IN THE MATTER OF AN ARBITRATION
PURSUANT TO A COLLECTIVE AGREEMENT

BETWEEN:

REVERA INC.
(BRIERWOOD GARDENS ET AL.)

("the Employer")

-and-

CHRISTIAN LABOUR ASSOCIATION OF CANADA

("the Union")

AWARD

Sole Arbitrator:	**Christopher White**	
For the Employer:	**John J. Bruce**	**Hicks Morley Hamilton Stewart Storie LLP**
	Mary Claire Bass	**Bass Associates PC**
	Peter Tsoporis	**VP, Labour Relations and Health and Safety**
	Justine Boyd	**Director, Labour and Employment**
	Mandie Kopitin	**Executive Director, Brierwood Gardens**
For the Union:	**Peter Vlaar**	**Legal Counsel**
	Kenneth Dam	**Labour Relations Representative**
	Georgette Durrant	**Union Steward, Trillium Court**
	Michelle McCauley	**Union Steward, Brierwood Gardens**
	Pat Juniper	**Union Steward, Summit Place**
Dates of Hearing:	**January 31 and February 18, 2022**	

THE GRIEVANCE

1. I was appointed by the parties on November 30, 2021 as sole arbitrator of the Union's policy grievance dated September 16, 2021 ("the Grievance") alleging that the Employer's COVID-19 mandatory vaccination policy constituted a breach of the Collective Agreements between the parties. With respect to those issues advanced at the hearing of this matter, the Grievance states, in part, as follows:

> *Thank you for bringing to our attention the mandatory vaccination policy, announced to the media on August 26 and dated to be effective on October 12, 2021.*
>
> *CLAC agrees that COVID-19 is a very serious and highly contagious disease that disproportionately affected residents in Long-Term Care Homes and in some cases retirement homes in Ontario. CLAC supports the introduction of policies that require all employees to be fully vaccinated.*
>
> *We do not agree, however, that placing unvaccinated employees on indefinite leave after October 12 is a reasonable exercise of management rights in the effort to protect residents and staff from getting COVID-19, which is the expressed intention of the policy.*
>
> *Accordingly, on behalf of CLAC members employed by your organization, we submit this letter as a union policy grievance. The various local union affiliates of CLAC with representation rights for affected members, and the bargaining units at which they are employed are identified in an attachment to this letter. Those various CLAC local union affiliates are hereinafter referenced as "the union".*
>
> *Mandating a medical procedure as a condition of maintaining employment is a breach of personal privacy and dignity that is not justified in light of the reasonable alternatives available that have proven to be effective. Indefinite leave, as described in the policy, is tantamount to termination of their employment. …*
>
> *Additionally, this policy was implemented without notice to, or consultation with the union.*
>
> *In support of these assertions, the union relies on the articles within the collective agreements that address Purpose, Management Rights, Strike and Lockout, Layoff / Seniority, Discipline, and any other relevant provisions therein.*
>
> *Accordingly, and for all of the foregoing, we request as relief that the policy be rescinded, and that the Employer revert to the policy framework set out in Chief Medical Officers COVID-19 Directive #6 issued August 17th, 2021.*

Furthermore, we request that any employee adversely affected by the implementation of the policy that is the subject of this grievance be returned to work and made whole in respect of all losses suffered as a result.

In the bargaining units listed below you will note that there are fourteen (14) collective agreements that refer policy grievances directly to arbitration and five (5) that refer a policy grievance to the second step. In light of the different requirements, we would like your written consent to deal with these policy grievances at the local bargaining units level as second step grievances.

2. It may be noted that the Grievance references the Employer's policy "dated to be effective October 12, 2021" that resulted in employees who were not fully vaccinated being placed on "indefinite leave". Subsequent to the date of the Grievance, the Employer amended its policy on September 29, 2021 so as to provide, subject to certain conditions set out in greater detail below, unvaccinated employees might be terminated for "continued non-compliance" with the policy. The Employer further amended its policy on December 31, 2021 so as to require LTC staff in its Ontario facilities to obtain a third vaccination shot (generally referred to as a booster) in order to be compliant with the policy as "fully vaccinated". The parties have agreed that the Employer's policy, amended as of the date of the hearing, is properly the subject of the Grievance before me.

3. The parties have Collective Agreements that govern three types of operations; stand - alone long-term care homes ("LTC"s), stand-alone retirement homes ("RH"s) and facilities that combine LTCs with RHs ("LTC/RH"s). The Employer policy at issue governs all three types of operation. The parties agreed, in respect of each of the three types of operation, that I would answer the following questions as Phase I of the proceeding:

i) Is the mandatory vaccination policy a reasonable workplace rule?;

ii) Will an unpaid leave typically be an appropriate initial just cause consequence for an employee who decides not to comply with the vaccination requirement policy?; and

iii) Will termination of employment typically be an appropriate just cause consequences for an employee who decides on a sustained basis not to comply with the vaccination requirement policy?

4. I was advised that employees had been placed on unpaid leaves and subsequently terminated as a result of the application of the Employer's policy. At this stage of the process the parties wished to be provided with guidance on the provisions of the policy generally but

irrespective of the outcome of this stage of the hearing, it was agreed that I would have jurisdiction to address the claims of individual employees affected by application of the policy having regard to their particular circumstances. In such cases, I would be required to answer the following question at Phase II of the hearing:

i) Are there specific circumstances for this individual employee which warrant a deviation from the Arbitrator's Phase I findings respecting the appropriateness of the unpaid leave and/or termination of employment consequences for this employee?

THE HEARING PROCESS

5. The parties agreed to an expedited process for the hearing of this matter. Prior to the first day of hearing, I was provided with an Agreed Statement of Facts ("the ASF") together with those documents upon which the parties wished to rely in their submissions on the issues in dispute. On that first day of hearing, the parties took me through the ASF and the documents they had provided in order to provide the context for their legal arguments that were made during the second day of hearing. No witnesses, expert or otherwise, were called by the parties and all evidence was presented through the documents that the parties agreed were properly before me.

6. The parties confirmed that this was not a case in which exemptions to the Employer's policy on the basis of the Ontario *Human Rights Code* were at issue and no arguments in that regard were being advanced by the Union. Similarly, the parties advised that this was not a case in which the constitutionality of any applicable government legislation was being raised. Accordingly, the issue in dispute was simply whether the Employer's policy could be upheld having regard to the terms and conditions of the Collective Agreements (together with any obligations existing pursuant to governing statutes).

THE AGREED STATEMENT OF FACT

7. The ASF provided by the parties (without the referenced documents attached) reads as follows:

Date	***Fact/Event***
	<u>Background</u> *1. This Collective Agreement between Revera and CLAC covers 5 facility locations, each of which have LTC and Retirement Home facilities which have the following beds/units:*

	Brierwood Gardens: *79 LTC beds* *71 RH units* *Riverbend Place* *39 LTC beds* *92 RH units* *Summit Place* *95 LTC beds* *37 RH units* *Telfer Place* *45 LTC beds* *179 RH units* *Trillium Court* *34 LTC beds* *62 RH units* *2. The LTC facilities are governed by the Long-Term Care Homes Act, 2007 and its regulations (which are being replaced by the Fixing Long-Term Care Act, 2021 when proclaimed into force). The Retirement Homes are governed by the Retirement Homes Act, 2010 and the Retirement Homes Regulatory Authority ("RHRA") and regulations.* *3. Each of the 5 LTC Homes under the Collective Agreement is subject to the (Minister of LTC) Minister's Directive (revised from time to time) respecting COVID19 and vaccines, as well as Directive #3 and other government and public health regulations, directives and recommendations governing LTC Homes.* *4. Each of the 5 Retirement Homes under the Collective Agreement are physically connected to their counterpart LTC Homes and there are, in varying degrees, shared/overlapping buildings, facilities, and staff. Accordingly, the 5 Retirement Homes are subject to the (Minister of LTC) Minister's Directive (as revised from time to time) respecting COVID19 and vaccines, as well as Directive #3 and other government and public health regulations, directives and recommendations governing Retirement and LTC Homes.* *5. Revera and CLAC also have collective agreements at 6 other retirement homes:*

	The Beechwood *Centennial Park* *Greenway* *King Gardens* *Lynnwood* *Maplecrest* *These other 6 RHs are standalone (i.e. not combined with LTC Homes). They are subject to the RHRA's "RHRA Guidance: Implementation of the Chief Medical Officer of Health (OCMOH) for Mandatory Vaccination Policies in Retirement Homes", recently replaced by the RHRA's "Retirement Homes Policy to Implement Directive #3, Directive #3, and other government and public health regulations, directives and recommendations governing Retirement and LTC Homes.* *In addition, Revera and CLAC have collective agreements at 7 additional standalone long-term care homes:* *Eagle Terrace – Newmarket* *Garden City Manor* *Main St. – Toronto* *Oak Terrace – Orillia* *Pinecrest Manor – Lucknow* *Sumac Lodge – Sarnia* *Village on the Ridge*
March 2017 (Modified Oct. 2019)	*Pre-COVID & Continuing Immunization Policy Requirements:* *Revera LTC and RH staff are required to be immunized against certain diseases (e.g. Tuberculosis)*
May 31/21	*Minister Directive issued requiring all LTC Homes to have a COVID-19 immunization policy effective July 1, 2021*
June 8	*Revera communicated to CLAC the COVID19 Immunization Policy, effective July 1 at all Revera LTC and RH sites.*
Week of June 8	*Policy communicated to staff at various Revera sites.*
July 1	*Effective date of COVID19 Immunization Policy at all Revera LTC and RH requiring (among other items) for all staff: (1) vaccination; (2) medical exemption; or (3) education.*
August	*Screening measures were in place for all staff and visitors and continued on an ongoing basis*
August	*Accommodation policies were in place and continued on an ongoing basis.*

August 26	*Press release issued by a coalition of national seniors' living operators, led by Revera, Chartwell, Sienna, Responsive, and Extendicare, announcing they will be making COVID-19 vaccination mandatory for their LTC and Retirement Home staff across Canada.*
August 26	*Revera communicated to CLAC and staff the revised Policy requiring (among other items) for all LTC and RH staff to be (1) vaccinated; or (2) medical exemption, effective October 12. The Policy identified the consequences of non-compliance as an unpaid leave of absence.*
Sept. 7	*Chief Medical Officer of Health issued instructions to Retirement Homes identifying that "some retirement home staff … remain unvaccinated, posing risks to residents" and requiring all Retirement Homes to have a mandatory vaccination policy (including the express option to require all staff to be vaccinated except where medical exemption).*
Sept. 16	*As per the CMOH Instructions and as per Retirement Homes Act, 2010 , RHRA issued "RHRA Guidance: Implementation of the Chief Medical Officer of Health (OCMOH) for Mandatory Vaccination Policies in Retirement Homes".*
Sept. 16	*Policy Grievance filed by CLAC*
Sept 29	*Revera communicated to CLAC and staff the September 28 revised Policy, which included expressly adding termination of employment for continued non-compliance: "An existing staff member who refuses to adhere and/or comply with any of the measures outlined above will be placed on an unpaid leave until they comply, or their employment is terminated.*
October 1	*Ministry Directive issued requiring that each LTC home's COVID19 immunization policy must include a mandatory vaccination requirement (except where medical exemption) by November 15, 2021.*
Oct. 6 – 11	*Notice of Unpaid LOA Letters issued to non-compliant staff, with LOA effective Oct. 13*
October 13	*Non-compliant employees place on unpaid LOA.*
Nov. 6 – 11	*1st follow-up notice letter sent to staff respecting non-compliance and warning of termination.*
Nov. 4	*Revised Ministry Directive issued, setting revised deadline of December 13 for LTC staff to be fully vaccinated (if they had received their 1st dose by November 15).*
Nov. 15	*Minor revisions to Policy (updated new hire and volunteer sections)*
Nov. 26 – 30	*2nd follow-up notice letter sent to staff respecting non-compliance and warning of termination.*
On or about Dec. 13	*Termination of employment letters issued to staff who had been on unpaid LOAs and who continued to be non-compliant with Policy.*
December	*Compliance #'s at each location:* *Location — Total CLAC Staff — Placed on LOA — Terminated — Compliance* *Brierwood Gardens — 106 — 11 — 9 — 92%*

	Riverbend Place	*94*	*3*	*2*	*98%*
	Summit Place	*146*	*11*	*11*	*92%*
	Telfer Place	*117*	*3*	*2*	*98%*
	Trillium Court	*66*	*2*	*1*	*98%*
	At the 5 Homes there were: *Zero religious accommodation exemptions.* *One medical accommodation exemption.* *The total terminations at all Revera locations (not just the 5 Homes) for non-compliance with the Policy were:* *LTC: 223* *RH: 93* *The percentage of staff at the 5 Homes who were fully vaccinated increased significantly from August 25 through October 12. [Attached spreadsheet is omitted from the Award.]* *From July 15 to October 15, 2021, the testing protocol was that all staff, visitors and contractors who were <u>not</u> fully vaccinated were to be Rapid Antigen Test tested 2 times weekly/day of. From October 15 to December 14, 2021, the testing protocol was that all staff, visitors and contractors who were <u>not</u> fully vaccinated were to be RAT tested w times weekly/day of, and staff and contractor who <u>were</u> fully vaccinated were to be RAT tested on a regular randomized basis. As of December 15, 2021 and ongoing, the testing protocol is that all staff, visitors, and contractors are to be RAT tested 3 times per week (48 hours between tests). Visitors and contractors must then wait in an area near the entrance for 15 minutes for negative test results before proceeding into the facility. Staff are allowed to proceed into the facility but must wait 15 minutes for negative test results before engaging in direct resident care. Staff who have been approved to "test to work" as per government guidances. Test to work is explained in the Guidance documents attached at Tab 29.)*			
Dec. 17 & 24	*Revised Directive #3 issued for LTC Homes and Retirement Homes by CMOH.*				
Dec. 17	*Revised Directive #5 issued for Hospitals and LTC Homes by CMOH.*				
Dec. 27	*RHRA issued "Retirement Homes Policy to Implement Directive #3".*				
Dec. 31	*Revised Minister's Directive for LTC Homes COVID19 Immunization Policy issued which required all LTC staff to be fully vaccinated with 3rd dose by January 28 (for those eligible before January 1) and by March 14 (for those eligible only after January 1).*				

Dec. 31	*Revera issued revised Policy (including all LTC Home and Retirement Home staff to receive 3rd dose).*
Starting week of Jan. 1, 2022	*Revera communicated the revised Policy requirements.*
Jan. 27	*Revised Minister's Directive (moving back 3rd dose deadline from January 28tyh to March 14th).*
Feb. 7	*Revised COVID19 Guidances for LTC and RH issued*
Feb. 10	*Revera issued revised Policy (to reflect adjusted dates)*

8. At the hearing it was confirmed by the parties that combined LTC/RH facilities should, for the purposes of this Award, be considered to be LTCs as the set-up of the buildings meant that there was a shared physical environment that might allow transmission of COVID-19 between staff and residents.

THE PARTIES

9. Revera Inc. is a multinational company based in Canada and currently owned by the Public Sector Pension Investment Board. Its many properties are focussed on providing accommodation and support to seniors through LTCs and RHs. Across Canada, Revera LTCs employ some 12,505 individuals while 6,546 employees are engaged at its RHs. On its website, the Employer states as follows:

> *<u>Why Revera?</u>*
>
> *As a leading owner, operator and investor in the senior living sector, we understand how to create the best experience for people living in a Revera home. We believe everyone should have the opportunity to live a life of purpose, and we create environments that make that possible.*
>
> *<u>Best in Class</u>*
>
> *Together with our partners, we own and operate more than 500 properties across North America and the United Kingdom. We share best practices across our network to ensure we deliver the highest standards in seniors' apartments, independent living, assisted living, memory care and long term care.*

10. The Christian Labour Association of Canada, is a trade union operating across Canada with a focus on representing employees in the construction, food service and healthcare

sectors. Founded in 1952, the Union has some 60,000 members across all sectors and its philosophy is set out in its website as follows:

> *We believe in cooperation, not confrontation. We work to make your workplace a better place – so that you and your coworkers can grow both as a workplace community and as individuals.*

In Ontario, the Union has a significant presence in the healthcare sector with a number of locals specializing in the representation of service workers. Under the Collective Agreements governing these parties, the Union holds bargaining rights for service workers in the classifications of Registered Practical Nurses (RPN), Personal Support Workers (PSW), Health Care Attendants (HCA), Resident Attendants (RA), Unregulated Health Care Providers (UCP) Activation Aides, Housekeeping Aides, Laundry Aides, Dietary Aides, Cooks and Maintenance employees. The vast majority of the employees in these classifications are engaged in providing support for the residents of the Employer's facilities in their activities of daily living (ADL). While the extent of that support will necessarily depend on the physical and cognitive health of each resident, it is fair to say that most, if not all, of the Union's members will have direct contact with residents in the course of performing their duties and responsibilities.

THE COVID-19 PANDEMIC

11. It is understandable that the parties did not provide any materials dealing with the general nature of the pandemic as it has been the subject of constant media reporting and has impacted the lives of all who may read this decision. Nevertheless, some brief background information will be helpful to put the evidence and submissions of the parties in context. The website of the World Health Organization (WHO) includes the following overview:

> *Coronavirus disease (COVID-19) is an infectious disease caused by the SARS-CoV-2 virus.*
>
> *Most people infected with the virus will experience mild to moderate respiratory illness and recover without requiring special treatment. However, some will become seriously ill and require medical attention. Older people and those with underlying medical conditions like cardiovascular disease, diabetes, chronic respiratory disease, or cancer are more likely to develop serious illness. Anyone can get sick with COVID-19 and become seriously ill or die at any age.*
>
> *The best way to prevent and slow down transmission is to be well informed about the disease and how the virus spreads. Protect yourself and others from infection by staying at least 1 metre apart from others, wearing a properly fitted mask, and washing your*

hands or using an alcohol-based rub frequently. Get vaccinated when it's your turn and follow local guidance.

The virus can spread from an infected person's mouth or nose in small liquid particles when they cough, sneeze, speak, sing or breathe. These particles range from larger respiratory droplets to smaller aerosols. It is important to practice respiratory etiquette, for example by coughing into a flexed elbow, and to stay home and self-isolate until you recover if you feel unwell. *(emphasis added)*

12. I take judicial notice that the first patient in Canada with COVID-19 was reported on January 25, 2020. The WHO declared COVID-19 to be a pandemic on March 11, 2020. There have been a number of variants of COVID-19 identified in Canada since the initial wave of the Alpha variant was diagnosed. These include the Beta variant on July 18, 2020, the Gamma variant on March 5, 2021, the Delta variant on July 23, 2021 and the Omicron variant on November 4, 2021. I also take judicial notice that at the times material to my determination:

i) individuals living or working in congregant settings (such as LTCs and RHs) are more susceptible to contracting COVID-19; and

ii) older individuals and those with underlying health conditions were more susceptible to the development of serious illness and/or death as a consequence of contracting COVID-19.

I note that this statements are consistent with the Union's observation in the Grievance:

CLAC agrees that COVID-19 is a very serious and highly contagious disease that disproportionately affected residents in Long-Term Care Homes and in some cases retirement homes in Ontario.

The date of the first vaccine approval in Canada was December 9, 2020 and, for the purposes of this Phase I decision, there has been no suggestion that approved vaccines have not been available to employees of the Employer at all times material to my determination.

THE COLLECTIVE AGREEMENTS

13. The Collective Agreement governing the parties in respect of **Brierwood Gardens, Riverbend Place, Summit Place, Telfer Place** and **Trillium Court** has a term running from August 1, 2019 to July 31, 2022. Each of the named facilities is an LTC/RH. The following provisions are relevant:

ARTICLE 1 - PURPOSE

1.01 It is the intent and purpose of the parties to this Collective Agreement, through the full and fair administration of all of the terms and provisions contained herein, to develop and maintain a relationship between the Union, the Employer and the employees which is conducive to their mutual well-being.

1.02 The employees will endeavour to work together with the Employer to assure the best possible nursing and health care for the residents of the facility.

1.03 It is the desire of both parties to recognize the mutual value of joint discussions and negotiations in all matters pertaining to working conditions, employment and services.

2.06 Management Rights

It is the right of the Employer to manage, control, develop and operate its facility covered under this Agreement in every respect subject only to the specific limitations set out in this Collective Agreement.

2.07 The Union acknowledges that it is the exclusive function of management to:

a. Plan, direct and control the operation of the facility, in accordance with its obligations, to introduce new therapeutic methods, and equipment, and to decide the location of equipment;

b. Determine the amount of supervision, to establish the standards of performance of all employees, to combine or split departments, and to determine the number of employees. The Union reserves the right to request consultation when there are changes in staffing in the nursing facilities;

c. To maintain order, discipline and efficiency, and to make and enforce reasonable rules to be observed by its employees, provided that they are not inconsistent with the provisions of this Agreement. Further, it is agreed that when making any new rules, regulations or altering past practices, the Employer will inform the Union stewards in ample time to enable the Union to make representations, if any, thereof;

d. To select, hire, classify, transfer, promote, demote, assign, retire, layoff, recall, suspend and discharge employees for just cause, provided that a claim that any employee who has completed the probationary period has been disciplined or discharged unjustly may be the subject of a grievance, and dealt with in accordance with the grievance procedure.

2.08 The Union reserves the right to request consultation and/or clarification concerning any change which may occur which affects the employees under its jurisdiction, at a time mutually agreed to.

ARTICLE 14 – SENIORITY

14.04 Seniority status, once acquired, shall be lost and the employee shall be deemed terminated for the following reasons if an employee: …

g. is absent from work without leave of absence being granted by or a satisfactory explanation being offered for an absence of three (3) working days; … or

j. employees who are on a leave of absence and engage in gainful employment while on such leave are subject to dismissal unless otherwise agreed to by the Employer.

