IN THE MATTER OF AN ARBITRATION PURSUANT TO
THE LABOUR RELATIONS CODE, R.S.B.C. 1996 c. 244

BETWEEN:

FRASER HEALTH AUTHORITY

(the "Employer" or “FHA”)

AND:

BRITISH COLUMBIA GENERAL EMPLOYEES’ UNION

(the "Union")

LORIANNA CAPOZZI TERMINATION GRIEVANCE

(Section 104 – BCLRB Case No. 2021-001482R)

AWARD

Arbitrator:	Koml Kandola
Counsel:	Sari Wiens, for the Employer Emily Luther and Roxanne Sproule, for the Union
Date of Hearing:	March 1 and 2, 2022 via videoconference (followed by written submissions)
Date of Decision:	April 4, 2022

I. INTRODUCTION

1 On September 13, 2021, the Provincial Health Officer of BC ("PHO") announced she would be issuing an order requiring all health authority employees to obtain vaccination against COVID-19 in order to be eligible to work (the "Hospital and Community Order"). The PHO issued the Hospital and Community Order on October 14, 2021.

2 Lori Capozzi (the "Grievor") has been employed by FHA since February 2014, as a substance abuse counsellor. She has a discipline-free record. Despite multiple notifications, she did not obtain vaccination, and advised FHA that she did not ever intend to do so. As a result, on November 25, 2021, FHA terminated her employment. The Union asserts that FHA did not have just and reasonable cause for termination and that there were reasonable alternatives, such as an unpaid leave of absence. The Union did not specify the length of leave it considered appropriate. FHA submits the Grievor's employment was terminated for just cause due to her ineligibility to work under the Hospital and Community Order.

3 I was appointed to hear this matter under the expedited arbitration provisions in the *Labour Relations Code.* This Award is issued under those requirements. The hearing occurred via videoconference on March 1 and 2, 2022. The parties agreed to a schedule for written arguments, with the last submission being filed on March 28, 2022.

II. EVIDENCE

4 The Employer called Stacey Benn, FHA's Leader of Human Resources Consulting Services, and Ken Casorso, FHA's Executive Director of People Services. The Union called Brent Camilleri, Coordinator for BCGEU's Negotiations Department, and the Grievor.

5 For over two years, the COVID-19 pandemic has been an unprecedented health emergency here and across the globe. As a communicable disease, it has had far-reaching impacts, including serious health consequences up to and including death. It has taken a major toll on our health care system and staff. Throughout the course of the pandemic, the PHO has issued a number of orders, including orders in the health sector, pursuant to her statutory authority to manage health hazards. On March 26, 2020, the PHO issued the Long Term Care Facility Staff Movement Limitation Order (the "Single Site Order"), which restricted staff from working in more than one facility, to limit transmission. This Order provides for exceptions to this restriction, and prohibits employers from terminating the employment of affected staff.

6 HEABC and the health sector unions negotiated labour adjustment terms for employees affected by the Order (the "Single Site Transition Framework" or "SSTF"), including agreement that employees unable to work under the terms of the Order would be placed on a COVID-related unpaid leave of absence under section 52.12(c) of the *Employment Standards Act* for the duration of the single site limitation. The SSTF also allowed for those employees' positions to be posted, on a temporary basis. The evidence was that, due to pressures on maintaining adequate staffing, HEABC and the health sector unions then agreed to allow employers to permanently post those positions. Mr. Camilleri conceded that there will be significant challenges associated with undoing those postings when and if the Single Site Order is rescinded and the employees on leave return to work. This was despite the fact that the Single

Site Order applies only to residential care, not the entire health sector, and that only approximately 15% of those staff had actually been working at more than one site.

7 The pandemic persisted and new and more contagious variants of the virus emerged. Starting in August 2021, the PHO issued a number of orders requiring heath care staff vaccination. These orders include a summary of considerations weighed by the PHO, including: recognition that vaccination is "the single most important preventive measure" that could be taken to protect patients, residents and the workforce; and recognition of the impact on unvaccinated staff. The first PHO vaccination orders applied to long-term care staff, requiring them to be vaccinated to be able to work, within prescribed timeframes. On August 25, 2021, FHA's CEO sent an email to all staff advising of the vaccination requirements in residential care, and that provincial-level discussions were taking place about similar requirements for staff in the rest of the health system. The Grievor confirmed receiving and reading this email. As noted, on September 13, 2021, the PHO announced vaccination requirements for staff in the broader health sector. On September 24, 2021, based on that announcement, FHA notified staff of the expected timelines required for vaccination.

