to get vaccinated only if they wished to continue to work for the Hospital.

[43] The Arbitrator's view was that the analysis in *Lakeridge* did not "grapple in any meaningful way" with the principle that discipline is not an appropriate response to an employee exercising their right to consent to receive medical treatment and/or disclose medical information.[9] The Arbitrator held that it was an error to engage in any balancing of interests or give any focus to the exigent circumstances of the COVID-19 pandemic that necessitated a mandatory vaccination policy.

[44] By elevating medical consent rights above the importance of the subject matter of the policy and its purpose, the Decision failed to address the very different context of the pandemic as described in the documentary record filed by Humber: an extreme situation which Humber and other hospitals faced in late 2021 and January, 2022 – dramatically increased COVID case counts among patients, increased rates of staff infections and a serious threat of health system overload at Humber and other hospitals in Ontario.

[45] The Arbitrator correctly states at para. 58 of the Decision that whether a rule or policy is reasonable is separate from an analysis of whether there is just cause for discipline for breach of the rule. The forum of the individual grievance is the appropriate place for consideration of individual consequences.[10] The fact that the employer's rule requiring vaccination in order to work in the workplace is reasonable is not a sufficient answer to the question of whether discipline is justified in the specific circumstances in which it was issued. However, the Decision then failed to balance Humber's duty to protect its patients and staff against the significant health and safety risks associated with the COVID-19 pandemic.

[46] In finding that non-compliance with mandatory vaccination can *never* be met with discipline given privacy and bodily integrity rights, the Arbitrator unreasonably disregarded the nature of Humber's workplace which made that policy reasonable in the first place: namely, that it was an acute care hospital with vulnerable patients experiencing increased infection rates due to the Omicron strain.

[47] In *Central West, supra*, similar to *Lakeridge*, an arbitrator upheld the reasonableness of a health authority's mandatory vaccination policy which stated that non-compliance would result in progressive discipline and cited numerous previous arbitral cases as support.[11]

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[9] Decision at para. 56.
[10] *North Bay*, at para. 5.
[11] *Central West,* at paras. 154-156.

[48] The Arbitrator in this case opined that employers could accomplish the objectives of a reasonable mandatory vaccination policy through less intrusive non-disciplinary measures, which is why the presumption that non-compliance may be responded to with discipline which generally applies does not apply where medical consent is engaged. Teamsters argued that employees should have been placed on non-disciplinary leave until the employer could demonstrate some harm to its legitimate interests.

[49] In *Central West* the arbitrator found that whether there was a "less intrusive" alternative, such as placing employees on indefinite unpaid leaves of absence, applies only to an analysis of the reasonableness of the mandatory vaccination requirement, not to the consequences of non-compliance.[12] He also found that placing employees on indefinite unpaid leaves of absence raised by the union in that case was not a suitable or effective alternative means of accomplishing the objective of the policy:

> [156] Nor, in my view, can it reasonably be suggested that placing employees on indefinite unpaid leaves of absence is, in any way, an alternative means of accomplishing the goals and objectives of the policy. The goal of the policy is to keep employees safe and working; it is not, as the Employers highlighted here, to keep employees safe and not working. The object of the policy is to get the work done, safely, with as much of the existing employee complement as possible. It is not to get the work done with temporary replacements – employees who, if they could be found on such contingent terms, would then need to be oriented and/or trained and who would then, presumably, be subject to termination should circumstances, including the state of mind of the non-compliant, change – all while the Employers were attempting to cope with the greatest public health crisis ever faced. That, in my view, is not a less intrusive means of accomplishing the objectives of the policy; it is a less effective means of enforcing it. The disciplinary aspect of the policy was coercive and it was meant to be. The goal was to achieve compliance.