ARTICLE 22 – LEAVES OF ABSENCE

22.01 For Personal Reasons

a. At the discretion of the Employer, an employee may be granted leave of absence without pay for personal reasons. Except in emergencies, written application for leave of absence must be made at least two (2) weeks in advance of such leave. When applying, the employee must indicate the date of departure and specify the date of return.

b. The Employer will give a written reply to the request within one (1) week after he has received the request. If the request is denied, he shall state the reason in the reply. The Union shall receive a copy of the reply.

c. An employee who overstays her authorized leave shall be considered to have terminated her employment without notice unless she provides an explanation satisfactory to the Employer.

14. I was further provided with the Collective Agreements for the six stand-alone RHs. The Collective Agreement for **Centennial Place RH** runs from April 15, 2019 to April 14, 2023 and provides:

ARTICLE 1 – PURPOSE

1.01 … It is the purpose of both parties to this Agreement:

a. To maintain an orderly collective bargaining relationship between the Employer and its employees;

b. To recognize the value of joint discussions and negotiations;

c. To encourage efficiency in operations;

d. To provide a mechanism for the amicable adjustment of grievances which may arise;

e. To provide compassionate care for the residents to meet their physical and emotional needs in a safe, comfortable environment, treating them and their families with the respect and dignity they deserve.

ARTICLE 3 – RECOGNITION OF MANAGEMENT RIGHTS

3.01 The Union recognizes and acknowledges that all management rights and prerogatives and the direction of the working forces, and the management of the Employer's enterprise, are vested exclusively with the Employer and without limiting the generality of the forgoing the exclusive functions of the Employer shall include the following:

a. to operate and manage its business in every and all respects;

b. to maintain order, discipline, efficiency amongst its employees and in connection therewith to establish and enforce reasonable rules, regulations, policies and practices from time to time; …..

f. to establish standards of service; to amend or modify standards; to determine new methods to be used; to determine the requirements of a job and the qualifications of an employee to perform the work required.

3.02 The Employer will exercise its management rights in accordance with the Collective Agreement.

3.03 Failure by the Employer to exercise any of its management rights shall not be considered an abandonment of any such rights.

ARTICLE 10 – SENIORITY

10.07 Loss of Seniority

An employee shall lose all seniority and shall be deemed to have quit the employ of the Employer and employment of the employee shall be deemed to have been terminated without further notice for any of the following reasons: …..

d. absence form work for three (3) consecutive working days without notifying the Employer, unless a reasonable explanation is provided to the Employer;

ARTICLE 16 – LEAVE OF ABSENCE

16.01

a. The Employer may grant a request for a leave of absence without pay for personal reasons, provided the employer receives at least two (2) weeks notice in writing (except in case of emergency) and provided that such leave may be arranged without undue inconvenience to the normal operations. Applicants when applying must indicate the reason for the leave of absence, the date of departure and specify the date of return. The employer will reply to the request in writing. Such requests shall not be unreasonably denied.

b. Employees who are on leave of absence will not engage in gainful employment while on such leave.

If an employee does engage in gainful employment while on such leave of absence, he will forfeit all seniority rights and privileges contained in this Agreement and will be subject to discharge.

ARTICLE 20 – HEALTH AND SAFETY

20.07 Infectious Diseases

The Employer and the Union desire to arrest the spread of infectious diseases in the Home.

The Joint Occupational Health and Safety Committee shall be involved in all infection control programs and protocols including surveillance, outbreak control, isolation precautions, worker education and training, and personal protective equipment training.

The Employer shall provide training and ongoing education in communicable disease recognition, use of personal protective equipment, decontamination of equipment, and disposal of hazardous waste.

ARTICLE 29 – SUPERIOR CONDITIONS

29.01 Superior Conditions in place at the facility shall be maintained.

15. The Collective Agreement covering **Beechwood Place RH** runs from January 1, 2019 until December 31, 2022 and provides:

ARTICLE 1 – PURPOSE

1.02 If this Agreement is silent on any existing rights and privileges, this shall not mean that either the Employer or the employees are deprived of such rights or privileges.

ARTICLE 2 - RECOGNITION

2.04 Management Rights

The Union recognizes that it is the right of the Employer to manage the facility and to:

e. make, enforce, and alter from time to time reasonable rules and regulations to be observed by the employees. No rules shall be introduced without prior consultation with the Union;

ARTICLE 12 – SENIORITY

12.03 Loss of Seniority

An employee's seniority rights shall cease to exist and the employee shall be deemed to have terminated employment if an employee: …..

c. fails to report on the first day following the expiration of a leave of absence, unless a justifiable reason is given promptly; …..

e. has been absent for two (2) consecutive working days without having notified the Employer, unless a justifiable reason is given promptly;

ARTICLE 16 – LEAVES OF ABSENCE

16.01

a. An employee who has completed probation shall be entitled to a leave of absence without pay and without loss of seniority when the employee requests it for good and sufficient reasons. A request for a leave of absence shall not be unreasonably denied.

b. An employee who wishes to have a leave of absence shall, except in cases of emergency, state her request in writing four (4) weeks prior to the commencement of the requested leave of absence to her supervisor. The request shall include the commencement date of the requested leave of absence, the return date to work and the reason for the request. Leaves of absence will not be granted to probationary employees.

16.02 Employees who are on leave of absence will not engage in gainful employment elsewhere without agreement of the Employer. An employee who violates this rule will forfeit all seniority rights, and may be dismissed by the Employer.

16. The Collective Agreement governing **King Gardens RH** runs from June 1, 2018 to May 31, 2022 and provides:

ARTICLE 1 – GENERAL PURPOSE

1.01 The purpose of this Agreement is to establish and maintain bargaining relations between the Employer and those of its staff at its King Gardens, Ontario for whom the Union is the bargaining agent as set out in Article 2 of this Agreement. It is the desire of the parties hereto to co-operate and harmoniously work together in the promotion of the highest standard of care for the residents in the Retirement Residences.

ARTICLE 7 – MANAGEMENT RIGHTS

7.01 The Union acknowledges that it is the exclusive function of the Employer:

1. To determine and establish standards and procedures for the care, Welfare, safety and comfort of the residents in the Residence, and to maintain order, discipline and efficiency and in connection therewith to establish and enforce rules and regulations, policies and practices from time to time to be observed by its employees and to alter such rules and regulations provided that such rules and regulations shall not be inconsistent with the provisions of this Agreement. It is agreed that such rules will be communicated and a copy supplied to the Union. …..

4. To exercise any of the rights, powers, functions or authority which the Employer has prior to the signing of this Agreement except as those rights, powers, functions or authorities are specifically abridged or modified by this Agreement.

7.02 It is agreed and understood that these rights shall not be exercised in a manner inconsistent with the terms of this Agreement; a claim that the Employer has so exercised these rights shall be the proper subject matter of a grievance.

ARTICLE 11 – SENIORITY

11.03 An employee shall lose all seniority and shall be deemed to have quit the employ of the Retirement Residence if he or she: …..

c. is absent for three (3) consecutive working days without notifying the Employer unless a reason satisfactory to the Employer is given and such employee shall be deemed to have quit the employ of the Employer without notice;

ARTICLE 22 – LEAVE OF ABSENCE

22.06 General Leave

Subject to the normal operation of the Retirement Residence the Employer may grant leave of absence without pay for up to three (3) months in any twelve (12) month period on the written request of an employee provided the reasons stated in the application are reasonable. Such things as illness or accident in the immediate family or for personal reasons resulting from death in the immediate family would be considered as being reasonable. An application may be submitted only by employees with six (6) months or more seniority. If leave of absence is granted, the employee shall be advised in writing with a copy to the Union. …..

22.07 Employees who are on a leave of absence will not engage in gainful employment elsewhere without agreement of the Employer. An employee who violates this rule will forfeit all seniority rights, and may be dismissed by the Employer.

ARTICLE 24 – HEALTH AND SAFETY COMMITTEE

24.01 The Employer ant the Union agree that they mutually desire to maintain standards of safety and health in the home, in order to prevent injury and illness. …..

24.06 The Employer will use its best efforts to make all affected direct care employees aware of residents who have serious infectious diseases. The nature of the disease need not be disclosed. Employees who are not direct care employees will be made aware of special procedures required of them to deal with these circumstances. The parties agree that all employees are aware of the requirement to practice universal precautions in all circumstances.

17. I was provided with a draft Collective Agreement for **Maplecrest RH** running from November 1, 2016 to October 31, 2019. In the circumstances I am setting out the provisions from that draft document that would be relevant in this proceeding as follow:

ARTICLE 1 – PURPOSE

1.01 The parties to this Agreement desire to foster and maintain a relationship among the Employer, the Union, and the employees which is in every respect conducive to their mutual well-being. The parties hereby pledge to fairly administer this Agreement as one means by which that purpose can be achieved.

ARTICLE 3 – MANAGEMENT RIGHTS

3.01 The Union acknowledges that all management rights and prerogatives are vested exclusively with the Employer, and without limiting the generality of the foregoing, it is the exclusive function of the Employer:

a. To maintain order, discipline and efficiency, to decide on the number of employees needed by the Employer at any time; and to establish and enforce reasonable rules and regulations governing the conduct of employees, where such rules will be posted on the Employee Bulletin Board with copies supplied to the Union Committee. The Employer reserves the right to amend or introduce new rules from time to time, copies of which are to be posted on the Bulletin Board with copies supplied to the local Union Office. The local Union shall have the right to make representation before any rule is amended or any rule is introduced. Where possible, the Union will be notified twenty four (24) hours in advance of the introduction of a new policy. …..

These rights will not be performed in a manner inconsistent with the terms of this Agreement. A claim that the Employer has so exercised these rights may be the matter of a grievance.

3.02 The Employer shall endeavour to inform the Union and CLAC Representative as soon as possible in advance of all planned significant changes in work methods, supervision, number of personnel employed, layoffs, staff orientation program and the like and to give full consideration to any representations made by the committee, prior to implementing such changes.

ARTICLE 5 – UNION REPRESENTATION

5.03 Labour/Management Committee *…..*

e. The parties commit themselves to these procedures [those governing the Labour/Management Committee] in recognition of their joint responsibility and mutual desire to give the best possible care to the residents entrusted to them. The parties declare that in all instances and circumstances they commit themselves to the best of their ability to the happiness, security and physical and emotional well-being of the residents.

ARTICLE 7 – SENIORITY

7.03 An employee's seniority rights once acquired shall cease to exist and the employee shall be deemed to be terminated if an employee: …..

c. utilizes a leave of absence for purposes other than those for which the leave was granted, or engages in gainful employment elsewhere while on the leave of absence, or who fails to report for duty on the first (1st) day following the expiration of a leave of absence, unless the employee has obtained permission for the Employer in writing or provides a reasonable explanation satisfactory to the Employer.

e. has been absent for tow (2) consecutive working days without having notified the Employer, in which case the employee shall be deemed to have quit without notice, unless a reason satisfactory to the Employer is given.

ARTICLE 17 - LEAVES OF ABSENCE

17.01 The Employer shall grant or deny a leave of absence without pay provided that the Employer receives at least four (4) weeks advance notice in writing (except in emergency situations) and that such leave may be arranged without undue inconvenience to the normal operations of the Home. When applying for a leave of absence, the employee must notify the Employer of the date of departure and the date of return. The employee's request for a leave of absence and the Employer's response to the request shall be in writing within two (2) weeks of receiving the request. The granting of a leave of absence shall be at the discretion of the Employer, but this discretion shall not be unreasonably exercised.

17.02 Employees who are on leave of absence will not engage in gainful employment elsewhere. An employee who violates this rule may be dismissed by the Employer. …..

17.04 To qualify for leave of absence as stipulated above the employee must have completed one (1) year of employment with the Employer. …..

17.07 Requests for leaves of absence shall be for good and sufficient reasons.

17.08 No leaves shall be granted if they cause undue inconvenience to the normal requirements of the company.

ARTICLE 29 – HEALTH AND SAFETY COMMITTEE

29.01 The Employer and the Union agree that they mutually agree to maintain standards of safety and health in the facility in order to prevent injury and illness.

18. The Collective Agreement governing the parties at **Lynwood Park RH** has a term running from April 1, 2017 until March 31. 2020. Its terms and conditions include the following provisions:

ARTICLE 1 - PURPOSE

1.01 The parties to this Agreement desire to foster and maintain a relationship among the Employer, the Union, and the employees, which is in every respect conducive to their mutual well being. The parties hereby pledge to fairly administer this Agreement as one means by which that purpose can be achieved.

1.02 If this Agreement is silent on any existing rights and privileges, this shall not mean that either the Employer or the employees are deprived of such rights or privileges.

1.03 The parties recognize that where legislation overrides the provisions contained in this Agreement, such legislation shall prevail. This shall include but not be limited to such statutes as the Ontario Human Rights Code (OHRC) and the Employment Standards Act (ESA).

ARTICLE 2 – RECOGNITION

2.05 The Union recognizes that it is the responsibility of the Employer to manage the home and, without limiting any provision within this Agreement, to:

a. maintain order, discipline and efficiency; …..

e. make, enforce, and alter from time to time reasonable rules and regulations to be observed by the employees. No rules shall be introduced without prior consultation with the Union. The Union will be advised of any new rules that will affect the employees;

ARTICLE 3 – REPRESENTATION

3.08 The parties agree to establish an active labour-management committee: …..

i. The parties commit themselves to these procedures [those governing the labour-management committee] in recognition of their joint responsibility and mutual desire to give the best possible care to the residents entrusted to them. The parties declare that in all instances and circumstances they commit themselves to the best of their ability to the happiness, security and physical and emotional well-being of the residents.

ARTICLE 12 – SENIORITY & LAYOFFS

12.03 An employee's seniority rights shall cease to exist and employment shall be deemed terminated if an employee: …..

c. fails to report on the first day following the expiration of a leave of absence, unless a justifiable reason is given; …..

e. has been absent for three (3) consecutive working days without having notified the Employer, unless a justifiable reason is given;

ARTICLE 18 - LEAVES OF ABSENCE

18.01 Personal

An employee who has completed six (6) months of service may be entitled to a leave of absence of up to two (2) months in duration, without pay and without loss of seniority. The Employer has the right to refuse should such request disrupt the normal operations of the Community. Requests shall not be unreasonably denied.

18.02 A request for a leave of absence shall, except in cases of emergency, be submitted in writing to the supervisor four (4) weeks prior to the commencement of the requested leave of absence. The request shall include the commencement date of the requested leave of absence, the return date to work and the reason for the request. The Supervisor will follow up in writing to the employee within two (2) weeks informing them if the request was approved.

18.03 An employee shall forfeit all seniority rights, and may be dismissed by the Employer, if she utilizes a leave of absence for purposes other than those for which the leave was granted or engages in gainful employment elsewhere while on leave of absence, or who fails to report for duty on the first day following the expiration of a leave of absence unless the employee has obtained permission from the Employer in writing or provides a reasonable explanation satisfactory to the Employer.

19. The Collective Agreement provided in respect of **Greenway RH** has a term running from November 30, 2015 until November 29, 2019 and includes the following terms and conditions:

ARTICLE 1 – PURPOSE

1.01 Whereas it is the desire of both parties to this Agreement:

a) To maintain and improve the harmonious relations and settle conditions of employment between the Employer and the Union.
b) To recognize the mutual value of joint discussions and negotiations in all matters pertaining to working conditions.

c) To promote the morale, well being and security of all the Employees in the bargaining unit of the Union.
d) To provide compassionate care and emotional needs in a safe, comfortable environment treating them and their families with respect and dignity they deserve.
e) To encourage efficiency in operation.

ARTICLE 3 – MANAGEMENT RIGHTS

3.01 Except where specifically modified by the terms of this Agreement, the Union acknowledges that all Management rights are vested exclusively with the Employer. The Employer has the exclusive right to manage and direct its operations and affairs in all respects. These rights and functions shall include, but are not limited to:

a) to determine and establish standards and procedures for the service, care, welfare, safety and comfort of the clients of the Employer,

b) To maintain order, discipline and efficiency, and to make, alter, and enforce reasonable rules and regulations to be observed by employees. …..

e) The Employer agrees not to exercise its rights in an unreasonable or discriminatory manner.

ARTICLE 10 – UNION REPRESENTATION

10.08 Joint Health and Safety Committee

a) The Employer and Union agree that they mutually desire to maintain standard of safety and health in the Residence in order to prevent accidents, injury and illness, and abide by the Occupational Health and Safety Act as amended from time to time.

ARTICLE 14 – SENIORITY, LAY OFF, PROBATION AND ORIENTATION

14.05 An employee shall lose seniority and shall cease employment for the following reasons:

d) is absent from work for a period three (3) scheduled shifts without notifying the Employer, unless a reasonable explanation is provided to the Employer: …..

g) engages in gainful employment without the authorization while on an approved leave of absence; (sic)

ARTICLE 22 – LEAVE OF ABSENCE AND BEREAVEMENT LEAVE

22.01 The Employer may grant a request for a leave of absence without pay for extenuating personal reasons, provided that he receives at least one month's notice in writing, unless impossible, and that such leave may be arranged without undue inconvenience to the normal operations of the Residence. Applicants when applying must indicate the date of departure and specify the date of return. If a leave of absence is granted, the Employee shall be advised in writing with a copy given to the Union.

To qualify for leaves of absence as stipulated above the Employee must have completed six (6) months of employment with the Employer and it is expressly understood no benefit except as hereinafter provided shall accrue to or be paid to any Employee on a leave of absence.

22.02

c) An Employee on a leave of absence will not engage in other work without the permission of the Employer. An employee who violates this provision will forfeit all seniority rights and will be deemed terminated.

ARTICLE 27 – HEALTH AND SAFETY

27.01 The Employer and Union agree that they mutually desire to maintain standard of safety and health in the Residence in order to prevent accidents, injury and illness, and abide by the Occupational Health and Safety Act as amended from time to time.

STATUTORY FRAMEWORK

20. Section 25(2) Ontario's *Occupational Health and Safety Act* ("OHSA") provides:

Duties of employers

(2) Without limiting the strict duty imposed by subsection (1), an employer shall,

(a) provide information, instruction and supervision to a worker to protect the health or safety of the worker; …..

(h) take every precaution reasonable in the circumstances for the protection of a worker;

21. Ontario's *Long-Term Care Homes Act, 2007* ("the LTCHA") includes the following provisions:

Preamble

The people of Ontario and their Government:

Believe in resident-centred care;

Remain committed to the health and well-being of Ontarians living in long-term care homes now and in the future; …..

Recognize the responsibility to take action where standards or requirements under this Act are not being met, or where the care, safety, security and rights of residents might be compromised;

Affirm our commitment to preserving and promoting quality accommodation that provides a safe, comfortable, home-like environment and supports a high quality of life for all residents of long-term care homes;

Home: the fundamental principle

1 *The fundamental principle to be applied in the interpretation of this Act and anything required or permitted under this Act is that a long-term care home is primarily the home of its residents and is to be operated so that it is a place where they may live with dignity and in security, safety and comfort and have their physical, psychological, social, spiritual and cultural needs adequately met.*

Residents' Bill of Rights

3 *(1) Every licensee of a long-term care home shall ensure that the following rights of residents are fully respected and promoted:*

1. Every resident has the right to be treated with courtesy and respect and in a way that fully recognizes the resident's individuality and respects the resident's dignity.

2. Every resident has the right to be protected from abuse.

3. Every resident has the right not to be neglected by the licensee or staff.

4. Every resident has the right to be properly sheltered, fed, clothed, groomed and cared for in a manner consistent with his or her needs.

5. Every resident has the right to live in a safe and clean environment. …..

12. Every resident has the right to receive care and assistance towards independence based on a restorative care philosophy to maximize independence to the greatest extent possible. …..

Further guide to interpretation

(2) Without restricting the generality of the fundamental principle, the following are to be interpreted so as to advance the objective that a resident's rights set out in subsection (1) are respected:

1. This Act and the regulations.

2. Any agreement entered into between a licensee and the Crown or an agent of the Crown.

3. Any agreement entered into between a licensee and a resident or the resident's substitute decision-maker.

Enforcement by the resident

(3) A resident may enforce the Residents' Bill of Rights against the licensee as though the resident and the licensee had entered into a contract under which the licensee had agreed to fully respect and promote all of the rights set out in the Residents' Bill of Rights.

Home to be safe, secure environment

5 *Every licensee of a long-term care home shall ensure that the home is a safe and secure environment for its residents.*

Infection prevention and control program

86 *(1) Every licensee of a long-term care home shall ensure that there is an infection prevention and control program for the home.*

Requirements of the program

(2) The infection prevention and control program must include,

> *(a) daily moitoring to detect the presence of infection in residents of the long-term care home; and*
>
> *(b) measures to prevent the transmission of infections.*

174.1 *(1) The Minister may issue operational or policy directives respecting long-term care homes where the Minister considers it to be in the public interest to do so.*

22. Section 229(10) of Regulation 79/10 under the LTCHA provides as follows:

Infection prevention and control program

229. *(1) Every licensee of a long-term care home shall ensure that the infection prevention and control program required under subsection 86(1) of the Act complies with the requirements of this section. …..*

(10) The licensee shall ensure that the following immunization and screening measures are in place:

> *4. Staff is screened for tuberculosis and other infectious diseases in accordance with evidence-based practices and, if there are none, in accordance with prevailing practices.*
>
> *5. There must be a staff immunization program in accordance with evidence-based practices and, if there are none, in accordance with prevailing practices.*

23. The *Retirement Homes Act, 2010* ("the RHA") includes the following provisions:

Fundamental principle

1 *The fundamental principle to be applied in the interpretation of this Act and any regulation, order or other document made under this Act is that a retirement home is to be operated so that it is a place where residents live with dignity, respect, privacy and autonomy, in security, safety and comfort and can make informed choices about their care options.*

Residents' Bill of Rights

51 *(1) Every resident of a retirement home has the following rights which constitute the Residents' Bill of Rights: …..*

4. The right to have his or her choice of care services provided by staff who are suitably qualified and trained to provide the services. …..