8 The Hospital and Community Order was then issued on October 14, 2021. It applied to all remaining employees of a health authority, without exception, and required that as of October 26, 2021, all health authority employees "must be vaccinated or have an exemption to work". Employers were prohibited from allowing unvaccinated staff to work after October 25, 2021, unless the staff member had obtained the vaccine within prescribed time frames, or had an exemption. The only exemption was on narrow medical grounds: there was no exemption for religious reasons. Exemptions could only be determined by the PHO's office, not by an individual employer. Staff ineligible to work as of October 26, 2021 still had the opportunity to return to work seven days after obtaining their first dose, provided they did so by November 14, 2021. As of November 15, 2021, there were no further exceptions.

9 Unlike some other PHO orders put before me, the vaccination orders for residential care and the Hospital and Community Order do not include an expiry date. Indeed, in a November 1, 2021 press conference, the PHO is quoted as saying "If people are in our health-care system and not recognizing the importance of vaccination, then this is probably not the right profession for them, to be frank". On February 15, 2022, the PHO affirmed that "the health care worker immunization is still in place" and "is not just for getting through this wave right now, it's for that longer-term protection as we learn to live with this virus over time".

10 On October 15, 2021, FHA sent a letter to staff outlining the Order's requirements. FHA also set out the consequences of failure to be vaccinated, as follows:

> If you do not receive Dose 1 by end of day October 25, 2021, you will not be permitted to work October 26, 2021, onward. You will be placed on an unpaid leave of absence for three weeks starting October 26, 2021 and a meeting with your manager, human resources and union representative (if applicable) will be scheduled. If you receive Dose 1 by November 14, 2021, you may return to work …
>
> If you do not receive Dose 1 during the three-week unpaid leave, your employment will be terminated effective November 15, 2021, due to your inability to work in accordance with the Order.

11 On October 22, 2021, the Grievor's manager repeated these requirements and consequences to the Grievor in a detailed email, and also set out additional vaccination information and resources. The Grievor acknowledged being aware of these communications.

12 Ms. Benn and Mr. Casorso both testified that FHA's goal was to encourage all employees to obtain vaccination so that they could remain eligible for work. FHA also implemented a policy that it says reflects the requirements of the Hospital and Community Order and the employment consequences set out above (the "Policy"). The policy was not approved until November 7, 2021. As discussed below, FHA did not rely upon the Policy in terminating the Grievor's employment, relying only on the Order itself.

13 Ms. Benn testified that, in implementing the Hospital and Community Order, FHA strived to consider each employee's situation and if they intended to meet the Order's requirements, including considering circumstances where employees confirmed an intention to get vaccinated but needed more time. Ms. Benn provided as examples arrangements made by FHA for: pregnant employees who had been advised to avoid vaccination in their first trimester; employees who wanted to get vaccinated by their immunologist; and employees who had applied to the PHO for an exemption and were awaiting a determination. Employees who were unvaccinated as of the October 26, 2021 deadline were placed on an unpaid leave of absence. Ms. Benn described the process that ensued as follows. During the leave, FHA met with the employee to review their personal circumstances, such as whether the employee was applying for an exemption or had "any other information that would chart a different path for them to be vaccinated", and to review the consequences of not getting vaccinated. If the employee remained unvaccinated as of November 15, 2021, FHA held a further meeting with them to have another discussion about their circumstances and the consequences of remaining unvaccinated. If, despite FHA's efforts, the employee chose to remain unvaccinated and did not have an exemption, FHA would ultimately terminate the individual's employment. FHA's witnesses testified this approach aligned with a provincial approach by all health authorities.

14 Mr. Casorso gave evidence regarding staffing challenges at FHA throughout the pandemic, including that there have been two to four times more unfilled shifts than pre-pandemic. He also testified about the difficulties that would be associated with doing temporary postings of the positions of unvaccinated employees on unpaid leaves of unknown duration, e.g.: the median time to fill temporary shifts is twice that needed for permanent postings; temporary shifts are considered undesirable and difficult to fill, with temporary shifts lacking an end date as amongst the least attractive; and temporary positions can go through a lot of staff churn. This evidence was not persuasively challenged by the Union.