[50] *Central West* was described in the following way in *North Bay*, *supra*:

> [5] The starting point for argument in this case was the recent Central West award. The award stands as a resounding precedent, based on a rigid review and analysis of the jurisprudence. It exemplifies the balancing of interests between employee rights and employer needs in the extraordinary circumstances under which mandatory vaccination policies were promulgated. The award distinguishes between the reasonableness of a mandatory vaccination requirement *per se*, and the reasonableness of its implementation in individual circumstances. That award definitively upholds an enforcement mechanism that includes potential termination from employment for non-compliance, while clarifying that the forum of the

[12] *Central West,* at para. 155.

> individual grievance is the appropriate place for consideration of individual consequences.

[51] The arbitrator in *North Bay*, at para. 17 went on to hold that discipline is contemplated by the mandatory vaccination policy in that case. Without an enforcement mechanism, the policy becomes a "mere suggestion and enforcement a mere ideal". The arbitrator held at para. 18 that extending a leave of absence would not constitute a less intrusive means of enforcing the policy. The employer's critical interest is the operation of its services and delivery of those services to the public which is not an interest that can be served with employees remaining on leave.

[52] In a June 6, 2024 award (released after the Decision), Arbitrator Andrew Tremayne upheld the reasonableness of Humber's mandatory COVID-19 vaccination policy – the same policy at issue in this judicial review - in the context of a policy grievance brought by a different union. In doing so, he observed that both *Central West* and *Lakeridge* were "on all fours" with the matter before him, finding that there were "few, if any material differences" between Humber and the healthcare employers in *Lakeridge* and *Central West*.[13]

[53] Teamsters correctly points out that decisions issued after the Arbitrator's Decision which were not presented to her cannot make the Decision unreasonable. However, the fact remains that this Decision is the one outlier in the arbitral decisions before and after it which have all ruled that in the COVID-19 context, non-compliance with a reasonable vaccination policy was a basis for discipline.

[54] While discipline may never be appropriate in a normal scenario for the failure to take medicine or be vaccinated, the Amended Policy was issued in the context of a pandemic that had caused a significant number of deaths and life-threatening illnesses, both of patients and staff who worked in the hospital and continued to do so. Unvaccinated employees posed greater risks not only for themselves but for all employees, patients and their families who might be exposed to unvaccinated employees.

[55] In finding that non-compliance with a mandatory vaccination policy can *never* be met with discipline because these policies engage an employee's right to consent to medical treatment and/or disclose medical information, the Arbitrator failed to engage in any balancing of Humber's duty to protect its patients, staff and visitors against the significant health and safety risks associated with the COVID-19 virus as required by *KVP* and I*rving*.

[56] Other than this Decision, no COVID-19 mandatory vaccine case supports that a mandatory vaccination policy can *never* be met with discipline. *Central West* cites 12 COVID-19 cases that support, expressly or impliedly that a refusal to be vaccinated can be the subject of discipline. *Lakeridge* explicitly considered and rejected the argument that discipline is never an appropriate response to an employee's exercise of their right to refuse medical treatment. *Central West* found

[13] *NOWU*, at paras. 138-139.

that there is no question that non-compliance with an otherwise reasonable COVID-19 mandatory vaccination policy – a refusal to be vaccinated unsupported on medical or human rights grounds – can be the subject of discipline.[14] *Central West* exemplifies the balancing of interests called for by *KVP* and I*rving* between employee rights and employer needs in the extraordinary circumstances under which mandatory vaccination policies were promulgated. The award distinguishes between the reasonableness of a mandatory vaccination requirement *per se*, and the reasonableness of its implementation in individual circumstances. That award definitively upholds an enforcement mechanism that includes potential disciplinary termination from employment for non-compliance, while clarifying that the forum of the individual grievance is the appropriate place for consideration of individual consequences.

[57] In this case, the Arbitrator applied a general principle regarding medical consent rights reached in a different context to find that a hospital worker's refusal to provide proof of vaccination during the COVID-19 global health pandemic can never form the basis of a disciplinary response by the employer because it engaged the employees' medical consent rights. In applying the general principle in this situation, the Arbitrator failed to consider that Humber was under a legal obligation to ensure compliance with its vaccination policy and that the exigent circumstances of the COVID-19 pandemic required a balancing of the safety risks posed to the hospital's patients and staff against the individual employee's privacy interest. In this respect, the Arbitrator's Decision was unreasonable.