8. The right to live in a safe and clean environment where he or she is treated with courtesy and respect and in a way that fully recognizes the resident's individuality and respects the resident's dignity. …..

Licensee's obligations

(2) Every licensee of a retirement home shall ensure that the rights set out in the Residents' Bill of Rights are fully respected and promoted in the home in accordance with the regulations, if any.

Standards

60 *(1) Every licensee of a retirement home shall ensure that the care services that the licensee and the staff of the home provide to the residents of the home meet the prescribed care standards. …..*

Safety standards

(3) Every licensee of a retirement home shall comply with all prescribed safety standards for the home, including standards with respect to fire, safety and public health requirements and emergency evacuation plans.

Safety plans

(4) Every licensee of a retirement home shall ensure that the following are in place for the home: …..

2. An infection prevention and control program that meets the prescribed requirements.

24. Section 27 of Regulation 166/11 under the RHA sets out the following requirements for the Infection Prevention and Control program referenced immediately above:

Infection prevention and control program

27. *(1) Every licensee of a retirement home shall ensure that the infection prevention and control program required by paragraph 2 of subsection 60(4) of the Act complies with the requirements in this section. …..*

(5) The licensee of a retirement home shall ensure that,

(0.a) any guidance, advice or recommendations given to retirement homes by the Chief Medical Officer of Health are followed in the retirement home;

(0.b) all reasonable steps are taken in the retirement home to follow,

(i) any directive respecting coronavirus (COVID-19) issued to long-term care homes by the Chief Medical Officer of Health under section 77.7 of the Health Protection and Promotion Act;

(ii) any guidance, advice or recommendations respecting coronavirus (COVID-19) that are given to long-term care homes by the Chief Medical Officer of Health and made available on the Government of Ontario's website respecting coronavirus (COVID-19);

(8) The licensee of a retirement home shall ensure that, …..

(c) each member of the staff has been screened for tuberculosis and all other infectious diseases that are appropriate in accordance with evidence-based practices or, if there are no such practices, in accordance with prevailing practices; and …..

25. To close the circle on legislation set out in the preceding paragraph, section 77.7 of the *Health Protection and Promotion Act* (HPPA) referenced in section 27(5)(0.b)(i) of Regulation 166/11 under the RHA provides as follows:

Directives to health care providers

***77.7** (1) Where the Chief Medical Officer of Health is of the opinion that there exists or there may exist an immediate risk to the health of persons anywhere in Ontario, he or she may issue a directive to any health care provider or health care entity respecting precautions and procedures to be followed to protect the health of persons anywhere in Ontario.*

Precautionary principle

(2) In issuing a directive under subsection (1), the Chief Medical Officer of Health shall consider the precautionary principle where,

(a) in the opinion of the Chief Medical Officer of Health there exists or may exist an outbreak of an infectious or communicable disease; and

(b) the proposed directive relates to worker health and safety in the use of any protective clothing, equipment or device. .

Must comply

(3) A health care provider or health care entity that is served with a directive under subsection (1) shall comply with it.

Definitions

(6) In this section,

"health care provider or health care entity" means: …..

10. A long-term care home under the Long-Term Care Homes Act, 2007.

26. One of the purposes of the RHA includes the establishment of the Retirement Homes Regulatory Authority (RHRA), the objects of which are set out in the RHA as follow:

Objects

16 *The objects of the Authority are,*

(a) to administer this Act and the regulations, including overseeing their enforcement, for the purpose of ensuring that retirement homes are operated in accordance with this Act and the regulations;

(b) to educate licensees, consumers and the public about matters relating to this Act and the regulations, including the requirements applicable to licensees, the prescribed care and safety standards for retirement homes, the rights of residents and best practices for the operation of retirement homes;

(c) to provide information about retirement homes;

(d) to advise the Minister on policy matters relating to retirement homes;

(d.1) to suggest to the Minister amendments to Ontario legislation that it considers would further the purposes of this Act or would assist the Authority in administering the Act and the regulations; and

(e) to carry out any other duties or powers assigned to it under any Act or by the Minister.

Powers

17 *The Authority has the capacity and the rights, powers and privileges of a natural person, except as limited by this Act or the regulations.*

GOVERNMENT MANDATES RE: COVID-19

27. As set out in paragraph 25, above, the HPPA grants the Chief Medical Officer of Health (CMOH) in Ontario the power to "*… issue a directive to any health care provider or health care entity respecting precautions and procedures to be followed to protect the health of persons anywhere in Ontario"* in cases where the CMOH "*… is of the opinion that there exists or there may exist an immediate risk to the health of persons anywhere in Ontario".* Suffice it to say, the CMOH considered the COVID-19 pandemic to constitute such a risk. Accordingly, the CMOH issued a number of Directives for various health care providers and institutions in Ontario. The Directive applicable to long-term care facilities is identified as Directive #3 and it has been revised a number of times since its initial issuance.

28. Further, as set out in section 174.1(1) of the LTCHA at paragraph 21 above, "*The Minister may issue operational or policy directives respecting long-term care homes where the*

Minister considers it to be in the public interest to do so." On October 1, 2021, a Minister's Directive was issued to long-term care homes with a new requirement requiring staff to be fully vaccinated to be a condition of attending in the workplace, as reflected in the statement provided by the Associate Deputy Minister of Health, Erin Hannah, as follows:

> ***Mandatory vaccination in all long-term care homes***
>
> *Effective today (October 1), the Minister of Long-Term Care has issued a revised Minister's Directive: Long-Term Care Home COVID-19 Immunization Policy. Per the revised Directive, every licensee must ensure that all staff, support workers, students, and volunteers provide proof of vaccination against COVID-19 or a valid medical exemption. Existing staff, students and volunteers, as well as support workers who currently attend the home, must provide this proof by November 15, 2021. Effective immediately, any new staff, support workers, students or volunteers must provide it before they begin working, undertaking their placement or volunteering in the home.*
>
> *Moving to a province-wide mandatory vaccination policy is a progressive step that many in the sector have called for, and we know you are well-poised to communicate this rapidly to your teams, residents and families, and ensure that staff are supported to get their first dose as soon as possible in order to meet the November 15th deadline for two doses. Staff, support workers, students or volunteers who choose not to provide proof of vaccination, or proof of a valid medical exemption, by the required date will not be able to attend a long-term care home to work, undertake a student placement or volunteer.*
>
> *(emphasis in original)*

In turn, the content of the Minister's Directive was incorporated into the COVID-19 Guidance Document for LTC's published by the Ministry of Long-Term Care (MLTC) at or about the same date as the Minister's Directive was issued. Subsequent iterations of Minister's Directives are similarly incorporated into the MLTC's COVID-19 Guidance Documents.

29. In each of its iterations, Directive #3 states at all times relevant to this Grievance:

> *The goal of this Directive is to minimize the potential risks associated with the ongoing COVID- 19 pandemic in Ontario in all long-term care homes (LTCHs) and retirement homes (RHs) while balancing mitigating measures with the need to protect the physical, mental, emotional, and spiritual needs of residents for their quality of life. As the COVID-19 situation evolves, there will be continual review of emerging evidence to understand the most appropriate measures to take. This will continue to be done in collaboration with health sector partners and technical experts from Public Health Ontario (PHO) and with the health system.*
>
> *To that end**, this Directive provides the minimum requirements with respect to COVID-19 infection and prevention control measures that must be in place for all LTCHs and***

RHs. *This includes having in place policies and procedures on the following topics in a manner that is compliant with this Directive and applicable policies, as amended from time to time, from the Office of the Chief Medical Officer of Health, the Ministry of Long-Term Care (MLTC), the Retirement Homes Regulatory Authority (RHRA), and the Ministry for Seniors and Accessibility (MSAA).*

Detailed information on each of the topics below, including guidance on operationalization of these core principles, can be found in sector-specific documents:

• **Long-term care homes** must follow MLTC's COVID-19 Guidance Document for Long- Term Care Homes in Ontario, effective [insert applicable date] or as current. .
• **Retirement homes** must follow RHRA's Retirement Homes Policy to Implement Directive #3, [insert applicable date] or as current.

(emphasis in original)

30. The Minister of Long-Term Care issued a further Directive dated December 31, 2021 requiring that employees of LTCs obtain a "booster" or 3rd vaccination shot in accordance with the following provision:

1.2 Subject to section 1.5, every licensee of a long-term care home shall ensure that no staff, support worker, student placement or volunteer who have not met the requirements of section 2 attends the home for the purposes of working, undertaking a student placement, or volunteering, as follows:

a. Staff, support workers, student placements, and volunteers who are eligible for a third dose prior to January 1, 2022 must meet the applicable requirements set out in section 2 by January 28, 2022;

b. Staff, support workers, student placements, and volunteers who are eligible for a third dose on or after January 1, 2022 must meet the applicable requirements set out in section 2 by March 14, 2022.

Subsequently, the Minister issued a further Directive extending the deadline for all LTC staff to receive their booster to March 14, 2022. The CMOH issued an updated Directive #3 requiring that LTC's must follow the Minister's Directive in each case consistent with the language set out in paragraph 29, above.

THE POLICIES

31. On May 31, 2021 a Minister's Directive was issued through the Ministry of Long-Term Care requiring that all LTCs in the Province have in place an immunization policy by July 1, 2021.

In a Memorandum issued by the Ministry's Associate Deputy Minister, Erin Hannah, summarizing the Directive, it states:

At a minimum, the policy must require staff, student placements and volunteers to do one of three things:

1. ***Provide proof of vaccinatio**n against COVID-19; or*
2. ***Provide a documented medical reason** for not being vaccinated against COVID-19; or*
3. ***Participate in an educational program** approved by the licensee.*

(emphasis in original)

32. By email dated June 8, 2021, the Union was provided with a copy of the Employer's Policy promulgated in compliance with the Minister's Directive set out above. The Provincial Director for the Union replied on June 17, 2021 acknowledging receipt of the Policy and stating that they would be shared with each of its representatives working at the Employer's facilities. The Policy was not the subject of a grievance.

33. The Employer's Policy effective as of July 1, 2021 ("the Original Policy") stated, in part, as follows:

> ***POLICY***
>
> *COVID-19 is a very serious and highly contagious disease that has killed millions of people worldwide and has caused a variety of other serious health problems (short of death) for hundreds of thousands of other people.*
>
> *Everyone at Revera shares a common mission and desire to do everything reasonably possible to protect residents as well as staff from getting COVID-19. WE ARE ALL IN THIS TOGETHER. We know that seniors have been disproportionately impacted by COVID-19. Sadly, we have had residents die and suffer other serious outcomes as a result of COVID-19. Regrettably, we have also had fellow staff members suffer serious outcomes. Each of us needs to do our part in helping to prevent further spread of this horrible disease.*
>
> *IT IS REVERA'S EXPECTATION AND SINCERE HOPE THAT ALL STAFF WILL BE VACCINATED (subject only to legitimate established exceptions of a medical nature). WE MUST DO EVERYTHING IN OUR POWER TO HELP FIGHT COVID-19 AND KEEP EVERYONE SAFE.*
>
> *While it is the expectation that all staff will voluntarily get vaccinated, Revera respects the decision of those staff members who decide not to get vaccinated. However, in order to protect its residents and other staff, Revera will be implementing the following measures for those who are not vaccinated to:*

1. provide a documented medical reason as to why they cannot be vaccinated or participate in an educational session regarding the benefits of vaccination and the risks of not getting vaccinated, and

2. participate in daily rapid antigen surveillance testing, and

3. continue to adhere to PPE requirements, even after these are no longer mandated by public health or provincial health ministries.

(emphasis in original)

The Original Policy then went on to put in place procedures to facilitate compliance with the terms set out above.

34. On August 26, 2021 the Employer was party to a news release that stated as follows:

A coalition of national seniors' living operators, led by Chartwell, Extendicare, Responsive Group, Revera and Sienna, announced today that they are making COVID-19 vaccination mandatory for their long-term care and retirement home staff across Canada.

"The fourth wave of COVID-19 is here, with cases rising across the country. Variants of the virus, such as Delta and other evolving variants like Lambda, are highly transmissible and continue to pose significant risk to seniors, people with health issues and those who have not yet been fully vaccinated.

Together, Canada's largest seniors' care providers are doing everything we can to remain vigilant and protect the vulnerable populations in our care from the virus. Frontline staff at each organization have demonstrated an enthusiastic response to our voluntary vaccination programs. We thank them for their commitment, but we need to do more.

As of October 12, 2021, staff who are not fully vaccinated will be placed on an unpaid leave of absence. Full vaccination is also required for all new hires, students and agency personnel, across each organization. The new vaccination policy will enhance protection against the virus for the people we care for and team members who deliver that care, as well as essential caregivers and visiting family members.

Vaccinations are safe, highly effective and significantly reduce the risk of serious illness and hospitalization. Each operator has removed barriers to vaccination and continues to provide supports to their frontline staff including education, appointment booking and paid time for vaccination, resulting in already high staff vaccination rates that continue to rise each week. IN light of this, we do not expect any impact on staffing levels. We are optimistic our staff will continue to act in the best interest of our communities and will work to achieve full vaccination across our homes.

As rates of infection once again increase in communities across the country, unvaccinated staff are more likely to bring the virus to work. The safety of our residents in long-term care and retirement homes, who trust us to provide the care and services they need, is paramount. This policy will increase their level of safety and improve quality of life for residents by reducing the need for isolation and disruption of daily activities that result from outbreak restrictions. It also protects ongoing access to visits from family members, which are critical to the well-being of all those in our care for whom outbreak restrictions have been difficult.

Throughout the pandemic, the dedication of our frontline staff has not wavered. We applaud frontline heroes across the country and, together, we call on all health care leaders to take up this challenge with their own teams, o support us in our work to build a fully vaccinated health-care workforce across Canada."

35. On August 26, 2021, the same day as the press release in the preceding paragraph was issued, the Employer communicated "… to CLAC and staff…" the revisions to its Policy ("the August 26 Policy") that include the following:

IT IS REVERA'S REQUIREMENT THAT ALL STAFF BE VACCINATED *(subject only to legitimate established exceptions of a medical nature or there is a valid human rights exception).*
WE MUST DO EVERYTHING IN OUR POWER TO HELP FIGHT COVID-19 AND KEEP EVERYONE SAFE.

For those who are not vaccinated at our Homes and Residences:

1. agree in writing that they will receive their first and/or second dose by a mutually agreed upon date or provide a documented medical reason as to why they cannot be vaccinated; and
2. wear appropriate PPE (e.g. applicable PPE, including masks and face shields) even after such precautions are no longer mandated by applicable public health authorities; and
3. submit to daily rapid antigen COVID-19 testing, again, even after such testing is no longer mandated by applicable public health authorities.

Refusal to adhere with any of these measures outlined above will result in being placed on an unpaid leave.

(emphasis in original)

36. Subsequent to the Employer's issuance of the August 26 Policy set out in the preceding paragraph, Ontario's Chief Medical Officer of Health (CMOH) sent out Instructions to RHs on September 7, 2021 that stated as follows:

AND WHEREAS:

> *• some retirement home staff within the meaning of the Retirement Homes Act, 2010, contractors, volunteers, and students remain unvaccinated, posing risks to residents;*
> *• due to age-related conditions and co-morbidities, retirement home residents face higher risk of serious illness and death due to COVID-19; and*
> *• vaccines provide the best protection against COVID-19.*

***AND HAVING REGARD TO** the prevalence of the Delta variant of concern globally and within Ontario, which has increased transmissibility and disease severity than previous COVID-19 virus strains, in addition to the declaration by the World Health Organization (WHO) on March 11, 2020 that COVID-19 is a pandemic virus and the spread of COVID-19 in Ontario.*

***I AM THEREFORE OF THE OPINION** that instructions from the OCMOH must be issued to establish mandatory COVID-19 vaccination policies in retirement homes within the meaning of the Retirement Homes Act, 2010 that are licenced under the Act.*

***Date of Issuance**: August 30, 2021*

***Effective Date**: Every Retirement Home (as defined below) must establish a COVID-19 vaccination policy by no later than September 7, 2021 and implement it by no later than September 21, 2021.*

***Issued To**: Retirement homes within the meaning of the Retirement Homes Act, 2010 that are licenced under the Act (herein referred to as "Retirement Home").*

On September 16, 2021, the RHRA then issued a Guidance document confirming the requirement set out in the CMOH Instruction.

37. On September 29, 2021, the Employer "…communicated to CLAC and staff…" further revisions to its Policy dated September 28, 2021 ("the September 28 Policy"), the material changes reading as follow:

> ***IT IS REVERA'S REQUIREMENT THAT ALL STAFF BE VACCINATED** (subject only to legitimate established exceptions of a medical nature or there is a valid human rights exception). WE MUST DO EVERYTHING IN OUR POWER TO HELP FIGHT COVID-19 AND KEEP EVERYONE SAFE.*
>
> *For those who are not vaccinated at our Homes and Residences:*

1. agree in writing that they will receive their first and/or second dose by a mutually agreed upon date or provide a documented medical reason as to why they cannot be vaccinated; and
2. wear appropriate PPE (e.g. applicable PPE, including masks and face shields) even after such precautions are no longer mandated by applicable public health authorities; and
3. submit to daily rapid antigen COVID-19 testing, again, even after such testing is no longer mandated by applicable public health authorities.

Refusal to adhere with any of these measures outlined above will result in being placed on an unpaid leave until they comply; or their employment is terminated.

(emphasis in original)

Under the Procedures section of the September 28 Policy, employees who were not vaccinated and were not subject to a human rights or medical exemption, had to be fully vaccinated by October 12, 2021 unless they elected to be vaccinated by an agreed upon date. Failure to meet any of those conditions would result in the employee being "…placed on an unpaid leave until they comply, or their employment is terminated".

38. It will be recalled that a Minister's Directive requiring mandatory vaccinations for LTC staff was issued a few days later on October 1, 2021.

39. On December 31, 2021, a Minister's Directive was issued requiring that all LTC staff (other than those who were medically exempted) receive a third dose of the COVID-19 vaccine by January 28, 2022 in order to be considered "fully vaccinated" and, therefore, permitted to attend work. On that same date, the Employer issued further revisions to its Policy ("the December 31 Policy") as set out in the ASF stating, *inter alia*, that all LTC and RH staff were required to receive third doses by January 28, 2022. On January 27, 2022 a further Minister's Directive was issued extending the deadline by which LTC staff were to receive third doses to March 14, 2022. On that same date, the Employer revised its Policy once more ("the January 27 Policy") to reflect the latest Directive, requiring that all LTC and RH employees were to have received a third dose of the vaccine by March 14, 2022 in order to be deemed fully vaccinated and eligible to attend at the workplace.

40. While there is no evidence as to when or by what means the December 31 Policy was communicated to the Union, I was provided with an email from the Employer to the Union dated January 27, 2022 including the January 27 Policy as an attachment. Noting that the timing and manner of communication utilized by the Employer in respect of the January 27 Policy is consistent with the Employer's prior communications of revisions of the Policy to the

Union it may be assumed that the same mechanism was used in respect of the December 31 Policy.

APPLICATION OF THE POLICIES

41. The Employer's original Policy was effective as of July 1, 2021. When communicated to the Union on June 8, 2021, the Employer's cover letter stated *inter alia* as follows:

> *Vaccines are a proven, safe and powerful weapon in our battle against COVID-19. The vast majority of our residents have opted to be vaccinated, which has led to a dramatic drop in COVID-related infections and deaths. This speaks volumes to the benefits of vaccination in combatting COVID-19.*
>
> *Revera has made repeated, concerted efforts to educate and encourage staff to be vaccinated and to dispel misinformation and vaccine hesitancy. These have included letters from the Chief Executive Officer, Chief Medical Officer and Senior Vice Presidents; repeated emphasis on staff webinars; personal testimonials; poster campaigns; COVID Hotline; social media campaigns; videos; links to independent sources of information about the vaccines; paid time to obtain the vaccine and individual meetings with hesitant staff.*

The letter of June 8, 2021 went on to state that the following conditions would apply to unvaccinated employees:

> *Revera will require any staff who are not fully vaccinated to:*
>
> *1. [Effective July 1, 2021] provide a documented medical reason as to why they cannot be vaccinated or participate in an educational session regarding the benefits of vaccination and the risks of not getting vaccinated, and*
>
> *2. [Effective July 5, 2021] participate in daily rapid antigen surveillance testing, and*
>
> *3. [Effective July 5, 2021] adhere to PPE requirements, even after these are no longer mandated by public health or provincial health ministries.*
>
> *(emphasis added)*

42. As noted above, the original Policy was not the subject of a grievance and there was no evidence (or suggestion) that the Employer did not take the steps referenced in its letter to provide education to workers respecting vaccination, paid time to obtain the vaccine or individual meetings with those who were vaccine hesitant. There were no grievances filed respecting the Employer's application of the original Policy.

43. As set out in the ASF, the Union grieved the revised August 26 Policy that identified unpaid leaves of absence as the consequence of an employee's failure to comply with its requirement that all staff be fully vaccinated by October 12, 2021. Of course, prior to October 12, 2021, the Employer issued its revised September 29 Policy that added the additional potential consequence of termination while maintaining the date of October 12, 2021 as the deadline for the employees in the workplace to be fully vaccinated (or have agreed to receive vaccination by a mutually agreed date). And, finally, on October 1, 2021 the Province of Ontario made it mandatory for employees in LTCs to be vaccinated in order to attend the workplace as of November 15, 2021.