15 In this context, Mr. Casorso testified that where there was no identifiable path forward for an employee to be eligible to work under the Hospital and Community Order, FHA did not consider it reasonable to place the employee on an unpaid leave of absence of unknown duration, on the hope that the employee or the PHO would change direction, particularly where there was no indication that the PHO would do so. In cross-examination, it was put to Mr. Casorso that the unpaid leave for an unvaccinated employee did not have to be indefinite and could have, for example, been for six months or one year. Mr. Casorso's evidence was that would be even more disruptive, stating "I had no reason to think six months or a year would make a difference or be a logical step". Ultimately, FHA terminated the employment of 460 employees who refused to get vaccinated and did not have a valid exemption. His evidence was that if all of those employees had been granted unpaid leaves, FHA would have had to fill 460 temporary positions and, for the reasons already set out, it would be very difficult to do so.

16 I turn now to the Grievor's case. On a number of occasions, the Grievor expressed her strong objection to vaccination. For example, on October 20, 2021, she sent a "personal notice of liability" to her manager, alleging that the vaccination requirement was unlawful and claiming that her manager would be personally liable for any loss of income the Grievor may encounter.

17 FHA met with the Grievor on October 29, 2021, where she confirmed she was not and did not ever intend to become vaccinated. She indicated that she objected to vaccination on religious grounds, and that she felt the PHO Order was unlawful and violated the *Charter.* However, the Union confirmed there is no religious discrimination component to this grievance. In a follow-up letter, FHA confirmed that it could not permit her to work under the terms of the Hospital and Community Order and that she was put on a three-week unpaid leave of absence effective October 26, 2021. FHA advised her that if she remained unvaccinated on November 15, 2021, her employment would be terminated.

18 Shortly thereafter, the PHO announced that a limited supply of the Johnson and Johnson vaccine, which uses a different technology and requires only one dose, would be made available in priority to health care workers. On November 10, 2021, FHA advised staff of this option and that they would receive more time to receive that vaccine if they wanted to.

19 A second planned meeting with the Grievor was postponed until November 25, 2021, for unrelated reasons. In that meeting, the Grievor confirmed she had "absolutely" no intention of obtaining any vaccination, including the Johnson and Johnson vaccine. As a result, FHA advised the Grievor that her employment was terminated. The letter of termination notes, among other things, that the Grievor's employment was being terminated for non-compliance with the Hospital and Community Order and her inability to work. FHA also advised that if the Grievor met the Order's requirements in future, she could discuss options with her manager. Her position was subsequently posted permanently and has since been filled.

20 The Grievor testified that the period after her termination was very difficult for her. She has since been providing individual counselling services through her own business.

III. ANALYSIS AND DECISION

21 This case is not about the validity of the Hospital and Community Order or the benefits or drawbacks of vaccination. This case is also not about the validity of an employer-imposed mandatory vaccination policy. FHA is not relying on the Policy in terminating the Grievor's employment. At the hearing, the Union did not put the Policy in question, nor was there any significant evidence called about it. The Union raised substantive issues regarding the reasonableness of the Policy for the first time in written argument, which I find is improper. In any event, it is not relevant because FHA did not rely on the Policy here. Further, this is not a policy grievance. The grievance form relates only to the termination of the Grievor. In these circumstances, it would be inappropriate to make any findings regarding the reasonableness of the Policy, and I decline to address the Union's arguments in that regard. Rather, this case is about whether FHA had just and reasonable cause to terminate the Grievor's employment, in the context of a PHO order imposing mandatory vaccination requirements that apply to health sector employees across the province. In that regard, the Union does not dispute that: the Hospital and Community Order applies to the Grievor; the Grievor is ineligible to work under that Order; and the Grievor has no intention of taking a COVID vaccine.