**2(a) Did the Arbitrator ignore arbitral precedent?**

[58] The Supreme Court in *Vavilov* emphasized that a decision maker's failure to follow a relevant past decision can render the decision under review unreasonable even if *stare decisis* does not technically apply.[15]

[59] By the time the grievances in this case were heard by the Arbitrator, a consensus had emerged from the arbitral cases examining the reasonableness of employer mandatory vaccination policies in the context of the COVID-19 pandemic: that is, non-compliance with an employer's reasonable mandatory vaccination policy is a basis for discipline, including termination of employment: *North Bay*, at para. 5.

[60] Teamsters incorrectly submits that *North Bay* was not provided to the Arbitrator: see paras. 18 and 56 of the Decision, where the Arbitrator refers to *North Bay*. Teamsters further submits that other than *Lakeridge*, none of the decisions relied on by Humber considered the issue of medical consent. It submits that if there was a consensus which it disputes, an arbitrator may depart from such a consensus so long as the departure is justified. Teamsters points out that the Arbitrator considered and gave reasons for rejecting the reasoning in *Lakeridge* and *Central West.*

[61] Teamsters argues that Humber's position is a marked departure from established arbitral precedents that an employee cannot be disciplined for refusing to give medical consent. It submits

[14] *Central West*, at para. 154.
[15] *Vavilov*, at para. 131.

that it is reasonable to conclude that the facts of the COVID-19 pandemic do not turn what would otherwise be indisputably non-culpable conduct into blameworthy conduct.

[62] I disagree that the decisions relied upon by Humber and put before the Arbitrator did not consider the issue of medical consent. Rather, the decisions did the balancing exercise required by *KVH* and *Irving* and found that in the context of the pandemic, non-compliance with a reasonable vaccination policy was a basis for discipline.

[63] The Arbitrator gave reasons for rejecting the reasoning in *Lakeridge* and *Central West.* Nevertheless, the issue she considered is the same issue that all the other arbitrators grappled with and concluded that discipline could arise in the case of a mandatory vaccination policy.

[64] I conclude that there was an arbitral consensus at the time of the Arbitrator's Decision and that the Arbitrator departed from this consensus and provided no compelling reason for doing so.

**2(b) Did the Arbitrator ignore judicial precedent?**

[65] Humber submits that concluding that the Amended Policy engages issues falling outside the employer's "sphere of authority" is inconsistent with judicial precedent. Courts have repeatedly confirmed that in the specific context of COVID-19, an occupational vaccine requirement does not amount to "forced vaccination", nor does it violate informed consent, bodily autonomy, or *Charter* rights.

[66] As support for this point, Humber primarily relies on three cases: *Hoogerbrug v. British Columbia*, 2024 BCSC 794; *Maddock v. British Columbia*, 2022 BCSC 1605 and *National Organized Workers Union v. Sinai Health*, 2022 ONCA 802 ("*Sinai Health*").

- In *Hoogerbrug*, the British Columbia Supreme Court dismissed a petition for judicial review brought by healthcare workers who were terminated for remaining unvaccinated in the face of public health orders requiring mandatory vaccination for their profession. The court held that the mandatory requirement did not constitute compelled medical treatment and did not interfere with bodily integrity. Rather, it held that the petitioners "lost their jobs because they chose not to accept vaccination against a highly contagious virus which posed the risk of serious illness and death to vulnerable patients and other healthcare workers": *Hoogerbrug*, at paras. 18, 276-278.

- In *Maddock*, the British Columbia Supreme Court elaborated on this principle, holding that while the public health orders imposing mandatory vaccination for patrons of certain establishments "may make the decision of whether or not to accept medical treatment in the form of vaccination more difficult… it does not impose a decision on the petitioner": *Maddock*, at para. 78.