44. In its application of the September 29 Policy, the Employer undertook a number of communications with its employees. Between October 6 and 11, 2021, it issued letters to staff who had not yet provided proof of vaccination, advising that unvaccinated employees would be "…removed from the schedule and placed on an unpaid leave of absence effective immediately until such time as you comply, or your employment is terminated". Those employees who remained unvaccinated (and had not committed to being vaccinated) were placed on unpaid leaves of absence effective October 15, 2021.

45. For those employees who were placed on unpaid leaves of absence, the Employer sent two further letters respecting the possibility of termination. Between November 6 and 11, 2021, the first letter was sent to employees stating as follows:

> *As you are aware, you were placed on an unpaid leave of absence effective October 12, 2021 for non-compliance with Revera's COVID-19 Immunization Policy (the "Policy").*
>
> *Pursuant to the Policy, where an existing staff member, student placements or volunteer is not fully vaccinated by October 12, 2021 they must:*
>
> > *1. agree in writing that they will receive their first and/or second dose by a mutually agreed upon date; and*
> >
> > *2. wear appropriate PPE (e.g. applicable PPE, including masks and face shields) even after such precautions are no longer mandated by applicable public health authorities; and*
> >
> > *3. submit to daily rapid antigen COVID-19 testing, again, even after such testing is no longer mandated by applicable public health authorities.*
> >
> > *For clarity, an individual must provide proof of their first dose vaccination for vaccines that require two shots before they can continue their employment or be*

granted access to our homes or residences AND adhere to the safety measures (PPE and daily testing) which will remain in place until such time as the staff member, student placement or volunteer provides evidence, to Revera's satisfaction, that they are fully vaccinated.

Our records to date, indicate that you have not fulfilled any of the aforementioned requirements [or list which requirements remain unfilled] of the Policy. Please be advised that your continued non-compliance shall result in the termination of your employment.

46. While the first letter advised that termination would occur without specifying the date on which such an action might take place, the second letter did provide that information. The second letter was sent to employees between November 26 and 30, 2021 stating:

As you are aware, you were placed on an unpaid leave of absence effective October 12, 2021 for non-compliance with Revera's COVID-19 Immunization Policy (the "Policy"). Pursuant to the Policy, where an existing staff member, student placements or volunteer is not fully vaccinated by October 12, 2021 they must:

1. agree in writing that they will receive their first and/or second dose by a mutually agreed upon date; and

2. wear appropriate PPE (e.g. applicable PPE, including masks and face shields) even after such precautions are no longer mandated by applicable public health authorities; and

3. submit to daily rapid antigen COVID-19 testing, again, even after such testing is no longer mandated by applicable public health authorities.

For clarity, an individual must provide proof of their first dose vaccination for vaccines that require two shots before they can continue their employment or be granted access to our homes or residences AND adhere to the safety measures (PPE and daily testing) which will remain in place until such time as the staff member, student placement or volunteer provides evidence, to Revera's satisfaction, that they are fully vaccinated.

Further to our correspondence to you dated DATE, our records to date, indicate that you have not fulfilled any of the aforementioned requirements [or list which requirements remain unfilled] of the Policy. Please be advised that your continued non-compliance will result in the termination of your employment fifteen (15) days from the date of this letter.

47. On or about the fifteenth day following the issuance of the second letter set out in the preceding paragraph, the Employer proceeded to terminate the employment of its

unvaccinated employees who were not subject to an exception or agreement otherwise. The termination letters stated as follow:

> *As you are aware, you were placed on an unpaid leave of absence effective October 12, 2021 for non-compliance with Revera's COVID-19 Immunization Policy (the "Policy"). Pursuant to the Policy, where an existing staff member, student placements or volunteer is not fully vaccinated by October 12, 2021 they must:*
>
> > *1. agree in writing that they will receive their first and/or second dose by a mutually agreed upon date; and*
> >
> > *2. wear appropriate PPE (e.g. applicable PPE, including masks and face shields) even after such precautions are no longer mandated by applicable public health authorities; and*
> >
> > *3. submit to daily rapid antigen COVID-19 testing, again, even after such testing is no longer mandated by applicable public health authorities.*
> >
> > *For clarity, an individual must provide proof of their first dose vaccination for vaccines that require two shots before they can continue their employment or be granted access to our homes or residences AND adhere to the safety measures (PPE and daily testing) which will remain in place until such time as the staff member, student placement or volunteer provides evidence, to Revera's satisfaction, that they are fully vaccinated.*
>
> *Further to our correspondence to you dated DATE and DATE, you have not fulfilled any of the aforementioned requirements [or list which requirements remain unfilled] of the Policy. Please be advised that your employment is being terminated for cause effective DATE for your continued failure to adhere to the Policy.*

48. There was no evidence tendered nor suggestion made by the parties that any further actions have been taken as a result of the revisions resulting in the December 31 Policy requiring employees to receive a third dose of the vaccine in order to be consider fully vaccinated.

COVID-19 POLICY CASELAW

49. While the parties provided caselaw on the general principles that they argue are applicable in this case, I was also provided with a number of decisions that dealt specifically with policies created by employers in response to the COVID-19 pandemic. Additionally, pursuant to the agreement of the parties I was given additional decisions, without comment, that had been issued following the conclusion of the hearing. These are:

- *Ontario Nurses Association v. Eatonville/Henley Place,* 2020 ONSC 2467 (CanLII) (Ont. Sup. Ct.)
- *Inovata Foods Corp. v A Director under the Occupational Health and Safety Act*, 2020 CanLII 49519 (ON LRB)
- *United Food and Commercial Workers Canada, Local 175 v Hazel Farmer,* 2020 CanLII 104942 (ON LRB)
- *United Food and Commercial Workers Union, Canada Local 333 and Paragon Protection Ltd.*, unreported November 9, 2021 (von Veh)
- *Electrical Safety Authority and Power Workers' Union*, 2021 CanLII 101015 (ON LA) (Stout) *
- *Electrical Safety Authority and Power Workers' Union*, 2022 CanLII 343 (ON LA) (Stout)
- *Ontario Power Generation and The Power Workers Union*, unreported November 12, 2021 (J. C. Murray)
- *Peter Valliere v. 4250915 Canada Inc. o/a Multi Luminaire*, unreported September 28, 2021 (Watson, Employment Standards Officer)
- *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, 2021 ONSC 7658 (CanLII) (Ont. Sup. Ct.)
- *Canada Post Corporation and Canadian Union of Postal Workers*, unreported November 30, 2021 (Burkett)
- *Bunge Hamilton Canada, Hamilton, Ontario v. United Food and Commercial Workers Canada, Local 175*, 2022 CanLII 43 (ON LA) (Herman)
- *Teamsters Local Union 847 and Maple Leaf Sports and Entertainment*, 2022 CanLII 544 (ON LA) (Jesin)
- *CKF Inc. and TC, Local 213 (COVID Testing), Re,* 2022 CarswellBC 198 (Saunders)
- *Power Workers' Union and Elexicon Energy Inc.*, 2022 CanLII 7228 (ON LA) (Mitchell)
- *Chartwell Housing Reit (The Westmount, the Wynfield, the Woodhaven and the Waterford) v. Healthcare, Office and Professional Employees Union, Local 2220*, 2022 CanLII 6832 (ON LA) (Misra)
- *Algoma Steel Inc. and USW, Local 2724*, 2022 CanLII 22896 (ON LA) (Kaplan)
- *Caressant Care Nursing & Retirement Homes and Christian Labour Association of Canada*, 2020 CanLII 100531 (ON LA) (Randall)
- *Participating Nursing Homes and Ontario Nurses' Association*, 2020 CanLII 36663 (ON LA) (Stout)
- *Eric Carter v. Toyota Motor Manufacturing Canada Inc.*, unreported December 16, 2020 (Zakoor – Employment Standards Officer)
- *Unifor Local 973 v. Coca-Cola Canada Bottling Limited*, 2022 CanLII 20322 (ON LA) (Wright)
- *The Toronto District School Board and CUPE, Local 4400*, 2022 CanLII 22110 (ON LA) Kaplan
- *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission,* 2022 CanLII 22222 (ON LA) (M.R. Wilson)

- *Algoma Steel Inc. and The United Steelworkers Local 2551,* unreported February 23, 2022 (J. C. Murray)

**initial "bottom-line" decision*

50. While each of the foregoing decisions is relevant to the issues under consideration in this proceeding, I wish to provide some more detailed review of three decisions in particular. The first of these is Arbitrator Stout's final decision in *Electrical Safety Authority and Power Workers' Union*, 2022 CanLII 343 (ON LA) (hereafter "the *Electrical Safety Authority*"). In this case, the learned arbitrator was dealing with the union's grievance of a policy summarized as follows:

> *[38] On October 6, 2021, the ESA announced that a revised Vaccination Policy would be implemented. The Vaccination Policy is attached as an appendix to this award. Relevant to this award is the requirement of mandatory vaccination and providing proof of vaccination. Employees who are not fully vaccinated are subject to testing requirements and they must also participate in an education session. The Vaccination Policy provides for exemptions under the Ontario Human Rights Code. However, the Vaccination Policy also provides that those employees who do not comply with the policy may be subject to discipline, up to and including discharge. The ESA has also reserved the right to place employees who do not comply with the requirements of the Vaccination Policy on an unpaid leave of absence.*

51. In the case before him, Arbitrator Stout was dealing with a workplace in which it was possible for many of the affected employees to work remotely and many were engaged in carrying out their duties and responsibilities in the field. As stated by the arbitrator:

> *[76] The ESA has not had a breakout in their workplace. Since the beginning of the pandemic in March 2020, only seven employees have contracted COVID-19 out of their over 400 employees and only two of those infections may be work related. Those two possible work related infections occurred in early January and early February 2021, before vaccines were available to the general population. Those two possible workplace infections were reported to the MOL and the WSIB. However, I have no evidence of any MOL orders being made or any significant WSIB claims being made in relation to those two possible workplace infections.*

Ultimately, it was found that "In this case, the ESA has not demonstrated any difficulties in protecting their workplace utilizing a combined vaccination and testing regime".

52. In dealing with the parties' argument about the potential conflict between individual and collective rights, Arbitrator Stout wrote:

[66] In St. Peter's Health System v. CUPE, Local 778, supra, Arbitrator Charney undertakes a detailed review of authorities provided to him and finds that prior to balancing the interests of the employer and the employees one must look at any common law rights issues and s.7 of the Charter as to whether it is permissible to enforce a mandatory medical treatment. Arbitrator Charney concludes:

> *"…suspending employees (non-disciplinary) for refusing to undergo medical treatment is a violation of their common law sec. 7 charter rights. Virtually all the court cases, including Supreme Court of Canada and Ontario Court of Appeal, find that enforced medical treatment, and I point out that this is not a medical examination but treatment, is an assault if there is no consent."*

[67] I appreciate the analysis of Arbitrator Charney, but I do not agree with his approach. I agree that an individual employee's rights, including the right to privacy, personal autonomy, and bodily integrity as well as rights under the Charter are fundamental to a just and democratic society. Such fundamental rights should not be easily abrogated or constrained by employers. However, these individual rights are not absolute and there are circumstances where the rights of the collective outweigh the rights of the individual. Arbitrator Charney's approach, with respect, also seems to ignore the fact that some jobs (first responders and healthcare providers for example) have an inherent physical component or occur in an inherently high risk work environment, see Halton District School Board and ETFO (BMS Grievances) 2020 CanLII 5702m (ON LA). I am of the view that a more nuanced contextual approach must be adopted applying the KVP test, and a balancing of interests is the more appropriate way to address the issue before me, see Sault Area Hospital and Ontario Nurses' Association (Vaccinate or Mask) (2015), 262 L.A.C. (4th) 1 (Hayes).

[68] Context is extremely important when assessing the reasonableness of any workplace rule or policy that may infringe upon an individual employee's rights. The authorities reveal a consensus that in certain situations, where the risk to health and safety is greater, an employer may encroach upon individual employee rights with a carefully tailored rule or policy, see Carewest v. AUPE (2001), 104 L.A.C. (4th) 240 (Smith).[2]

[69] In cases where the rule or policy involves health and safety, one must consider the obligations that arise under the Occupational Health and Safety Act, including an employer's obligation to "take every precaution reasonable in the circumstances for the protection of the worker," see s. 25(2)(h). This statutory obligation fits neatly within the KVP test, which is grounded in a contextual analysis and a balancing of interests approach to determine the reasonableness of any rule or policy.

[70] While an individual employee's right to privacy and bodily integrity is fundamental, so too is the right of all employees to have a safe and healthy workplace. The interests in this case raise extremely important public policy issues during a very unique and difficult

time in our history. The context is very unusual, but the existing law provides guidance for the analysis.

[71] In workplace settings where the risks are high and there are vulnerable populations (people who are sick or the elderly or children who cannot be vaccinate), then mandatory vaccination policies may not only be reasonable but may also be necessary and required to protect those vulnerable populations.

[72] However, in other workplace settings where employees can work remotely and there is not specific problem or significant risk related to an outbreak, infections, or significant interference with the employer's operations, then a reasonable less intrusive alternative, such as the VVD/T Policy employed prior to October 5, 2021, may be adequate to address the risks.

53. In the result, Arbitrator Stout allowed the grievance, requiring that the employer's policy be amended to reflect the circumstances as he found they then existed in that workplace. Included in his orders was a direction that the provision that employees might be disciplined or discharged for failing to get vaccinated be removed. As stated in the award:

[92] In my view, disciplining or discharging an employee for failing to be vaccinated, when it is not a requirement of being hired or an agreed condition of employment and where there is a reasonable alternative, is unjust. Employees do not park their individual rights at the door when they accept employment. While an employer has the right to manage their business, in the absence of a specific statutory authority or specific provision in the collective agreement, an employer cannot terminate an employee for breach of a rule unless it meets the KVP test and is found to be a reasonable exercise of management rights.

54. The second case I wish to reference in greater detail is that of Arbitrator Misra in *Chartwell Housing Reit (The Westmount, the Wynfield, the Woodhaven and the Waterford) v. Healthcare, Office and Professional Employees Union, Local 2220*, 2022 CanLII 6832 (ON LA), (hereafter "*Chartwell*"). The *Chartwell* decision is especially important as Arbitrator Misra was considering a policy that was similar, but not identical to that which is under consideration in this case. That language was identified by the arbitrator as follows:

20. If an employee did not provide proof of vaccination or exemption for medical reasons by October 11, 2021, they would not be permitted to work thereafter until the requirements were met. The September 2021 Mandatory Vaccination Policy went on to state (at p. 3):

Employees who fail to comply with this Policy ***will be placed on an unpaid***

> ***administrative leave*** *or may have their employment terminated. Failure to comply with this Policy by non-employee Staff may result in the termination of the Staff members contract, assignment or placement. (Emphasis in original)*

Chartwell is, of course, one of the senior living chains that participated in the news release issued on August 26, 2021 as set out in paragraph 34, above. The union filed a policy grievance on September 8, 2021. It also appears that the parties agreed to argue the case on the basis of the policies as they existed on the date of the arbitration as there are references to language introduced following the date of the grievance which mirrors that found in the September 27 Policy in this case. Accordingly, while the collective agreement language under consideration before Arbitrator Misra is different in some material respects before me, many of the same arguments respecting the reasonableness of the policy are the same have been advanced in this proceeding.

55. Two provisions of the collective agreement governing the parties in *Chartwell* that were the subject of particular focus in the hearing read as follow:

> *Article 18 – Miscellaneous*
> *…*
> *18.4 Prior to effecting any significant changes in rules or policies which affect employees covered by this Agreement, the Employer will discuss the changes with the Union and provide copies to the Union.*
>
> *18.5 Existing rights, privileges, benefits, practices and working conditions shall be continued to the extent that they are more beneficial and not inconsistent with the terms of this Collective Agreement unless modified by mutual agreement of the Employer and the Union.*

56. Arbitrator Misra identified three questions that were to be answered in the case before her, as follow:

> *158. Based on a review of the grievance and the parties' submissions, there are three questions to be answered:*
>
> > *1. Did the Employer breach Article 18.4 of the collective agreement when it promulgated the September 2021 Mandatory Vaccination Policy in late August 2021?*
> >
> > *2. Did the Employer breach Article 18.5 of the collective agreement when it included in the Policy the disciplinary penalty of termination of employment?*

3. Is the September 2021 Mandatory Vaccination Policy reasonable, particularly as it relates to the consequences of non-compliance?

57. With respect to the first of these questions, it was clear on the evidence that the employer had not discussed the policy introduced on August 26, 2021 with the union. Accordingly, Arbitrator Misra found a breach of Article 18.4 and ruled:

> *176. Therefore, in respect of Art. 18.4, I make the following declaration and order:*
>
> *- I declare that the Employer violated Art. 18.4 of the collective agreement when it failed to discuss with the Union its significant changes to its COVID-19 vaccination policy, and failed to provide the Union with a copy of that policy prior to effecting the changes; and,*
>
> *- I order that in the future the Employer abide by the language and spirit of Art. 18.4.*

58. With respect to the second question, the learned arbitrator found that prior to August 26, 2021 the employer had vaccination policies, such as that made in connection with annual influenza vaccinations, that did not include a disciplinary response in the event of an employee's non-compliance. Similarly, the first iteration of the employer's COVID-19 Vaccination policy in June 2021 did not include a disciplinary component. Accordingly, the following finding of fact was made by the arbitrator:

> *186. Based on this evidence, I find that the existing practice and working condition of bargaining unit employees who were non-compliant with the Employer's vaccination policies was that they would be taken off the schedule, and effectively put on an unpaid leave of absence. That practice and working condition was more beneficial to them than the change in the September 2021 Mandatory Vaccination Policy which imposes, in addition to the leave of absence penalty, the alternative of a disciplinary penalty of discharge for refusal to be vaccinated or provide a medical exemption.*

59. Accordingly, the following answer was given to the second question respecting Article 18.5 of the collective agreement at issue in *Chartwell*:

> *247. In respect of Article 18.5, I make the following declaration and orders:*
>
> *- I declare that the Employer violated Art. 18.5 of the collective agreement when it failed to continue the existing practice or working condition of*

> *putting employees on an unpaid leave of absence when they failed to comply with a vaccination policy, and failed to discuss with the Union the new disciplinary aspect of the September 2021 Mandatory Vaccination Policy, in order to try to reach a mutual agreement.*
>
> *- I order that in the future the Employer abide by the language of Art. 18.5; and,*
>
> *- I order that unless the parties agree otherwise, the statement "or may have their employment terminated" as it applies to these HOPE bargaining unit members, be struck from the September 2021 Mandatory Vaccination Policy, the November 2021 revised version of this Policy, and any other revision of this particular policy.*

60. Turning to the third question considered by Arbitrator Misra, the reasonableness of the policy was analyzed on the basis of how it balanced the interests of the employer and the employees in the context of the consequences for non-compliance. In answering the question, the learned arbitrator commences by stating:

> *196. An evaluation of whether the unilaterally imposed September 2021 Mandatory Vaccination Policy is reasonable must be conducted in light of my findings above, and in particular having regard to the finding that the Employer has breached Art. 18.5 in respect of the disciplinary aspect of non-compliance with the policy.*

61. Turning to the issue of whether the mandatory nature of the requirement that an employee be vaccinated in order to attend in the workplace, it is found that this is not "a live issue" as of the date of hearing given the Minister's Directive of October 1, 2021 and, accordingly, is reasonable. Similarly, the Union did not dispute that placing unvaccinated employees on unpaid administrative leaves of absence was reasonable (noting that this had been the practice under the immunization policy in place prior to the COVID-19 pandemic).

62. The arbitrator goes on to deal with the issue of the reasonableness of the policy's disciplinary consequences for an employee's failure to vaccinate. While her determination respecting a violation of Article 18.5 was considered to be a complete answer to the determination as to whether the policy could stand, Arbitrator Misra finds, in the alternative, that the policy was unreasonable. Making a finding on this issue was necessary, in part, because the employer:

> *219. …requested that I provide the parties with a "generic just cause" ruling, to provide guidance to the parties on the "broad based application" of the policy to the fourteen*

individuals who were terminated from employment. It was seeking some direction about whether, through these actions, it had met the just cause standard. Thus, it is clear that in the Employer's view, non-compliance with the policy along with the various steps it had taken should be sufficient to ground a finding of just cause.

In responding to that request by the employer, the arbitrator writes as follows

236. Earlier, I have quoted the entirety of para. 34 of the KVP decision, cited above, because this is a case where the "Effect of such Rule re Discharge" part of the paragraph, which is not generally included when the KVP rules are quoted in the jurisprudence, is instructional. This collective agreement contains a "just cause" provision in the Management Rights article. As the arbitrator noted in KVP, if breach of a rule or policy, like the mandatory vaccination policy in this case, is the foundation for discharge of employees, it cannot on its own be binding on a board of arbitration unless the rule or policy is found to be reasonable, or just cause is established. The existence of the rule or policy itself is not sufficient, and employees' collective agreement rights cannot be impaired or diminished except by agreement of the parties.

237. It is for this reason that I cannot acquiesce to the Employer's urging to make findings about whether its course of conduct leading up to the December terminations establishes, whether fully or partially, its obligation to meet the just cause standard for the termination of each of the 14 individuals. My jurisdiction, based on the policy grievance before me, is to address the questions posed by that particular grievance. I am not seized of any individual termination grievance.

238. Nonetheless, there is no doubt that the KVP rules are designed to address the arbitral concern that if a policy includes a termination provision for breach of the policy, such a policy must be reasonable, and does not oust an employer's onus to establish just cause in each situation, unless the parties have agreed otherwise.