22 The Union argues that a “temporary inability to work” under the terms of the Hospital and Community Order does not give rise to just and reasonable cause for termination. It says FHA’s interests in providing a safe workplace could have been balanced with the Grievor’s interests in maintaining employment through more reasonable alternatives. The Union expressly stated it is not arguing in favour of any particular outcome but says, for example, that the Grievor could have been placed on an unpaid leave of absence, or a layoff. It also argues that FHA’s approach was one of “automatic termination”, which did not allow for consideration of mitigating factors or individual circumstances as required in the just cause analysis.

23 The Hospital and Community Order does not require termination. For reasons set out above, FHA determined that termination was the ultimate outcome for employees who, despite its efforts, chose to remain unvaccinated and therefore ineligible to work. I find that the FHA repeatedly advised the Grievor of the Order’s requirement for vaccination to remain eligible for work. It encouraged her to obtain vaccination, provided multiple opportunities to do so, and gave express notice of the employment consequences of failing to do so. For her own personal reasons, the Grievor chose not to get vaccinated. Clearly, the Grievor has the right to make her personal choices, and I accept she strongly believes in her views. However, the result of those choices was that she rendered herself, by virtue of the terms of the Order, ineligible to work for FHA, in any capacity. Further, she advised FHA that she had no intention of ever becoming vaccinated. Accordingly, there was no reasonable prospect of her becoming eligible to work under the Order in the foreseeable future. An employee who, by her choice, renders herself statutorily ineligible to work indefinitely gives FHA cause for some action, whether it be considered culpable or non-culpable. Was termination an excessive response? Should FHA have resorted to other alternatives such as layoff or an extended unpaid leave of absence?

24 The layoff provisions of the parties’ collective agreement (Articles 10.05-10.07) apply in the context of a loss of work or reduction of the workforce, which is not the case here. In his evidence, Mr. Camilleri acknowledged that the layoff provisions did not apply here. Further, and in any event, if considered to be laid off, the Grievor could not accept recall because she is ineligible to work and, under the collective agreement, would be deemed to have abandoned her right to re-employment. With respect to an unpaid leave of absence, while the collective agreement provides for some extended unpaid leaves, the evidence was the Grievor did not apply for any of them nor would she have been eligible. As to whether FHA should have placed the Grievor on an unpaid leave of absence generally, the Union concedes the duration of the leave would be unknown. I was not pointed to any entitlement under the collective agreement or in arbitral law to an unpaid leave of absence of indefinite length where an employee is legally prohibited from working and, due to her personal choices, has no foreseeable prospect of return.

25 I have reviewed all of the authorities referred to by the parties. A clear feature of the jurisprudence is that each case will turn on its own facts and must be decided within its specific context. While there is no case directly on point, I note some of the following findings. For example, in the context of a rapid testing regime, an arbitrator found it was reasonable for the employer to put unvaccinated employees who refused to participate in testing on an unpaid leave for a defined period of time (six weeks), to consider their decision: *Ontario Power Generation and the Power Workers Union,* November 12, 2021 (Murray). The employer advised it would terminate the employment of those employees thereafter, though no such termination had yet occurred. The arbitrator stated as follows at paragraph 19:

> [I]n the context presented by this global pandemic, when lives of co-workers are at risk, unvaccinated individuals who refuse to participate in reasonable testing are, in effect, refusing of their own volition to present as fit for work and reduce the potential risk they present to their co-workers. The Company has made it clear that termination of employment at the end of the 6-week period will typically occur. It is important for those individuals who are fired for choosing to not be tested to understand that they are very likely to find the termination of employment upheld at arbitration. Effectively, employees who refuse testing will likely will have made a decision to end their career with this Company.

26 In *Chartwell Housing REIT and Healthcare, Office and Professional Employees Union Local 2220*, February 7, 2022 (Misra) ("*Chartwell*"), the provincial government ordered long-term care homes to devise a staff COVID-19 immunization policy. The employer, which operated four care homes, promulgated a mandatory vaccination policy to that effect. The employer later told staff that those not fully vaccinated by a prescribed date would be placed on an unpaid leave of absence. At about the same time, the government issued a revised order indicating that all staff must provide proof of vaccination or valid medical exemption by a certain date, or would be ineligible to work. The employer notified staff that despite being on an unpaid leave, "continued non-compliance with the policy may result in discipline up to and including the termination of your employment". After repeated notifications of the possibility of termination, 14 employees were terminated as a result. In considering the reasonableness of the policy, Arbitrator Misra's analysis was driven by specific collective agreement language regarding the continuation of existing practices. In the context of that language, she found the employer had violated the collective agreement by providing for termination as a penalty: para. 195. She declined to consider whether the employer had just cause to terminate the employment of the 14 employees. Importantly, she noted there was no evidence tendered of difficulties in recruitment and retention as a result of the employees being put on unpaid leaves of absence (para. 226) or of any operational necessity that would support termination (para. 233). Even then, she went on to state as follows at para. 243:

> Despite my findings above, it is important to state that this decision should not be taken by those employees who choose not to get fully vaccinated as indicating that the Employer would never be able to terminate their employment for non-compliance with the policy in question, or indeed any reasonably policy. … No employer has to leave a non-compliant employee on a leave of absence indefinitely. At some point, and subject to the Employer warning employees of the possibility of termination, and having considered other factors, it will likely have just cause to terminate the employment of such an employee. (emphasis added)

27 I was not pointed to any contract provisions in this case akin to those relied upon by Arbitrator Misra. Further, unlike in *Chartwell,* there was evidence before me of the operational impact of leaving unvaccinated employees on undefined unpaid leaves of absence, evidence I accept and find to be compelling. While the Union argues that Mr. Casorso's evidence related to staffing issues at the higher level, I find there is nothing to suggest the staffing implications he testified about would be different for the Grievor's position or at her worksite. In addition, unlike in *Chartwell,* FHA provided opportunities for employees to raise individual circumstances and for those to be addressed, to the extent they were relevant in the context of the Hospital and Community Order. For all of these reasons, I find *Chartwell* to be factually distinguishable.

28 I must also consider the full context within which this case arose and which existed at the time of termination. Unlike with the Single Site Order, the provincial parties did not negotiate an agreement that allowed unvaccinated employees to be put on unpaid COVID-19 leave and there was otherwise no collective agreement requirement to do so. Further, in November 2021, the Omicron variant had taken hold and was posing serious challenges regarding transmission and hospitalization. Then and now, the PHO has stated we are still in a pandemic, not endemic, stage. Unlike other PHO orders, the Hospital and Community Order does not include an expiry date. Importantly, I find that, at the time of the termination, the PHO had not provided any indication that the Order would be lifted in the foreseeable future and, indeed, has repeatedly stated that vaccination is a key tool in the continued response to the virus both in the short-term and long-term. It is speculative to opine when the pandemic may end and even so, it would be speculation to assume that the vaccination requirement in the Order will be lifted once the PHO determines we have moved to an endemic stage. These realities were acknowledged by Mr. Camilleri in cross-examination.

29 There is no dispute that the Grievor advised she will not get vaccinated and has no intention of ever doing so. There is no exemption available to her under the Order. Simply put, there was no path forward for the Grievor for continued employment. Termination is the most serious of employment outcomes. The Grievor suffered emotionally as a result. She had seven years of seniority and a clean record. These are significant considerations. On the other end of the scale is the existence of a government order with no expiry date, no indication of the Order being lifted in the near future, and the serious operational impacts on the health care system associated with placing unvaccinated employees on unpaid leaves of absence of unknown duration. I find the Grievor failed to comply with the requirements of the Hospital and Community Order and rendered herself ineligible to work. In all of the circumstances of this case, I agree that FHA was not required to place the Grievor on a leave of absence of indefinite duration, where there was no foreseeable prospect of her being eligible to work at the time. I find FHA has presented compelling operational reasons for its approach to the Grievor's employment and that no lesser alternative was reasonably available.

30 While the Union says FHA did not consider individual circumstances and followed a scripted approach in its communications and meetings with unvaccinated employees, the evidence was that FHA did so to ensure consistency in messaging and communication; where individual circumstances were conveyed and could be accommodated, FHA undertook to do so. For the same reasons, to the extent that the Union argues termination was an automatic consequence of not getting vaccinated, in the factual context of this case, I disagree. The evidence was that FHA inquired about and considered individual circumstances to the extent appropriate in the context of the Order.

IV. CONCLUSION

31 For the reasons given, the Grievance is dismissed.

DATED this 4th day of April, 2022, in the District of North Vancouver, BC.

"*KOML KANDOLA*"
Koml Kandola, Arbitrator