- In *Sinai Health*, the Court of Appeal for Ontario confirmed a decision rejecting a union's argument that a hospital's mandatory COVID-19 vaccination policy violated hospital workers' ability to provide informed consent, thus leading to irreparable harm (in the context of an injunction application). The application judge found that the harm suffered by the hospital workers was properly characterized as a loss of employment and were not violations of informed consent or bodily autonomy as alleged: *Sinai Health*, at para. 38; see also *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, 2021 ONSC 7658, at paras. 48-53.

[67] Humber submits that these cases are clear that its policy is not tantamount to compelled medical treatment or disclosure.

[68] Teamsters correctly points out, however, that this caselaw was not submitted to the Arbitrator and that therefore it is not a basis to find the Decision unreasonable that the Arbitrator did not provide an explanation for not following principles set out in that caselaw.

**2(c) Legislative Regime**

[69] Humber relies on three areas of law that it says show that the employer had just cause to discipline the Grievors: O. Reg. 67/93, *Health Care and Residential Facilities* (the "Health Facility Regulation"); *Hospital Management*, R.R.O. 1990, Reg. 965 under the *Public Hospitals Act* (the "Hospital Management Regulation"); and Directive #6. The Health Facility Regulation and the Hospital Management Regulation were not put to the Arbitrator and are not referenced in the Decision.

[70] Teamsters argues that Directive #6 does not prevail over other legislative provisions protecting autonomy and privacy rights, such as s. 18 of the *Personal Health Information Protection Act*, 2004, S.O. 2004, c. 3; and ss. 10-11 of the *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sched. A. Apart from Directive #6, the Decision does not address these various provisions.

[71] Directive #6 stated that the hospital must implement a vaccination policy and ensure compliance. Specifically enumerated in the Directive was that employees must disclose immunization information to the employer. The Amended Policy provided that failure to comply would result in disciplinary action including termination of employment.

[72] It is clear from the jurisprudence as noted above that mandatory vaccination policies do not impose a decision on the employee. The Arbitrator found at para. 47 of the Decision that Directive #6 does not circumscribe an employee's right of medical consent and therefore they are not circumscribed legislatively. The Arbitrator's Decision is not unreasonable in this regard.

**3. Did the Arbitrator err in finding that termination could not be justified on non-culpable grounds?**

[73] It is not necessary to determine whether the Arbitrator erred in finding that termination could not be justified on non-culpable grounds because as noted by the Arbitrator at para. 74 of the Decision, *Coca-Cola Bottling Products* and *Lakeridge* both suggest that even in the context of discipline, two weeks of unpaid leave is an unreasonably short period of time to conclude the employee is not likely to change his or her mind about their vaccination choice. It follows that the Decision to reinstate the Grievors was not unreasonable because their employment was terminated after they had been on unpaid leave for only two weeks.

**Conclusion**

[74] It was unnecessary and unreasonable to decide that an employee can never be disciplined for failing to comply with a mandatory vaccination policy during a pandemic. Whether discipline is appropriate in the future for breach of a mandatory vaccination policy should be determined on the facts at the time the issue may arise.

[75] Because the Arbitrator did not err in the result in finding that termination could not be justified because the Grievors had only been on unpaid leave for two weeks, and having regard to the Remedy Decision, no practical purpose would be served in ordering a rehearing in this matter.

[76] The application is dismissed.

**Costs**

[77] In accordance with the parties' agreement, Humber is entitled to its costs in the all-inclusive amount of $10,000.

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Backhouse J,

I agree _____

Lococo J.

I agree _____

Mew J.

**Released:** May 6, 2025

**CITATION:** Humber River Health v. Teamsters Local Union No. 419, 2025 ONSC 2270
**DIVISIONAL COURT FILE NO.:** 693/24
**DATE:** 20250506



**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**DIVISIONAL COURT**

**Backhouse, Lococo and Mew JJ.**

**BETWEEN:**

HUMBER RIVER HEALTH

Applicant

**– AND –**

TEAMSTERS LOCAL UNION NO. 419

Respondent

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**REASONS FOR DECISION**

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**Backhouse J.**

**Released: May 6, 2025**