239. Based on my review of the policy, and the evidence before me, as well as the parties' submissions, I am satisfied that the inclusion of the discharge penalty as it is articulated in the September 2021 Mandatory Vaccination Policy is unreasonable. In the current context of the pandemic, where circumstances are constantly changing such that it is impossible to know what the near future holds, the short notice upon which the Employer wishes to act, and has in fact already acted, makes termination irrevocable. It also apparently precludes an employee relying on any mitigating factors, such as length of service, a clean disciplinary record, or any other factor that may be considered in an employee's particular circumstances.

240. Furthermore, there is no specific evidence before me of an actual health and safety concern as a result of unvaccinated employees being kept off work on unpaid

leaves of absence, nor of any operational effect on the homes. This is not a situation where as a result of an unvaccinated employee coming to work there may be an outbreak that would lead to the dire consequences that LTC home residents have experienced with each outbreak. …..

242. As such, and for all the reasons outlined above, I find that the policy is both unreasonable and inconsistent with the collective agreement to the extent that it includes the termination provision as a consequence of non-compliance.

63. The final decision that I wish to address in some greater detail is that of Arbitrator Wright in *Unifor Local 973 v. Coca-Cola Canada Bottling Limited*, 2022 CanLII 20322 (ON LA) (hereafter "*Coca-Cola*"). In *Coac-Cola*, Arbitrator Wright was dealing with a grievance challenging the reasonableness of a COVID-19 vaccination policy that included many of the same elements that are at issue in this case. The initial policy, introduced on October 27, 2021, applied to all employees in the employer's operations across Canada. Revisions were made to policy over the following months and, as set out in the award:

13. On December 7th, 2021, the Company advised all employees by email that additional workplace measures would apply to those employees who were not fully vaccinated by January 1st, 2022: effective January 3rd, 2022, unvaccinated employees would be required to wear face shields over their masks when on site or in the field; and effective January 17th, unvaccinated employees would have to submit to a mandatory rapid testing program on their own time but at the Company's expense. In the same email, the Company warned that further protocols might apply to unvaccinated employees:

> *"Please note that ongoing failure to comply with Coke Canada's vaccination policy will have consequences such as being subject to additional protocols and rules, including Leave Without Pay, and the possibility of significant discipline up to and including the termination._" _[sic)*

A further revision to the policy on January 12, 2022 mandated that employees who were not fully vaccinated by January 31, 2022 would be placed on indefinite unpaid leave.

64. The learned arbitrator identified three arguments advanced by the union as follow:

22. The Union challenges the reasonableness of the Policy on three grounds. First, it argues that the Policy is unreasonable because less intrusive means, such as enhanced PPE and rapid antigen testing, are sufficient to keep employees safe at work and enable the Company to meet its statutory obligation under the Occupational Health and Safety Act. Second, it expresses a concern that an employee's decision to not get vaccinated is almost always based on a strongly held personal belief, that may reflect a political

perspective or lifestyle choice, because no one gives up a regular salary for no reason. This, it suggests, should be considered when judging the reasonableness of the Policy. Third, it argues that the Policy puts employees in an untenable situation; they must choose between their livelihood or their bodily integrity/autonomy.

65. In the result, Arbitrator Wright found the policy to be reasonable. With the exception of employees who were unable to take the vaccine for reasons protected by the Ontario *Human Rights Code,* he determined that:

> *36. …an employee's personal belief – however strongly held – must give way to the health and safety concerns that animate the Policy. COVID-19 can lead to serious illness and death. Two employees at the Company died from the disease. In that context, an employee's personal beliefs cannot override the Employer's interest in doing everything possible to maintain the health and safety of the workplace.*

66. With respect to the significant impact on employees that might be occasioned by application of the policy to them, Arbitrator Wright found that the employer interest in protecting the health and safety of workers trumped the privacy interest of unvaccinated employees, writing:

> *37. The Union also expresses a related concern that employees who have made the decision not to get vaccinated are placed in the untenable position of having to choose between their livelihood or their bodily integrity/autonomy. No one can deny it is an exceptionally hard choice for some employees to face, and one that would only be justified as a mandatory company requirement in the kind of extraordinary circumstances presented by the pandemic. In Elexicon Energy Inc., cited above, Arbitrator Mitchell suggests the difficulty of this choice is a relevant consideration for arbitrators balancing the employee interest to privacy, bodily integrity and autonomy, against the employer interest in maintaining the health and safety of the workplace in determining the reasonableness of a mandatory vaccination policy:*
>
> > *"92. In my view, arbitrators should take into account in the balancing exercise the deep dilemma of employees who strongly do not wish to be vaccinated whatever their motives, and who may have few or no other realistic choices to work elsewhere or who will have to give up a significant amount of earned benefits and stability if they choose not to get vaccinated. Just because there are hard choices, as opposed to no choice at all, does not make the policy not coercive, or render it more reasonable. Of course, the policy may be reasonable notwithstanding the potential consequences to the individual employees, but in my view, there is little legitimacy in a decision that finds the policy to be reasonable while denying the lived reality of employees faced with the coercive impact of these policies."*

> *38. In my view, this is a fair observation; it is consistent with Arbitrator Stout's characterization in ESA of the employee's interest in privacy and bodily integrity as being "fundamental". Nevertheless, Arbitrator Mitchell ultimately decides that the employer's interest in protecting the health and safety of other employees is "sufficiently important to justify the policy" 7 although he does find the policy to be unreasonable in respect of three unvaccinated employees working from home, and those employees who work entirely outside.8 In the present case, none of the employees in the bargaining unit work remotely and none work entirely outside. Consistent with Arbitrator Mitchell's conclusion, the Employer's interest in this case in maintaining the health and safety of the workplace— in taking "every precaution reasonable for the protection of a worker" — justifies the Policy notwithstanding the difficulty of the choice for some employees.*

67. Further, Arbitrator Wright also considered the reasonableness of the policy to the extent that it contemplated a disciplinary response, including termination of employment, in the event that an employee did not comply with the mandatory requirement that all employees be vaccinated. In finding that the policy in *Coca-Cola* was not unreasonable in this respect, the learned arbitrator agreed with the analysis of Arbitrator Herman in *Bunge Hamilton Canada, Hamilton, Ontario v. United Food and Commercial Workers Canada, Local 175*, 2022 CanLII 43 (ON LA) where he wrote:

> *30. With respect to the references in the Vaccine Policy to discipline and termination, as the Vaccine Policy states, at this stage discipline or termination are only possibilities. It is reasonable, if not required, for an employer to put employees on notice of potential consequences of non-compliance with a rule or policy, and the Vaccine Policy does this. When or if discipline is meted out or an employee is discharged, a grievance can be filed. Any resulting arbitration would provide opportunity to consider whether the Employer can establish just cause for the suspension or termination, as the case may be, and that determination is likely to involve consideration of the circumstances at hand at the time of the suspension or termination, circumstances that cannot be known at the present time.*
>
> *31. It is therefore reasonable for the Vaccine Policy to include a statement that employees who are not fully vaccinated by January 24, 2022 'will not be allowed on the site and put on unpaid leave pending a final determination on their employment status (up to and including termination of employment'.*

Arbitrator Wright stated that he agreed with the analysis of Arbitrator Herman, above, finding that it was:

> *41. …directly applicable to the present case where discipline or termination is a possible but not inevitable outcome of non-compliance". To the extent that any employee is disciplined or discharged under the terms of the present Policy, that outcome can be*

challenged with an individual grievance requiring the Company to establish just cause for its decision. A just cause analysis is broader and more rigorous than is the determination of whether a workplace policy is reasonable. Moreover, as Arbitrator Herman points out, an individual grievance alleging that an employer's decision to discipline or terminate "is likely to involve consideration of the circumstances at hand at the time of the suspension or termination, circumstances that cannot be known at the present time."

68. Finally, Arbitrator Wright sought to distinguish the case before him from the decision of Arbitrator Misra in *Chartwell* on the following basis:

> *42. In the Chartwell Housing Reit award, Arbitrator Misra concluded, among other things, that a mandatory vaccination policy was unreasonable because she found a breach of the policy resulted in automatic discharge. She made clear that it was only that aspect of the policy that was unreasonable:*
>
> > *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 noncompliance with the policy in question, or indeed any reasonable policy. It is only the automatic application of this policy as it respects discharge that has been found to be unreasonable.*
>
> *43. The Policy before me contemplates discipline or termination as being a possibility, rather than being an inevitable consequence of a failure to comply with its terms, and so is distinguishable from the Chartwell Housing Reit award. After a careful review of the caselaw, Arbitrator Misra herself concludes that arbitrators are likely to find vaccination policies like the one before me to be reasonable:*
>
> > *212. What is clear from a review of these decisions is that arbitrators have accepted that a mandatory vaccination policy will likely be found to be reasonable in the current COVID-19 context and having regard to employers' responsibilities to maintain a safe and healthy workplace for all employees. They have also found reasonable those policies that included putting employees on notice that if they remain unvaccinated (or those who fail to disclose their vaccination status or don't have a medical exemption) they will be subject to being placed on an unpaid leave of absence, and may be subject to termination of employment. What these decisions have not stated is that termination is an automatic outcome for failure to get vaccinated, and in none of the cases had the Employer in fact enacted any terminations of employment.*

EMPLOYER SUBMISSIONS

69. As noted above, this case was argued without witnesses. Evidence included the ASF with the supporting documents to that provided on agreement of the parties. Further evidence was provided by each party in the form of academic papers, extracts from both government and non-governmental organizations and, in the case of the Employer, internal data respecting impacts of COVID-19 on its operations. All of these resources have been carefully reviewed but will not be individually identified in this Award. Finally, each of the parties provided written summaries of their submissions and I am grateful for the clarity and organization that these documents provided in my consideration of the parties' positions.

70. The Employer commenced its submission by seeking to distinguish the Policy at issue in this case from that under consideration in *Chartwell*. As stated in its written submission:

> *The first thing to emphasize (because this shapes the rest of the analysis in this case) is that this is very different language than what was before Arbitrator Misra in the Chartwell case [see paragraph 54, above]. It does not create what she called an automatic and specific "discharge penalty" for non-compliance with the policy that can occur without a preceding unpaid leave. Instead, similar to the policy language that Arbitrator Herman considered in Bunge Hamilton [see paragraph 67, above], the Policy identifies the consequences of non-compliance with the policy as an unpaid leave and notes the potential for a termination, which is left to the just cause provisions of the Collective Agreement.*

71. The Employer then turned to the framework for analysis of policies introduced by employers set out in the decision of *KVP Co. Ltd. v Lumber & Sawmill Workers' Union, Local 2537*, [1965] O.L.A.A. No. 2, 16 L.A.C. 73, 1965 CarswellOnt 618, (hereafter "*KVP*") which both parties accept as the standard applied in such an exercise. The analytical framework in that decision reads as follows:

> ***Recapitulation re Rule Unilaterally Introduced by the Company***
>
> *33 For convenience the above may be summarized as follows:*
>
> ***Characteristics of Such Rule***
>
> *34 A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:*
>
> *1. It must not be inconsistent with the collective agreement.*
>
> *2. It must not be unreasonable.*

3. It must be clear and unequivocal.

4. It must be brought to the attention of the employee affected before the company can act on it.

5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.

6. Such rule should have been consistently enforced by the company from the time it was introduced.

Effect of Such Rule re Discharge

1. If the breach of the rule is the foundation for the discharge of an employee such rule is not binding upon the board of arbitration dealing with the grievance, except to the extent that the action of the company in discharging the grievor, finds acceptance in the view of the arbitration board as to what is reasonable or just cause.

2. In other words, the rule itself cannot determine the issue facing an arbitration board dealing with the question as to whether or not the discharge was for just cause because the very issue before such a board may require it to pass upon the reasonableness of the rule or upon other factors which may affect the validity of the rule itself.

3. The rights of the employees under the collective agreement cannot be impaired or diminished by such a rule but only by agreement of the parties.

72. In assessing the various iterations of the Policy in this case, it was the position of the Employer that only the first and second requisite characteristics are at issue, that is whether the Policy is inconsistent with the Collective Agreement(s) and whether the Policy is unreasonable.

73. The Employer further took the position that in cases where the rule under consideration impacts employee interests related to privacy or bodily integrity those interests must be balanced with the employer interest having regard to the context in which the rule arises. In this regard, the Employer referenced the decision of the Supreme Court of Canada in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.* 2013 SCC 34 (CanLII, [2013] 2 SCR 458 (hereafter "*Irving Pulp & Paper*") at paragraph 27:

[27] In assessing KVP reasonableness in the case of unilaterally imposed employer rules or policies affecting employee privacy, arbitrators have used a "balancing of interests" approach. As the intervener the Alberta Federation of Labour noted:

> *Determining reasonableness requires labour arbitrators to apply their labour relations expertise, consider all of the surrounding circumstances, and determine whether the employer's policy strikes a reasonable balance. Assessing the reasonableness of an employer's policy can include assessing such things as the nature of the employer's interests, any less intrusive means available to address the employer's concerns, and the policy's impact on employees.*

73. Turning to the question of the intersection between the Policies and the Collective Agreements, the Employer submitted that its various iterations were neither inconsistent with the Collective Agreements nor the applicable statutes or the "statutory instruments" (e.g. Minister's Directive, Guidances, CMOH Directives etc.) promulgated under those statutes. Indeed, it was argued that the Policies were, in fact, consistent with the Employer's contractual and statutory obligations. With respect to the Collective Agreements, the Employer pointed to the Purpose clauses, a number of which included a commitment by the parties to work with a view to safeguarding the interests of residents. With respect to statutes, the Employer focused on Article 25(2)(h) of the OHSA requiring employers to "take every precaution reasonable in the circumstances for the protection of a worker" (see paragraph 20, above) as well as the Bills of Rights for residents set out in the LTCHA and RHA (see paragraphs 21 and 23, above. These latter statutes articulate resident rights as including their safety, security and quality of life.

74. In support of its position that the various iterations of the Policy represented reasonable steps in support of its contractual and statutory obligations, the Employer provided a document with many attachments titled "Impacts of COVID19 on the Employer's Homes and on the Ontario Sector". That document stated that the total number of LTC residents at its facilities as of the hearing date was 8,136 and the RH residents numbered some 8,928 individuals. The staff serving those residents (not just members of the bargaining units involved in this proceeding) included 12,505 employees in LTC and 6,546 employees in RH facilities. In the two year period between January 1, 2020 and December 31, 2021 LTC facilities were in "outbreak" for some 918 weeks impacting 2,623 residents and 1,918 staff with 734 deaths attributed to COVID-19. For the same period in RH facilities, the Employer reported that it was considered to be in "outbreak" for some 572 weeks impacting 839 residents and 557 employees with 133 deaths attributed to COVID-19. In the six-week period between January 1and February 14, 2022, the Employer reported and additional 56 deaths in its LTC facilities and 2 additional deaths in its RH facilities. It is my understanding that by "outbreak", the Employer was referring to determinations made by Chief Medical Officers of local Public Health Units (or their equivalents).

75. Further to the direct implications for the health of residents represented by the numbers above, the Employer pointed to the impact on the operations of each of its senior

living facilities resulting from steps taken to prevent outbreaks from occurring. These steps included a variety of actions including restriction of visitors, reduction of congregant activities whether social or associated with ADL and introduction of rules related to masking, cleaning, physical distancing etc., all of which directly impacted employees delivering services as well as the quality of life of residents. Data was provided from across the LTC and RH sectors in Ontario to demonstrate that impacts on the Employer's facilities was in no way unique. Finally, the Employer provided data respecting the data from the facilities that are governed by the Collective Agreements in this case. While the results varied from facility to facility (e.g. Trillium Court LTC/RH experienced no outbreaks while Brierwood LTC had five (5) outbreaks totalling some 88 days), it was submitted that the risk of outbreak was ever-present and required that the Employer take steps to reduce or eliminate such risk.

76. Next, the Employer conducted a detailed review of the statutory framework and the statutory instruments such as Minister's Directives. The bottom line of the Employer's analysis was that there was a mandatory requirement that LTC employees be fully vaccinated as of October 1, 2021 and that RH facilities were obligated by statute to " reasonably replicate and follow" the rules applicable to LTCs.

77. It was the Employer's position that aside and apart from any statutory obligations it might have, its Policy was reasonable having regard to:

- the "precautionary principle" often cited by arbitrators in consideration of policies related to health and safety issues;
- the nature of the work performed by the members of the bargaining unit that requires them to be in close physical proximity/contact with both co-workers and residents;
- the expectations of residents and their families that all steps will be taken to protect the physical, mental and emotional health and safety of those who reside at the LTCs and RHs as their homes;
- the risk to residents and members of the public in the event that an outbreak compromises the ability of the LTC or RH to maintain operations due to staff shortages;
- the need to reduce risk in these circumstances even where that risk has not yet manifested in an actual outbreak;
- the enhanced level of risk for residents who are elderly (often with medical challenges) living in congregant settings;
- the use of vaccination as part of a multi-faceted or "layered" strategy to reduce COVID-19-related illness in the Employer's facilities; and
- the absence of any credible scientific evidence supporting those who may be vaccine-hesitant.

78. Having regard to all the foregoing, it was submitted that the answer to the first question put to me by the parties, "Is the mandatory vaccination policy a reasonable workplace rule?", must be answered in the affirmative.

79. Turning to the second and third questions put by the parties, the Employer started by observing that "just cause" for an employer action (such as imposed leaves of absence or terminations of employment) may exist whether the trigger constitutes either culpable or non-culpable conduct on the part of the employee. In this case, the Employer takes the position that an employee's failure to be vaccinated given the mandatory requirement of the Policy, constitutes culpable misconduct on the part of the employee. As set out in the Employer's written submissions:

> *The employees are off work not because they complied with the Employer's directive, but because they decided <u>not</u> to comply with the Employer's reasonable workplace directive.*
>
> *The Employer recognizes that these are unique circumstances involving bodily integrity issues (albeit its experience has been that this has typically been a stance of bodily integrity per se with no compelling objective basis for declining vaccination, and in fact a stance against own and others' health interests). Nevertheless, the employees' decisions not to comply with the reasonable rule are not beyond their control and they are responsible for their decisions not to comply. <u>It is culpable non-compliance with a reasonable workplace rule. And the unpaid leave of absence is a just cause consequence of this culpable non-compliance with the reasonable workplace rule.</u>*
>
> *(emphasis in original)*

80. The Employer further submits that the arbitral jurisprudence arising since the advent of the COVID-19 pandemic in circumstances where employers have introduced a mandatory vaccination policy in circumstances where employees are working in congregant settings, supports those employees who elect not to be vaccinated being required to take an unpaid leave of absence. Similarly, where employers have introduced a "vaccination or test" policy, a rule that employees who elect not to comply may be required to take an unpaid leave of absence has been found to be reasonable. See: *Bunge Hamilton* (Herman), *Chartwell* (Misra), *Maple Leafs Sports and Entertainment* (Jesin), *Elixcon Energy* (Mitchell), *Algoma Steel* (Kaplan) and *Ontario Power Generation* (J.C. Murray), *supra*, full citations at paragraph 49, above.

81. The Employer emphasized that employees were provided with resources that might allow them to assess and obtain vaccinations. Further, they were provided with clear communication respecting the workplace consequences of non-compliance with sufficient time

to consider and make an informed choice as to how they wished to proceed. In the event that an employee wished to obtain a vaccination immediately prior to a particular deadline, mechanisms were built in to the Policy that would allow the employee to do so without negative financial consequences.

82. Accordingly, the Employer urged a finding that the answer to the second question, "Will an unpaid leave typically be an appropriate initial just cause consequence for an employee who decides not to comply with the vaccination requirement policy?", should similarly be answered in the affirmative.

83. With respect to the third question that the parties have put before me, the Employer submits that the arbitral jurisprudence supports its position as well. In this regard, a number of authorities were cited, including *Chartwell* in which Arbitrator Misra wrote as follows:

> *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 reasonable policy. It is only the automatic application of this policy as it respects discharge that has been found to be unreasonable****. Employees must understand that even if their Union and the Employer are unable to reach agreement pursuant to Art. 18.5, the Employer continues to have its Management Right under the collective agreement to terminate an employee for just cause. Hence, employees who remain non-compliant with the policy should not think that they are protected forever from the possibility of being dismissed, as the Employer may at some point do so if it feels it can establish that it has just cause for termination of any particular employee.* ***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 by Employer)*

84. Examples of other policies setting out termination of employment as a potential consequence of non-compliance that have been found to be reasonable were proffered by the Employer as follow:

> *And in Bunge Hamilton, Arbitrator Herman held at para. 31 that it was reasonable for the policy to identify "will not be allowed on the site and put on unpaid leave* ***pending a final determination on their employment status (up to and including termination of employment)"****. And in Elexicon Energy at para. 118, Arbitrator Mitchell found*

reasonable the policy's identification that non-compliant employees placed on a leave of absence may be subject to disciplinary action up to and including termination.

Arbitrator Murray in Ontario Power Generation at page 7:

*The Company has given employees who are sent home without pay **6 weeks** to consider whether they are willing to partake in the testing regime like so many of their colleagues. I think it is important for them to understand that, in my preliminary view, in 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**;*

Arbitrator Stout in Electrical Safety Authority (Full Reasons):

*[97] **If an employee is unable to perform any work for a substantial period of time or if they are being unreasonable in complying with any reasonable alternative, then an employer may have just cause to impose discipline, up to and including termination.** However, each case must be individually assessed to determine whether or not the employee's conduct is such that their behaviour is sufficiently egregious or undermines the obligations and faith inherent to the employment relationship, see McKinley v. BC Tel [2001] S.C.R. 161.*

Arbitrator Kaplan in Algoma Steel found reasonable a policy in which (at page 2):

*Employees who have refused altogether to comply with the policy (e.g., unvaccinated employees who refuse to undergo testing) **may initially be placed on an unpaid leave of absence for no longer than 2 weeks and, if they continue not to comply will be subject to termination of employment for just cause and/or terminated pursuant to article 7.03(4) of the Collective Agreement**. [article 7.03(4) is a loss of seniority provision after 10 days of absence without satisfactory explanation.]*

[emphasis added by Employer]]

85. With respect to the question of what would constitute non-compliance with the mandatory requirement to be vaccinated on "a sustained basis", the Employer argued that in cases in which the employee is making a decision within their control and for which they are responsible, the arbitral jurisprudence supports employers being able to "move quickly to termination for just cause, even where the employee is asserting strongly held views of

personal health, integrity and safety". In support of this proposition, I was referred to the decisions in *Simcoe Paramedic Services v. Ontario Public Service Employees Union, Local 308*, 2008 CanLII 66623 (ON LA) (Knopf); *Toronto East General Hospital and S.E.I.U., Loc. 1-On (Re)*, [2004] O.L.A.A. No. 945 (Reilly); *Greater Toronto Airports Authority v. P.S.A.C.*, 2001 CarswellNat 1034 (Knopf); and *International Association of Machinists and Aerospace Workers, Transportation District 140, Local Lodge 2413 v. ASIG Ground Handling Canada Ltd. (McCanna Grievance)*, [2017] C.L.A.D. No. 62, 2017 CarswellNat 2744, 131 C.L.A.S. 7, 278 L.A.C. (4th) 214 (Baxter).

86. The Employer argued that an employee's decision to remain unvaccinated in the circumstances of this case without a reason that is supported at law (i.e. medical or human rights exemption) or by any compelling objectively supported reason (e.g. by scientific evidence) "…undermines the obligations and faith inherent to the employment relationship", particularly where the "foundational purpose" of that employment is "not just to ensure the health and safety of the residents, but also to optimize their quality of life". The Employer noted that employees in this sector entered it knowing of this "foundational purpose" and further know that LTC and RHs are "high risk COVID-19 environments" in a real-world as opposed to abstract sense. Accordingly, the Employer submitted that the communications to employees of its expectations as well as the consequences for a failure to meet those expectations constituted reasonable notice that supports the proposition that their non-compliance was, in fact, on a "sustained basis" for the purpose of the Policy.

87. In this case, there are no positions within the bargaining unit to which the Policy does not apply and all jobs involve attendance at the workplace as an essential duty and responsibility. Further, at the times material to this case there was no certainty as to when the COVID-19 pandemic might end so as to permit unvaccinated employees to attend in the workplace. Accordingly, the Employer argued that this was not a case in which it should be obligated to maintain employees on an open-ended leave of absence.

88. Finally, the Employer argued that there were a number of negative consequences that flowed directly from employees' failing to vaccinate so as to be able to attend in the workplace. Its submission on this point is set out in its written document as follows:

> *1. In this case (even if this was not a case of culpable non-compliance and even if positions were going to open up in the near term—which has not happened for the past 4 months and cannot reasonably be anticipated in the near to mid future), there are a number of negative impacts on the Employer, other employees and residents of keeping these employees on prolonged leaves of absence:*

(a) The non-complying employees do not accumulate seniority (typically after 1 or 2 months), but maintain seniority. The non-complying employees maintain their seniority which effectively gives them ownership of their positions and schedule lines. This means that any other employees or agency/contract staff would have to choose to accept the shift, position and line on what amounts to a temporary backfill basis, with no certainty as to when the non-compliant employee may choose to return to work.

(b) This creates a number of negative impacts:

(i) It is more difficult to recruit employees or agency/contract staff to fill the position because they obviously prefer permanent positions. This is especially true where a large number of staff or potential staff have part time jobs elsewhere and do not want to alter their other work arrangements unless the job is permanent. The same hesitancy applies when an employee would be considering changing shifts to fill the position—it is more difficult to convince them to change shifts if it is only a temporary backfill position that could end at any time.

(ii) When the position is successfully filled, for the same reasons identified above, it is difficult to retain them in the position, and there is considerable turnover.

(iii) All of the above results in staffing gaps that create significant overtime and overtime costs for the employer.

(iv) And, these staffing gaps create significant agency and contractor staff costs.

(v) The staffing gaps result in overworked and burned out staff.

(vi) The staffing gaps risks diminished resident care.

(vii) The turnover results in considerable increases in recruiting costs and time.

(viii) The turnover results in considerable orientation and training time and costs.

(ix) The turnover results in overworked and burned out staff.

(x) The turnover risks diminished resident care.

(c) It is unfair and negatively impacts the backfilling employees and those who continue to work during the heavy work load of the winter outbreak season because the non-complying employee can wait until working conditions improve before deciding to return to work. Or the non-complying employee can wait until

a plum position opens up before deciding to exercise her seniority to post into that position and return to work.

(i) When the position is successfully filled, for the same reasons identified above, it is difficult to retain them in the position, and there is considerable turnover.

(ii) All of the above results in staffing gaps that create significant overtime and overtime costs for the employer.

(iii) And, these staffing gaps create significant agency and contractor staff costs.

(iv) The staffing gaps result in overworked and burned out staff.

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(vi) The turnover results in considerable increases in recruiting costs and time.

(vii) The turnover results in considerable orientation and training time and costs.

(viii) The turnover results in overworked and burned out staff.

(ix) The turnover risks diminished resident care.

(d) It is unfair and negatively impacts the backfilling employees and those who continue to work during the heavy work load of the winter outbreak season because the non-complying employee can wait until working conditions improve before deciding to return to work. Or the non-complying employee can wait until a plum position opens up before deciding to exercise her seniority to post into that position and return to work.

(e) In Chartwell, Arbitrator Misra minimized some of these impacts on the basis that only 2% of the staff had been terminated and she felt that keeping them on a leave of absence would have only created minimal staffing related problems and costs.

(i) First, this is incorrect. A small percentage staff shortage or turnover translates into considerable recruiting, orientation and training costs and exponentially expanded overtime costs and agency/contractor costs.

(ii) Second, in any event, some of the Revera homes terminated close to 10% of their staff for non-compliance, so the costs of keeping them all on leaves of absence would be much larger.

(iii) Third, focusing on the percentage of non-compliant employees misses the whole purpose of the Policy which was and is to motivate employees to be compliant and continue to be fully vaccinated (and to deter them from being non-compliant). Clearly, keeping/losing/regaining their seniority is a key motivator as is evidenced by their grievances and this arbitration. And it does not make sense to warn all of the employees of termination, but then giving a non-compliant employee the soft landing of a prolonged leave of absence just because they were one of the only ones who did not comply.

(f) In any event, it is inappropriate to be engaging in this assessment of negative consequences because this is a sustained culpable, non-compliance with a reasonable workplace rule that undermines the obligations and faith inherent in their employment in which they are entrusted to ensure the health, care and quality of life of frail and vulnerable residents. And even this was not true, for the past 4 months and for the foreseeable future (certainly not in the near- or mid-term), there are and will be no bargaining unit positions that are not covered by the reasonable workplace rule.

89. In conclusion the Employer argued that the answer to the third question, "Will termination of employment typically be an appropriate just cause consequences for an employee who decides on a sustained basis not to comply with the vaccination requirement policy?", should be answered in the affirmative in the circumstances of this case.

UNION ARGUMENT

90. The Union commenced its argument by acknowledging the seriousness of the COVID-19 pandemic and, in particular, its significant impact on the healthcare sector. It confirmed that, as a Union, it "…continues to support, encourage and recommend vaccination for its members". But the Union considers that an employee's decision to be vaccinated or not is "…fundamentally about workers' privacy, dignity, autonomy and agency to choose whether to have a preventative treatment injected into one's body or not". In the words of the Union at the hearing:

> *Some people might respond by saying [employees] do have a choice, they just need to live with the consequences. That's a 'Hobson's choice' – in other words they can choose to take what's available or nothing at all.*

91. While it was the position of the Union that the answer to all three of the posed questions should be in the negative it was emphasized that an answer to the first question in the affirmative, i.e. the mandatory vaccination policy is a reasonable workplace rule, did not

preclude a negative answer to the second or third questions respecting the consequences of a failure to comply with that rule. In the result, the Union sought declaratory relief that the Policy as written was not reasonable and a direction that the Employer amend the policy to allow for testing as an alternative for RH workers and in LTCs for periods when the Minister's Directive requiring mandatory vaccination was, or may be, not in force. As noted, at the outset of this Award I remain seized to deal with any individual grievances filed by employees negatively impacted by the Policy in accordance with the question fashioned by the parties – "Are there specific circumstances for this individual employee which warrant a deviation from the Arbitrator's Phase I findings respecting the appropriateness of the unpaid leave and/or termination of employment consequences for this employee?".

92. Starting with the question of the reasonableness of the mandatory vaccination policy as a workplace rule, the parties were in agreement that the starting point were the requisites as set out in *KVP*. As well, the Employer and the Union agreed that in assessing the "reasonableness" of a unilaterally-introduced policy – the second *KVP* requisite – arbitrators have focused on a balancing of the employer's interests with those of the union and the workers it represents. Finally, the Union also adverted to the paragraph 27 from *Irving Pulp and Paper* that, for ease of reference, reads:

> *[27] In assessing KVP reasonableness in the case of unilaterally imposed employer rules or policies affecting employee privacy, arbitrators have used a "balancing of interests" approach. As the intervener the Alberta Federation of Labour noted:*
>
> > *Determining reasonableness requires labour arbitrators to apply their labour relations expertise, consider all of the surrounding circumstances, and determine whether the employer's policy strikes a reasonable balance. Assessing the reasonableness of an employer's policy can include assessing such things as the nature of the employer's interests, any less intrusive means available to address the employer's concerns, and the policy's impact on employees.*

93. In its position that the various iterations of the Policy under review in this case do not meet the test of reasonableness, the Union articulated the following grounds for that conclusion:

> *It is unreasonable for the following reasons:*
>
> *(a) It is a breach of employees' fundamental right of privacy, bodily dignity and autonomy that is not outweighed by the employer's interests;*
> *(b) The policy's purported purpose is not supported by evidence and is based on a faulty premise.*
> *(c) It is coercive;*

(d) *The certain consequence of non-compliance with the policy is disproportionate to the hypothetical harm the policy is intended to prevent;*
(e) *It is illogical*

There is no specific triggering event that distinguishes October 12, 2021 or August 26, 2021 that suddenly warranted the requirement for vaccination.

(i) *These workers were healthcare heroes up until that point and vaccines were available to health care workers from around February 2021. What changed to merit the introduction of the Policy?*
(ii) *BOOSTER SHOT: It is unreasonable because they are allowing people with admittedly no to very little immunity continue to work with only 2 doses until March 14, 2022*
(iii) *Residents are not required to be vaccinated;*
(iv) *Unvaccinated workers can be accommodated on a protected medical ground, and yet the employer doesn't consider them to be a risk severe enough to claim undue hardship.*

(f) *It is not the least intrusive means available to address the employer's concerns;*
(g) *the impact on the employees is significant, permanent, removes their livelihood, affects their sense of worth, identity, treats them like villains, and affects their employability*

94. With respect to the interests of workers, the Union pointed to a series of cases that stand for the proposition that these are important rights of fundamental importance to individuals. I was directed to the Supreme Court of Canada's decision in *Carter v. Canada (Attorney General)*, [2015] 1 S.CR. 331; 2015 SCC 5 (CanLII) at paragraph 67:

> *67. The law has long protected patient autonomy in medical decision-making. In A.C. v. Manitoba (Director of Child and Family Services), 2009 SCC 30, [2009] 2 S.C.R. 181, a majority of this Court, per Abella J. (the dissent not disagreeing on this point), endorsed the "tenacious relevance in our legal system of the principle that competent individuals are- and should be free to make decisions about their bodily integrity" (para. 39). This right to "decide one's own fate" entitles adults to direct the course of their own medial care (para 40): it is this principle that underlies the concept of "informed consent" and is protected by s. 7's "guarantee of liberty and security of the person ….*

95. Further, I was referred to Arbitrator Charney's decision in *St. Peter's Health System v. Canadian Union of Public Employees, Local 778 (Flu Vaccination Grievance)*, [2002 O.L.A.A. No. 164; 106 L.A.C. (4th) 170 – addressed by Arbitrator Stout in *Electrical Safety Authority* at paragraph 52, above – as standing for the principle that section 7 Charter rights are "imbued" in the common law. To the same effect, the Union referenced the Ontario Court of Appeal's

decision in *Jones v. Tsige*, 108 O.R. (3d) 241; 2012 ONCA 32; 2012 ONCA 32 (CanLII) that established the tort of intrusion upon exclusion. While this is obviously not a tort case, the Union was advancing the decision for the proposition at paragraph 45 of the decision stating:

> *While the Charter does not apply to common law disputes between private individuals, the Supreme Court has acted on several occasions to develop the common law in a manner consistent with Charter values.*

Similarly, in this case it was submitted that Charter values that touch on the individual rights of the employees affected by the Employer's Policy should be inform any determination respecting the reasonableness of that Policy.

96. The Union next addressed the "precautionary principle" that informs a number of the analyses in the caselaw. While the principle has been articulated a number of ways, the Union chose one that is particularly neat, "reasonable efforts to reduce risk need not wait for scientific certainty". The difficulty with assuming that principle applies in this case, says the Union, is that the parties have nearly two years of data as of the date of the hearing and, in its view, that data does not support the implementation of these Policies by the Employer. To rely on the precautionary principle in this case is misguided as, in fact, the risk of harm to employees (e.g. termination of employment) outweighs the risk by allowing them to stay in the workplace where there is an absence of scientific evidence that doing so will protect them, their co-workers or the residents. As put by the Union in pithy terms: "The precautionary principle should inform temporary measures, not irrevocable measures such as terminations. There is nothing "cautious" about termination". In support of this proposition I was referred to a number of decisions with that of Vice-Chair Mitchell of the Ontario Labour Relations Board in *United Food and Commercial Workers Canada, Local 175 v Hazel Farmer,* 2020 CanLII 104942 (ON LRB) being
particularly helpful:

> ***The Interpretation of Section 25(2)(h)***
>
> *36. I have distilled the scope of section 25(2)(h) from the jurisprudence of the Courts and the Board to be that the Act is public welfare legislation and is to be broadly interpreted in accordance with its purposes. Section 25(2)(h), in particular, is sweeping in its scope and potentially goes beyond and in addition to any specific regulation because it is not possible to anticipate every circumstance in the wide variety of workplaces through Ontario. The purpose of the section is not to eliminate hazards but to take reasonable precautions to protect workers from them.* ***A generous approach to interpretation of the Act in line with its purposes does not, however, justify a limitless interpretation of the provision. There cannot be a complete absence of risk and danger and the Act is***

not aimed at achieving an impossible standard of a risk-free workplace*. Ultimately, what the Act requires is a balance between the risk of harm, and the ability to carry out necessary public and private functions. It is not every precaution that must be taken but every reasonable one. This involves balancing what is to be gained in light of all the factors and circumstances including potentially the cost, the effect on efficiency, the severity and magnitude of the risk and the likelihood or frequency of its occurrence. And while it is not possible for all risk to be eliminated, it does not follow that the obligation of employers is to the minimum required in a regulation as there may be specific safety measures particular to a specific workplace that are required in addition to specific regulations: R. v. Timminco Ltd./Timminco Ltée, 2001 CanLII 3494 (ON CA), 54 O.R. (3d) 21; Ontario (Ministry of Labour) v. Sheehan's Truck Centre Inc., 2011 ONCA 645 (CanLII), 107 O.R. (3d) 763; Blue Mountain Resorts Ltd. v. Ontario (Ministry of Labour), 2013 ONCA 75 (CanLII), 114 O.R. (3d) 321; Ontario (Labour) v. Quinton Steel (Wellington) Limited, 2017 ONCA 1006 (CanLII); Ontario Public Service Employees' Union v. Ontario (Ministry of Transportation), 2006 CanLII 10956 (ON LRB); Glencore Canada Corporation, 2015 CanLII 85298 (ON LRB); Sgt. Mark Radke v. Ontario Provincial Police, 2017 CanLII 56938 (ON LRB).*

37. In the specific context of the COVID-19 pandemic, section 25(2)(h) gives effect to the precautionary principle that there is an obligation to take all reasonable measures in the circumstances to protect the health and safety of workers. In the context of an epidemic caused by a new and previously unknown virus, the precautionary principle was given voice to by Mr. Justice Campbell following the SARS crisis in Ontario and was as described by Justice Morgan in Ontario Nurses Association v. Eatonville/Henley Place, 2020 ONSC 2467 (CanLII) as follows:

> *An important recommendation of the Commission of Inquiry chaired by Justice Archie Campbell in the wake of the SARS outbreak of 2003 – an outbreak of a virus related to COVID-19 - is that the precautionary principle is to be put into action in order to prevent unnecessary illness and death. As explained by Justice Campbell, this principle applies where health and safety are threatened even if it cannot be established with scientific certainty that there is a cause and effect relationship between the activity and the harm. Theentire point is to take precautions against the as yet unknown.*
>
> *(emphasis of the Union)*

97. In its examination of the Employer's interests in this case, the Union turned next to obligations to residents. Here the Union submitted that Employer focus was misdirected. Instead of asking "What is the best way to get staff vaccinated?", it should be asking "What is the best way to protect our residents?". The answer to that latter question, said the Union, was to appreciate the evidence of waning vaccine efficacy and, instead, focus on carrying out a robust testing program and improve vaccination take-up by residents. Further, it was submitted that the data is clear that improved staffing levels leads to reduction in transmission

of COVID-19 such that, somewhat perversely, the very step taken by the Employer by removing staff from these facilities, whether temporarily or permanently, is to increase the risk of outbreak.

98. The Union referenced the revision to CMOH Directive #3 issued on February 7, 2022 shortly prior to the hearing date in which it was announced that certain temporary measures in LTCs including restrictions on co-mingling of residents and visitors were to be eased, in part, due to the negative effect of isolation on resident mental health. In the Union's view this demonstrated that there must always be some balancing of competing risks and the imposition of absolute rules is both counter-intuitive and counter-productive.

99. This brings me to one of the linchpins of the Union's argument that the Employer Policy was not reasonable. It was the Union's position that the Employer's core premise is that the unvaccinated create a significant risk for transmission of the COVID-19 virus. The difficulty is that the Policy does not quantify that risk, nor does the Union consider that the Employer has led evidence of a significant risk. As a starting point for this proposition, the Union references the decision of Arbitrator Hayes in *Sault Area Hospital and Ontario Nurses' Association*, 2015 CanLII 55643 (ON LA), a case that dealt with the employer's "Vaccinate or Mask" policy created to deal with outbreaks of annual influenza. The parties in that case called much evidence, including that of experts, over the course of some seventeen (17) days of hearing. One of those experts called by the Association was Dr. Gaston De Serres, a medical epidemiologist working primarily on vaccine preventable diseases. Dr. De Serres' evidence was largely accepted by Arbitrator Hayes and I was referred to the following excerpts from the award:

> *125. Moving on to the specifics of a VOM [Vaccinate or Mask] policy for HCWs [health care workers], Dr. De Serres stated that:*
>
> > *The goal of that policy is ostensibly the reduction of disease burden among patients attributable to unvaccinated HCWs. Embedded within the premise of such a policy is that influenza vaccination will substantially reduce patient disease burden and there are no other practicable program or policy options for achieving the same or greater level of necessary patient protection.*
>
> *126. He went on to identify as a threshold question the question of whether it is known that unvaccinated HCWs are infecting patients. In his words:*
>
> > *Before assessing by how far patient disease burden can be reduced by the "vaccinate or mask" policy, we first need to know how many patients are being infected by unvaccinated (and/or unmasked) HCWs in the absence of the policy. We need to know how many patients are typically or on average*

infected by HCWs, and in particular those who are unvaccinated, during the seasonal influenza period which typically spans November to April in the northern hemisphere.

127. In addition to the potential influenza disease burden of unvaccinated HCWs, Dr. De Serres also identified some other significant factors at play in any VOM analysis:

> *The risk of influenza from unvaccinated HCWs to patients is the end result of a complex interaction of variables and conditions including: the frequency of influenza infections in HCWs; the proportion of infected HCWs with sufficient virus shedding to transmit; the amount of effective droplets produced by symptomatic or asymptomatic HCWs; the frequency, duration and closeness of contact between HCW and patients; and the level of pre-existing protective immunity in patients to protect themselves. Each of these factors will further vary for seasonal versus pandemic influenza, by seasonal subtype and by age, comorbidity etc. The risk to patients would be further reduced if HCW adopt other behaviours which also reduce the probability of transmission (e.g. staying home when sick, wearing a mask when in contact with patients, minimizing the time in close contact with patients).*

128. As will later be seen, at least two of these factors were the subject of serious disagreement by the experts who testified in this proceeding. They do not agree about the disease burden carried by unvaccinated HCWs. They do not agree about asymptomatic transmission.

HCW Disease Burden

129. The experts all agree that the question of the disease burden carried by unvaccinated HCWs is important because, at root, any VOM policy is ultimately grounded on the assumption that the disease burden from this source is significant. However, there is major disagreement about the medical/scientific evidence. The ONA experts do not accept that the evidence supports the proposition that increasing HCW influenza immunization rates serves to protect patients from morbidity and mortality. The OHA/SAH experts maintain that the evidence is strong.

130. Dr. De Serres went on in his Report to explain more fully why he holds the view that accurate quantification of the disease burden of unvaccinated HCWs is important:

> *I am not disputing that HCW have a professional duty to protect their patients, that healthcare acquired influenza exists, that the influenza vaccine protects or that unvaccinated HCW may occasionally transmit influenza to their patients. However, to justify a mandatory intervention abrogating HCW rights, the ethical dilemma and burden of proof rests on the proportionality, intrusiveness and effectiveness of the intervention in relation to the magnitude*

> *of the disease burden caused by unvaccinated HCW. My work as an epidemiologist is to quantify risks and my work as a policy analyst is to weight those risks against other considerations.*
>
> *After weighing the scientific evidence, I conclude that accurate quantification of the influenza disease burden in patients attributed to unvaccinated healthcare workers is missing. This information is fundamentally required in assessing the proportionality of the effectiveness of the intervention and the number or workers whose rights may be infringed each year by the 'vaccinate or mask' policy….*
>
> *Some may argue that in the absence of knowing the actual number of patients infected by unvaccinated HCWs, even a single patient potentially infected warrants any and every measure possible. However, such an extreme perspective is tantamount to a pursuit of 'zero risk'. Such 'zero risk' pursuits are elusive and slippery slopes that generally end in more and more draconian measures geared toward achieving the nearly impossible at a high cost in terms of target group trust and morale and professional credibility*

100. In this case the Union submits that the same type of statistical problem exists that negates the "reasonableness" of the Employer's Policy. As stated by the Union at the hearing:

> *You will see a lot of statistical analysis in the Employer's materials in measuring how effective the vaccine is at preventing transmission. That's a measurement of the effectiveness of an intervention (the vaccine) at preventing a bad outcome (transmission). These measurements and statistical analyses are helpful in informing government decisions on public policy and private employer's decisions on workplace policies. It's only logical then that a statistical analysis be conducted of the efficacy of excluding unvaccinated workers from the workplace in order to prevent transmission. In other words, measuring the efficacy of an intervention (exclusion) at preventing a bad outcome (transmission).*

101. The Union provided me with an academic paper dated December 8, 2021 and titled "Evaluating the number of unvaccinated people needed to exclude to prevent SARS-CoV-2 transmissions" (hereafter "the NNE Paper" – NNE meaning "number needed to exclude"). The paper was authored by;

- Dr. Aaron Prosser, MD, MSc (corresponding author)
  Resident, Department of Psychiatry and Behavioural Neuroscience
  McMaster University;

- Dr. Bartosz Helfer, PhD, MSc
  Assistant Professor, Director, Meta-Research Centre, University of Wroclaw, Poland
  National Heart and Lung Institute, Imperial College London, UK; and
- Dr. David L. Steiner, PhD, CPsych
  Professor Emeritus, Department of Psychiatry and Behavioural Neurosciences,
  McMaster University

102. The NNE Paper includes an Abstract at the outset that summarizes the background for the study, methods used, findings together with a conclusion. Given the importance of the NNE Paper to the Union position I set the Abstract out in its entirety:

Abstract

***Background**: Vaccine mandates and vaccine passports (VMVP) for SARS-CoV-2 are thought to be a path out of the pandemic by increasing vaccination through coercion and excluding unvaccinated people from different settings because they are viewed as being at significant risk of transmitting SARS-CoV-2. While variants and waning efficacy are relevant, SARS-CoV-2 vaccines reduce the risk of infection, transmission, and severe illness/hospitalization in adults. Thus, higher vaccination levels are beneficial by reducing healthcare system pressures and societal fear. However, the benefits of excluding unvaccinated people are unknown.*

***Methods**: A method to evaluate the benefits of excluding unvaccinated people to reduce transmissions is described, called the **number need to exclude** (NNE). The NNE is analogous to the **number needed to treat** (NNT=1/ARR), except the absolute risk reduction (ARR) is the baseline transmission risk in the population for a setting (e.g. healthcare). The rationale for the NNE is that exclusion removes **all** unvaccinated people from a setting, such that the ARR is the baseline transmission risk for that type of setting, which depends on the secondary attack rate (SAR) typically observed in that type of setting and the baseline infection risk in the population. The NNE is the number of unvaccinated people who need to be excluded from a setting to prevent one transmission event from unvaccinated people in that type of setting. The NNE accounts for the transmissibility of the currently dominant Delt (B.1.617.2) variant to estimate the minimum NNE in six types of settings: households, social gatherings, casual close contacts, work/study places, healthcare, and travel/transportation. The NNE can account for future potentially dominant variants (e.g., Omicron, B.1.1.529). Th assist societies and policymakers in their decision-making about VMVP, the NNEs were calculated using the current (mid-to-end November 2021) baseline infection risk in many countries.*

***Findings**: The NNEs suggest that at least 1,000 unvaccinated people likely need to be excluded to prevent one SARS-CoV-2 transmission event in most types of settings for many jurisdictions, notably Australia, California, Canada, China, France, Israel, and others. The NNEs of almost every jurisdiction examined are well within the ranged of the NNTs of acetylsalicylic acid (ASA) in primary prevention of cardiovascular disease (CVD) (≥ 250 to 333). This is important since ASA is not recommended for primary prevention of CVD because the harms outweigh the*

benefits. Similarly, the harms of exclusion may outweigh the benefits. These findings depend on the accuracy of the model assumptions and the baseline infection risk estimates.

***Conclusions**: Vaccines are beneficial, but the high NNEs suggest that excluding unvaccinated people has negligible benefits for reducing transmissions in many jurisdictions across the globe. This is because unvaccinated people are likely **not** at significant risk – in absolute terms- of transmitting SARS-CoV-2 to other is most types of settings since current baseline transmission risks are negligible. Consideration of the harms of exclusion is urgently needed, including staffing shortages form losing unvaccinated healthcare workers, unemployment/unemployability, financial hardship for unvaccinated people, and the creation of a class of citizens who are not allowed to fully participate in many areas of society.*

(emphasis in original)

103. The authors of the NNE Paper use the example of aspirin to explain the principle. You would have to require 250 to 333 people in the general population taking aspirin on a daily ongoing basis in order to prevent one heart attack. In order to complete a proper risk-benefit analysis requires weighing the risk posed by taking aspirin on a daily ongoing basis by that entire group against the benefit to the one individual who has had a heart attack prevented. The Union applied the statistical findings from the NNE Paper to the prevalence rate for COVID-19 in the jurisdictions in which the Employer's facilities are located and concluded that you would have to exclude huge numbers of unvaccinated individuals in order to prevent even one infection in an LTC or RH. On this analysis the net effect of excluding unvaccinated staff either through unpaid leaves of absence of termination resulted in virtually no reduction of risk in their workplaces.

104. The Union argued that the Policy was also reasonable as it was coercive in the sense articulated by Arbitrator Mitchell in *Power Workers' Union and Elexicon Energy Inc.*, 2022 CanLII 7228 (ON LA) (hereafter "*Elexicon*") in which he writes:

> *91. ….. Arbitrator Stout pointed out in ESA that the Supreme Court of Canada has recognized the critical importance of employment as fundamental to one's identity and livelihood:*
>
> > *The Supreme Court of Canada has on a number of occasions recognized that work is fundamental to one's identity, providing a means of financial support and a contributory role in society, see Machtinger v. HOJ Industries Ltd . [1992] 1 SCR 986. The Supreme Court of Canada went on to indicate that not only is work fundamental to an individual's identity, but the manner in which employment can be terminated is equally important.*
>
> *92. Whatever may constitute irreparable harm in an application for injunctive or interim*

relief, in the context of an assessment of the reasonableness of a mandatory vaccination policy, it would be inaccurate and disrespectful to the legitimate interests of employees in maintaining their income and their employment in my view, to ignore the genuinely coercive nature of a policy which threatens the loss of income and possible termination of employment if it is not complied with. Employees everywhere rely on their employment whatever their skill levels, but it must also be recognized that in an industry like electrical power transmission there are skilled trades and other occupations and professions where the employees may not easily find another employer in the same geographic area to work for. Even if they could do so, they would have to give up their seniority and other benefits of long service which they earned in the course of their employment. The coercive impact of the threat of loss of income, benefits, and employment and the impact on stability and careers is very real. In my view, of course employees have a choice, but just saying that the choices are hard is insufficient when it comes to determining the reasonableness of the policy. In my view, arbitrators should take into account in the balancing exercise the deep dilemma of employees who strongly do not wish to be vaccinated whatever their motives, and who may have few or no other realistic choices to work elsewhere or who will have to give up a significant amount of earned benefits and stability if they choose not to get vaccinated. Just because there are hard choices, as opposed to no choice at all, does not make the policy not coercive, or render it more reasonable. Of course, the policy may be reasonable notwithstanding the potential consequences to the individual employees, but in my view, there is little legitimacy in a decision that finds the policy to be reasonable while denying the lived reality of employees faced with the coercive impact of these policies.

105. Noting that arbitrators often refer to the importance of "context" in making their decisions respecting COVID-19 policies, the Union sought to examine the context in which the introduction of the Employer's Policy took place. It undertook an analysis of the Employer's document titled "Impacts of COVID19 on the Employer's Homes and on the Ontario Long-Term Care and Retirement Sector" identified in paragraph 74, above. The Union commenced by noting that the data appeared to be drawn from the Employer's facilities across Canada and, as such, arose in multiple jurisdictions having a variety of regulatory frameworks, practices and different vaccination and community rates of transmission. With respect to the Employer's LTC facilities in Ontario for which the Union has bargaining rights, the Union noted that one facility had experienced no outbreaks. Another had only recently had its first outbreak and that LTC had the lowest vaccination rate. Notwithstanding that fact, 11 staff were placed on leaves of absence and subsequently terminated pursuant to the Policy. Further, there have been no resident deaths in any of the facilities represented by the Union. Finally, three of the eleven outbreaks in these facilities involved more than one resident case and in case they occurred after the terminations of unvaccinated staff had taken place. In the words of the Union, having only vaccinated staff in the facilities was not the "silver bullet solution" promised by the Employer.

106. With respect to RHs, the Union noted that there had been 23 outbreaks since the advent of the pandemic with nine (9) deaths occurring over four (4) of the outbreaks. In nine (9) of the outbreaks only residents or staff contracted COVID-19 which the Union suggested demonstrated no cross-over infection between the two groups had taken place. In five (5) of the 23 outbreaks, more than one resident was involved but in three (3) of those situations the outbreak did not take place until after unvaccinated staff had been terminated. Finally, the Union notes that there is no information provided for two (2) of the RHs and I was asked to infer that no outbreaks had occurred at those facilities.

107. The Union argued that this "context" demonstrated that the Employer Policy was not reasonable as there was no connection could be drawn between the application of the Policy and any improvement of outcomes at the workplaces in question. And, while "context" is always important, the Union emphasized that it is only the beginning of a proper analysis. It drew my attention to paragraph 31 of *Irving Pulp & Paper* where Abella, J. for the Court wrote:

> *31 But the dangerousness of a workplace—whether described as dangerous, inherently dangerous, or highly safety sensitive—is, while clearly and highly relevant, only the beginning of the inquiry. It has never been found to be an automatic justification for the unilateral imposition of unfettered random testing with disciplinary consequences. What has been additionally required is evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace.*

108. Finally, the Union argued that the Policy was not reasonable both because there had been an inconsistent application of the principles and practice by the Employer over the course of the pandemic and because there were less intrusive options that constituted reasonable alternatives to a policy requiring vaccination as a mandatory condition of attending in the workplace.

109. With respect to the consistency of enforcement, the Union commenced by noting that prior the COVID-19 pandemic, the Employer had a vaccination policy that did not include a disciplinary response for those employees who elected not to be immunized for conditions not mandated by statute. In particular, the annual influenza vaccination was "strongly recommended" by the Employer but not mandated. In terms of the actual Policy in this case, the Union noted that the Employer did not implement its provisions in any kind of lock-step with the statutory regime. Its August 26 Policy making vaccinations mandatory in all facilities predated the Minister's Directive of October 1, 2021 that made vaccination mandatory in LTCs only. With respect to its December 31 Policy that introduced a requirement for a third dose by January 31, 2022, the Union noted that once the Minister's Directive was revised to extend that date to March 14, 2022, the Employer changed its Policy as well to match that date. If the

Employer was prepared to wait until the later date for booster shots in 2022, why was it prepared to introduce its August 26 Policy five (5) prior to being required to do so in the fall of 2021?

110. Finally, the Union argued that reasonable alternatives to the mandatory vaccination policy were available to the Employer. I was provided with a range documents supporting the efficacy of Rapid Antigen Tests and more user-friendly PCR tests, together with studies that demonstrated that vaccines were less effective in preventing the transmission of the Delta and Omicron variants of the virus. Additionally, the Union argued that the data reviewed in paragraphs 105 and 106, above, stood for proposition that there were no demonstrable benefits of vaccination based on the real-world experience of this Employer. Lastly, the Union noted that the Employer has actually expanded its testing program subsequent to the termination of its unvaccinated employees pursuant to its Policy. That only serves to underline the efficacy of testing as the critical component of a layered approach to managing during the pandemic. And, there has recently been an announcement that an anti-viral medication, Paxlovid, was authorized on January 17, 2022 for patients with mild to moderate COVID-19 who are at high risk of developing serious disease. All of this leads to the conclusion, argued the Union, that there are options that can be, and should have been, explored by the Employer as it both introduced and applied the various iterations of the Policy.

111. In the result, the Union asks that the answer to the question "Is the mandatory vaccination policy a reasonable workplace rule?" be answered in the negative and that the remedies proposed be awarded. With respect to those LTC employees (including employees at combined LTC/RH facilities) who cannot attend work due to the Minister's Directive requiring vaccination for employee attending the workplace remain on unpaid leaves of absence until such time as the Directive permits their return to work.

112. The Union next addressed the second and third questions before me as to whether the unpaid leave of absence and the termination for non-compliance with the Policy constitute appropriate just cause responses. In answering those questions in the negative, the Union started its analysis once more with *Irving Pulp & Paper* in which the Court stated:

> *4 A substantial body of arbitral jurisprudence has developed around the unilateral exercise of management rights in a safety context, resulting in a carefully calibrated "balancing of interests" proportionality approach. Under it, and built around the hallmark collective bargaining tenet that an employee can only be disciplined for reasonable cause, an employer can impose a rule with disciplinary consequences only if the need for the rule outweighs the harmful impact on employees' privacy rights. The dangerousness of a workplace is clearly relevant, but this does not shut down*

the inquiry, it begins the proportionality exercise.

113. In considering proportionality, the Union argued that the impact on unvaccinated employees of the application of the Employer's Policy could not be understated. Loss of employment, whether temporary or permanent, has a huge economic impact on the affected workers both in the present moment and in respect of their future employability. Further, as restated by Arbitrator Stout in *Electrical Safety Authority*, work is fundamental to the identity and well-being of the individual. It was submitted that those employees impacted by the Employer Policy had made countless sacrifices as they worked throughout the pandemic and now were, effectively, being tossed to the curb. The harm occasioned for affected employees is significant and measurable as they do not even qualify for Employment Insurance benefits. They are left with compensation or benefits of any kind.

114. Simply put, the Union argued that the Employer must fail in its argument that a failure to comply with the mandatory vaccination requirement, should it be found to be reasonable, cannot constitute just cause for the consequences contemplated by the Policy. It was submitted that fairness must underlie any determination that just cause exists in any given case and that can only be determined on the consideration of the particular circumstances of individual grievances where discipline or discharge have been imposed. In support of this general principle, the Union referenced the decisions in *Port Arthur Shipbuilding Co. v. Arthurs*, [1967] O.J. No. 972, 67 CLLC para 14,024 (Ont. C.A.),; *Ontario Store Fixtures and C.J.A., Local 1072*, [1993] O.L.A.A. No. 737, 31 C.L.A.S. 517 (MacDowell); and *Bluewater District School Board and Association of Bluewater Administrators*, 2015 CanLII 39611 (ON LA) (Knopf).

115. In the decision of *Wm. Scott & Co. (Re)*, [1976] B.C.L.R.B.D. No. 98, [1977] 1 Can. LRBR 1, 1976 CarswellBC 518 (Weiler), the Board addressed the exercise that must be undertaken by an arbitrator in considering whether just cause exists for an employer decision to terminate:

> *13 Instead, arbitrators should pose three distinct questions in the typical discharge grievance. First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?*
>
> *14 Normally, the first question involves a factual dispute, requiring a judgment from the evidence about whether the employee actually engaged in the conduct which triggered the discharge. But even at this stage of the inquiry there are often serious issues raised about the scope of the employer's authority over an employee, and the kinds of employee conduct which may legitimately be considered grounds for discipline. (See for*

example Douglas Aircraft (1973) 2 L.A.C.(2d) 56.) However, usually it is in connection with the second question -- is the misconduct of the employee serious enough to justify the heavy penalty of discharge? -- that the arbitrator's evaluation of management's decision must be especially searching:

> *(i) How serious is the immediate offence of the employee which precipitated the discharge (for example,the contrast between theft and absenteeism)?*
>
> *(ii) Was the employee's conduct premeditated, or repetitive; or instead, was it a momentary and emotional aberration, perhaps provoked by someone else (for example, in a fight between two employees)?*
>
> *(iii) Does the employee have a record of long service with the employer in which he proved an able worker and enjoyed a relatively free disciplinary history?*
>
> *(iv) Has the employer attempted earlier and more moderate forms of corrective discipline of this employee which did not prove successful in solving the problem (for example, of persistent lateness or absenteeism)?*
>
> *(v) Is the discharge of this individual employee in accord with the consistent policies of the employer or does it appear to single out this person for arbitrary and harsh treatment (an issue which seems to arise particularly in cases of discipline for wildcat strikes)?*

The point of that overall inquiry is that arbitrators no longer assume that certain conduct taken in the abstract, even quite serious employee offences, are automatically legal cause for discharge. (That attitude may be seen in such recent cases as Phillips Cables (1974) 6 L.A.C. (2d) 35 (falsification of payment records); Toronto East General Hospital (1975) 9 L.A.C. (2d) 311 (theft); Galco Food Products (1974) 7 L.A.C. (2d) 350 (assault on a supervisor).) Instead, it is the statutory responsibility of the arbitrator, having found just cause for some employer action, to probe beneath the surface of the immediate events and reach a broad judgment about whether this employee, especially one with a significant investment of service with that employer, should actually lose his job for the offence in question. Within that framework, the point of the third question is quite different than it might otherwise appear. Suppose that an arbitrator finds that discharge and the penalty imposed by the employer is excessive and must be quashed. It would be both unfair to the employer and harmful to the morale of other employees in the operation to allow the grievor off scot-free simply because the employer overreacted in the first instance. It is for that reason that arbitrators may exercise the remedial authority to substitute a new penalty, properly tailored to the circumstances of the case, perhaps even utilizing some measures which would not be open to the employer at the first instance under the agreement (e.g. see Phillips Cables, cited above, in which the arbitration board decided to remove the accumulated seniority of the employee).

116. Further, the Union directed my attention to *Re Ontario Store Fixtures and C.J.A., Local 1072*, (supra) where at paragraph 47, the learned arbitrator stated the following respecting the penalty of discharge:

> *47 There is no doubt that violence and insubordination by employees are unacceptable in an industrial undertaking and that employers have the power, in proper circumstances, to discharge employees on the basis of such conduct. However, it is not every case of violence or insubordination that will justify the discharge of an employee, a sanction that has been called "industrial capital punishment". There are many factors which may mitigate the severity of the offence and these must be considered in each individual case. It is clear that an employee, who repeatedly cannot or will not submit to the instructions of his employer, need not be kept. Nor is a worker of a dangerous and violent temperament entitled to remain as part of the work force in a plant. An employer has the right - indeed the duty – to keep peace within its operations. Anyone who threatens the safety of other employees may be removed permanently. It is, however, in my view incumbent upon the company to demonstrate that the insubordinate or violent conduct of the employee was such as to make it improbable that he would be able to function effectively in the plant again. Discharge is a harsh penalty, and should be utilized only sparingly. It should be used only where it is clear that no other method of discipline will be of any avail.*

117. In the result, the Union submitted that there is no basis on which a finding that termination could typically be found to be a just cause response to an employee who decides on "a sustained basis" not to comply with the Policy. There is an obligation on the Employer to demonstrate why termination is required as a result of the employee's choice – a choice the Union reiterates that is really no choice at all for individuals forced to decide between the continuation of their employment and their firmly-held personal beliefs respecting vaccination.

EMPLOYER REPLY SUBMISSION

118. In its reply, the Employer focused on the NNE Paper presented by the Union in support of its position that there had been no analysis undertaken respecting the degree of risk represented by allowing unvaccinated workers to continue in the workplace. It started by noting that NNE Paper did not have the academic credibility necessary to make it a reliable resource in this proceeding. In that respect, the Employer referenced the following statement on the paper itself:

> *NOTE: This preprint reports new research that has not been certified by peer review and should not be used to guide clinical practice.*

119. The Employer took issue with the methodology used, and the conclusions reached, by the authors of NNE Paper. First, the Employer challenged the appropriateness of using NNE as the metric to assess effectiveness of vaccination in this case. In support of this position the Employer submitted an extract from a paper addressing this issue:

> *The paper "Number needed to treat and number needed to harm are not the best way to report and assess the results of randomised clinical trials" published in the British Journal of Haemeotology finds the NNT misleading and the most appropriate metric in these circumstances is the Absolute Risk Reduction (ARR).*
>
> > *The name 'number needed to treat' is unfortunate, as it encourages people to think it is a precise number, without probabilistic content, which does not have to be referred to a baseline risk. In contrast, 'absolute risk reduction' explicitly mentions both the probabilistic element and the comparative element which are inherent in the estimator. Given the regularity with which clinicians state that they find statistical concepts difficult, it is as well to have names that keep the basis for judgment explicit. The NNT has poor qualities, and at best conveys only the same information as the ARR. The ARR is an absolute measure in a form which is in common use, and has good statistical properties. Therefore, it appears to us strongly preferable to base both statistical inference and scientific conclusions on the latter. If RCTs and meta-analyses are held up as the gold standard method for obtaining evidence, an unreliable statistic should not be used in interpreting this evidence.*
> > *Source: https://onlinelibrary.wiley.com/doi/10.1111/j.1365-2141.2009.07707.x*

120. Consistent with the foregoing, the Employer submitted that ARR (Absolute Risk Reduction) was the appropriate metric to use and that all unvaccinated individuals should be excluded from the workplace in order to achieve ARR. Further, even if NNE was considered to be an appropriate tool to assess the reasonableness of the Policy in this case, the Employer argued that the analysis in the NNE Paper was flawed in these circumstances. It only measured the risk of the first direct infection taking place which, it submitted, was "misleading" in the context of an LTC or RH where the seniors with greater vulnerability were living in a congregant setting. The Employer further took the position that the risks of COVID-19 getting into one of its facilities had the potential for harms other than medical as significant impacts on the quality of life do result.

121. The Employer noted that the authors of the NNE Paper did not define what they considered to be a "healthcare" setting and it was submitted that, in fact, LTCs and RHs are more analogous to "households" given the activities of daily living that are supported, a setting in which the NNE would be higher. Further, it was argued that the NNE Paper analyzes how

many unvaccinated individuals would have to be excluded from a setting in one day to prevent transmission. Given the ongoing nature of the pandemic it was argued that there is a cascading effect that increases the risk of infection exponentially over time. Accordingly, it is not appropriate to say that there is a static level of risk day after day. Like compound interest, the level of risk on the second day is increased by the percentage of risk that existed on the first day. As stated by the Employer, "With each day, the probability of "no infection" decreases and the probability of "infection" increases.

122. The Employer further notes that the data considered by the authors of the NNE Paper is derived from the baseline infection of the Delta variant of the virus and does not account for the greater transmissibility of the Omicron variant that became prevalent in the fall of 2021. Finally, the Employer submitted that the lists of harms created by exclusion of the unvaccinated does not take into consideration harms for the Employer and residents that must be considered in any balancing of interests or proportionality analysis. As stated by the Employer in its written submission:

> ***G. The NNE Paper "Harms of Exclusion" is misleading***
>
> *We submit the harms weighed in the NNE paper are misleading for the following reasons:*
>
> *I* *I. The NNE paper relies on social/life harms, whereas the Aspirin study relies on medical harms. As such, the NNE study is mixing and matching two very different types of harm. The qualitative harms considered in the NNE paper are not contemplated in any other NNT analysis and we caution the Chair with reliance on this breakthrough, non-peer reviewed, approach.*
>
> *II* *II. The medical harms of vaccination are negligible. The risk of adverse outcome from a COVID-19 Vaccine is 0.06% and the risk of a serious adverse outcome is 0.003%.*
>
> *III* *III. The NNE paper fails to weigh the medical harm and risk to individuals who are unvaccinated. These harms include serious illness and death as a result of a COVID infection, to themselves and other individuals.*
>
> *IV* *IV. The NNE paper fails to consider the life harms to residents as a result of a COVID infection in a long term care or retirement home, such as being essentially locked in their room for the duration of an outbreak.*
>
> *V* *V. The NNE fails to consider the enhanced workload on other employees as a result of a COVID infection in a in a long term care or retirement home*
>
> *VI* *VI. The NNE fails to consider the significant medical harms to others, especially when considering the current environment where risks to resident are severe illness and death on COVID infection.*

We believe all the factors above should be weighed in any proportionality analysis regarding the NNE exclude.

UNION SUR-REPLY SUBMISSION

123. In this case, the parties had exchanged their materials prior to the second hearing date on which submissions were made. The Employer elected not to address the NNE Paper on which the Union relied in its initial submission but, rather, provided its detailed response in reply (as was its right). Given the detailed nature of the Employer's submission on the NNE Paper which included some third-party materials that had not previously been exchanged, I gave the Union the opportunity to make a brief sur-reply on the Employer's argument respecting the NNE Paper.

124. In sur-reply, the Union started by noting that the point of the NNE Paper was to address the probability of infection in the workplace by an unvaccinated person and was not to suggest that there was a guarantee that infection could not occur. A low probability that infection might occur is one of the factors that should be considered in conducting any proportionality analysis in this case. With respect to the Employer's suggestion that the NNE Paper did not take into the consideration the transmission risk of secondary infections, the Union disagreed and argued that this risk was considered by the authors in its analysis of the Delta variant. Further, the Union argued that, in fact, the more transmissible a variant of the virus might be, the less efficacious the vaccine will be in preventing any transmission.

125. Finally, the Union submitted that an LTC or RH is not more analogous to a household setting. An LTC or RH through the period of the pandemic has greater protections as a result of staff training, screening protocols, access to personal protective equipment and testing kits as well as practices and protocols for hygiene, distancing etc. that are more likely to be observed. In this sense, the Union argued that the facilities in question should be considered as healthcare settings for the purpose of considering the applicability of the NNE Paper.

DECISION

126. I would start by stating that it must be recognized that this Award represents an assessment of the various iterations of the Employer's Policy at specific moments in time. Over the past two years, we have experienced rapid evolutions both in the virus itself through Alpha, Beta, Gamma, Delta and Omicron variants (there is currently a new version of Omicron in ascendance) and in our responses to that virus. We are advised that the development and approval of vaccines has occurred with lightning speed in relative terms (which may in part

explain the vaccine hesitancy of some). Protocols and best practices have evolved over this period with the research and experience that the passage of time has permitted. Two short years later, it is hard to remember the first days of the pandemic when many individuals were washing their groceries back at home, businesses were shuttered and people chose to walk on the road to create distance from those approaching them on the sidewalk. And, as of the date of this Award, Ontario has removed its mask mandate and allowed full openings of restaurants, gyms etc. and Canada has discontinued the requirement of testing for all those who sought to enter the country (whether Canadians returning from vacation or otherwise). The point is that it is important to read this Award with a view to the conditions as they existed at the time the Policies were put in place and the information available to the parties and not through the lens of conditions as they may currently exist.

127. Next, I would note that the hearing process utilized by the parties was a model of efficiency and they are to be commended. The parties agreed on the questions to be posed in Phase I of the proceeding, submitted an ASF with the various source documents attached, exchanged the additional documents on which they intended to rely prior to the day on which this matter was argued and managed to conclude their submissions on a complex matter in a single day of argument. At the same time, it must be observed that all the evidence before me is set out in the documents on which the parties relied were not introduced through witnesses, expert or otherwise, and it has been acknowledged and agreed that any findings of fact I may make must self-evidently be the product of my reading and interpretation of those materials.

128. For ease of reference, the first question put to me was "Is the mandatory vaccination policy a reasonable workplace rule?". As the second and third questions deal with the consequences for employees who do not comply with the rule, I understand the question to be whether it was reasonable for the Employer to introduce a requirement that all employees must be vaccinated in order to attend in the workplace. That requirement, to be effective on October 12, 2021, was communicated to employees and the Union on or about August 26, 2021. While mandatory vaccination became a requirement in LTCs (and arguably in RHs) as of November 15, 2021 by virtue of the Minister's Directive dated October 1, 2021, the question remains as to whether it was reasonable for the Employer to impose that requirement on the earlier date by way of the August 26 Policy.

129. I have concluded that the mandatory requirement that employees be vaccinated was a reasonable workplace rule. In making that determination, I have considered the following:

- There was no evidence before me that suggested that vaccination was not an effective, if not vital, part of the strategy to prevent infection by the COVID-19 virus or reduce the severity of illness if a vaccinated individual did contract the illness.
- The evidence before me was that vaccines were extremely safe with little risk to those who took them. While there was some evidence about medical conditions associated with the AstraZeneca vaccine that was initially available in Canada, by August 26, 2021, mRNA vaccines were widely available in Ontario with no evidence of any significant medical issues associated with them.
- The residents at the LTCs and RHs are particularly at risk of serious illness or death as a consequence of contracting COVID-19
- The residents and staff at the LTCs and RHs are living and working in a congregant setting where the risk of transmission is greater
- The nature of the duties and responsibilities carried out by staff requires them to be physically in the workplace and, in most cases, to work directly with residents, often assisting with ADL
- The Delta variant of the virus had been identified in Canada on July 23, 2021 and was associated with more severe illness, especially in vulnerable populations such as those served in these facilities
- While vaccination was not yet mandatory pursuant to a Minister's Directive, guidance from all advisory bodies in Ontario was urging workers in LTC and RH to be vaccinated

130. The Union has made a number of arguments that the requirement of mandatory vaccination was not reasonable. It was submitted that the balance between individual employee interests rooted in privacy, security of the person, bodily dignity and autonomy must outweigh those relied upon by the Employer in this case. As stated by many arbitrators who have been called on to assess that balance in respect of mandatory COVID-19 vaccinations, this is a contextual analysis. And I would note that, with one exception, all arbitrators have determined that the balance favours the Employer's position in this case. That one exception is Arbitrator Stout in the *Electrical Safety Authority* case, however, in that decision the context was significantly different given the nature of the work and the manner in which it could be performed. As stated by the arbitrator:

> *[71] In workplace settings where the risks are high and there are vulnerable populations (people who are sick or the elderly or children who cannot be vaccinated), then mandatory vaccination policies may not only be reasonable but may also be necessary and required to protect those vulnerable populations.*
>
> *[72] However, in other workplace settings where employees can work remotely and there is not specific problem or significant risk related to an outbreak, infections, or*

significant interference with the employer's operations, then a reasonable less intrusive alternative, such as the VVD/T Policy employed prior to October 5, 2021, may be adequate to address the risks.

131. Of course, there is the decision in *Chartwell* that deals with a similar, if not identical policy, introduced into an LTC setting on August 26, 2021 as part of the coordinated actions of this Employer with four of the other large senior living chains in Canada. In dealing with the issue of whether a mandatory vaccination policy was reasonable in that case, Arbitrator Misra simply found that it was not a "live issue" as a result of the Minister's Directive of October 1, 2021.

132. In this case however, that answer will not serve as I am also dealing with RH's. I must also agree with the Union that establishing context cannot be a complete answer to the question as to how competing employee and employer interests should be properly balanced. Again, as referenced by the Union, the Supreme Court of Canada in *Irving Pulp & Paper* stated:

31 But the dangerousness of a workplace—whether described as dangerous, inherently dangerous, or highly safety sensitive—is, while clearly and highly relevant, only the beginning of the inquiry. It has never been found to be an automatic justification for the unilateral imposition of unfettered random testing with disciplinary consequences. What has been additionally required is evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace.

While that case dealt with substance abuse testing, what the Court was saying was that to state that a workplace is dangerous does not then justify any policy that is in some way safety-related. As reflected in the final sentence of the paragraph above, there must be something more – in that case evidence of a general problem with substance abuse in the workplace.

133. Similarly, in this case it is not enough to say that senior residents in congregant settings are at risk of contracting this virus, there must be evidence that unvaccinated staff represent an increased risk to those residents in order to reasonably justify the introduction of a mandatory vaccination policy. I consider the evidence before meets that test. The evidence is clear that the COVID-19 pandemic has disproportionately affected the residents of both LTCs and RHs. While it would be possible to take judicial notice that this is so, I have been provided with data from across the sector and from this Employer that satisfies me that mandatory vaccination is a reasonable and measured response to the circumstances with which the parties have been dealing. While it is the case, as pointed out by the Union, that some of the Employer's workplaces covered by the Collective Agreements have had no, or few, outbreaks and, further, that there were unvaccinated workers at those facilities when those outcomes were achieved,

nevertheless the preponderance of evidence clearly demonstrated that COVID-19 represented a significant risk with significant consequences for all those who worked and lived at these facilities.

134. The Union has argued that less intrusive options were available to the Employer such as testing, masking, use of PPE and compliance with practices and protocols designed to prevent transmission within the facilities. In support of that position, the Union tabled the NNE Paper to stand for the proposition that there had been no analysis of the risk of transmission represented by an unvaccinated person entering the workplace. In response I would start by noting that the date of the NNE Paper was December 8, 2021 and, therefore, as a resource it would have been unavailable to the Employer on the dates when each of the August 26 Policy, the Grievance and the September 28 Policy were issued. Further, the NNE Paper was apparently published after the date on which the Employer's second letter respecting potential termination was issued to employees and less than a week prior to the terminations actually being effected. There is no evidence to suggest that the Employer (or the Union for that matter) were aware of the NNE Paper at the time it was first published. All of this to say that it is important to remember that it is necessary to focus on the information that was available to the Employer at the time that it introduced the various iterations of its Policy.

135. More important, I am troubled by a number of issues related to the NNE Paper. First, I note that it was not peer-reviewed and there is no evidence that it represents a significant body of academic thought and research that might outweigh the extensive evidence before me supporting the efficacy of vaccination in preventing transmission and reducing the negative effects of the virus in vaccinated individuals who contract the virus. Second, I find the Employer response to the NNE Paper compelling in its criticism that the proposition advanced by the authors does not consider the "compounding effect" (my words) of an unvaccinated individual attending in the workplace on succeeding days.

136. Turning to the Union's argument that the requirement of mandatory vaccination represents an inconsistency in the Employer's approach, I must respectfully disagree as I have considered the dynamic nature of the progress of the pandemic and the evolving nature of governmental, employer and public responses to it. In argument the Union asked rhetorically what the magic was about August 26 or September 28 that required issuance of those versions of the Policy or, for that matter, October 12 when the mandatory vaccination rule came into effect. While there was no direct evidence on the point, I think that it is fair to infer that each of those dates represents points in time at which the Employer's actions crystallized and were sufficiently developed to introduce and/or implement the policies in question. Policies do not emerge fully formed but are responses to events that have preceded and prompted them. On

consideration of the evidence, it might equally be argued that the introduction of mandatory vaccination should have been issued at an earlier date (as opposed to not at all).

137. While I have found that the mandatory requirement that employees be vaccinated was a reasonable workplace rule at the time the August 26 Policy was issued for both LTCs and RHs, I do note that as of the date of the arbitration it was a mandatory requirement for LTCs in any event pursuant to the Minister's Directive of October 1, 2021. I also note that by virtue of section 27 of Regulation 166/11 under the RHA it appears "reasonable" that a mandatory vaccination rule should be in place at the Employer's RHs. Again for ease of reference, the operative sections read:

> ***Infection prevention and control program***
>
> ***27.*** *(1) Every licensee of a retirement home shall ensure that the infection prevention and control program required by paragraph 2 of subsection 60(4) of the Act complies with the requirements in this section. …..*
>
> *(5)* ***The licensee of a retirement home shall ensure that,***
>
> *(0.a) any guidance, advice or recommendations given to retirement homes by the Chief Medical Officer of Health are followed in the retirement home;*
>
> *(0.b)* ***all reasonable steps are taken in the retirement home to follow,***
>
> > **(i) any directive respecting coronavirus (COVID-19) issued to long-term care homes by the Chief Medical Officer of Health** under section 77.7 of the Health Protection and Promotion Act;
>
> (my emphasis)

In light of the foregoing, and in all the circumstances, it is hard to see how it would not be "reasonable" for the Employer to implement a mandatory vaccination requirement for staff in its RHs. This further supports the conclusion that the mandatory vaccination requirement was reasonable in both LTC and RH facilities.

138. Finally, for clarity, my answer in the affirmative to the first question, "Is the mandatory vaccination policy a reasonable workplace rule?" applies to each iteration of the Policy that was before me at the hearing.

139. I am electing to deal with the second and third questions posed to me at the same time. For ease of reference these are:

ii) Will an unpaid leave typically be an appropriate initial just cause consequence for an employee who decides not to comply with the vaccination requirement policy?; and

iii) Will termination of employment typically be an appropriate just cause consequences for an employee who decides on a sustained basis not to comply with the vaccination requirement policy?

140. I would start by reiterating that Phase I of this proceeding does not constitute a determination of any individual grievance filed by an employee affected by the application of the various iterations of the Policy. Indeed, the parties have given me jurisdiction over any such individual grievance and have crafted a question for what they have styled as Phase II of the process. That question, again, is:

> *Are there specific circumstances for this individual employee which warrant a deviation from the Arbitrator's Phase I findings respecting the appropriateness of the unpaid leave and/or termination of employment consequences for this employee?*

141. So, to be clear, any adjudication of whether just cause exists for an Employer action taken in respect of an individual employee will be determined on the evidence, submissions and law that may be put before me in such case, having regard to the test articulated by the parties.

142. In its argument the Union referred me to the oft-cited decisions in *Wm. Scott & Co. (Re)*, (supra), and *Re Ontario Store Fixtures and C.J.A., Local 1072*, (supra), that deal respectively with the questions to be asked in discharge cases to determine if just cause has been shown and the principle that discharge is the "capital punishment" of labour relations and should be a last resort in the continuum of labour relations response to misconduct. From its submission, I understood that Union was arguing that I ought not to conclude that non-compliance with the Policy would constitute just cause for the Employer's decision, either to place an employee on unpaid leave or terminate in the event of sustained non-compliance.

143. Of course, it was the parties themselves that drafted the questions and gave me jurisdiction to answer them. I do not consider this a circumstance in which I can say that I cannot or will not answer the questions put to me. Nevertheless, I do not see the questions as making determinations that the Employer had just cause to take any particular action with respect to any particular employee. Those are determinations that can only be made on consideration of the individual case as it may be advanced. Rather, I understand that the parties are seeking general guidance as to whether just cause might exist in the "typical" case,

that is to say, without reference to the specific circumstances of a given individual. Noting that there were some 25 employees terminated at the LTC/RH facilities alone, it may be that such generic guidance will be of assistance. In any event, the questions as posed have been put to me and I must answer.

144. Turning to the caselaw presented, I have focused on those dealing with COVID-19 mandatory vaccination policies. Each contemplates the possibility of unvaccinated employees being placed on unpaid leaves of absence and some, but not all, raise the possibility that an unvaccinated employee may eventually be terminated. In the section titled "COVID-19 Policy Caselaw" at paragraphs 49 through 68, above, I have reviewed three of the decisions in some greater detail and, in turn, some of those decisions reference earlier awards on the questions at issue here.

145. In *Electrical Safety Authority*, Arbitrator Stout found that a mandatory vaccination policy was unreasonable in the context of the workplace under consideration. And, as noted at paragraph 130 above, he commented that in workplace settings such as those under consideration in this case "*mandatory vaccination policies may not only be reasonable but may also be necessary and required to protect those vulnerable populations".* As I have found, such a mandatory vaccination policy is reasonable in the case before me. Arbitrator Stout goes on to find that the reference to disciplinary responses, up to and including discharge, for breach of the policy before him must be removed, writing:

> *[92] In my view, disciplining or discharging an employee for failing to be vaccinated, when it is not a requirement of being hired or an agreed condition of employment* ***and where there is a reasonable alternative****, is unjust. Employees do not park their individual rights at the door when they accept employment. While an employer has the right to manage their business, in the absence of a specific statutory authority or specific provision in the collective agreement****, an employer cannot terminate an employee for breach of a rule unless it meets the KVP test and is found to be a reasonable exercise of management rights.***
>
> (emphasis added)

146. In this case, I have found that the mandatory vaccination requirement was reasonable exercise of management rights in accordance with *KVP* and that the alternative (e.g. masking, testing, physical distancing etc. alone) was not a reasonable alternative. I do not see *Electrical Safety Authority* s standing for the proposition that discipline, up to and including termination, could not be a proper response to a breach of a mandatory vaccination policy.

147. I turn next to Arbitrator Misra's decision in *Chartwell*. In that decision, the learned arbitrator found that the mandatory vaccination rule was no longer a "live issue" given the Minister's Directive of October 1, 2021. Further, she was dealing with an LTC collective agreement and unvaccinated employees were unable to attend the workplace in any event. It is Arbitrator Misra's determination respecting the termination of employees for non-compliance with the mandatory vaccination policy that must be reviewed in my consideration of the second and third questions posed by these parties.

148. Arbitrator Misra articulated the questions relevant to this inquiry as follows:

> *2. Did the Employer breach Article 18.5 of the collective agreement when it included in the Policy the disciplinary penalty of termination of employment?*
>
> *3. Is the September 2021 Mandatory Vaccination Policy reasonable, particularly as it relates to the consequences of non-compliance?*

With respect to the first of these questions, Article 18.5, was a form of superior rights clause and, ultimately, the learned arbitrator determined that it operated so as to prevent the employer in that case from including termination as consequence of non-compliance with the policy. In this case, there is no such provision in the Collective Agreements that govern this proceeding. One of the Collective Agreements, Centennial Place, does include a provision that reads, *"29.01 Superior Conditions in place at the facility shall be maintained."* but is readily distinguishable from the language before Arbitrator Misra at Article 18.5 and, in any event, the Union did not advance the argument that succeeded in *Chartwell* on this point.

149. Turning to the second question before Arbitrator Misra, she determined that the consequences of non-compliance in the policy before her were not reasonable. In doing so, she focused on two points. First, it was found that the policy in that case was drafted so as to oust the jurisdiction of the arbitrator from making a determination as to whether discharge met the standard of just cause. Second, it was found that the policy was unreasonable because discharge of the employee was unnecessary on the arbitrator's reading of the evidence. On this latter point, it was considered that the prejudice to the employee of discharge outweighed any prejudice to the employer in having them remain on unpaid leave. That was not to say, that at some point in the future the employment relationship might not be terminated but that, as of the date of the hearing, that point had not yet been reached.

150. Dealing with these points in turn, I note that the Employer was at some pains to distinguish the policy language in *Chartwell* to the language of the policy before me. For ease of reference, I set out the operative language of the two policies below:

Chartwell	*Revera (Employer)*
*Employees who fail to comply with this Policy **will be placed on an unpaid administrative leave** or may have their employment terminated. Failure to comply with this Policy by non-employee Staff may result in the termination of the Staff members contract, assignment or placement.* *(emphasis in original)*	*Refusal to adhere with any of these measures outlined above will result in being placed on an unpaid leave until they comply; or their employment is terminated.*

Arbitrator Misra found that the language before constituted an automatic penalty for breach of the policy and, as such, must be struck down as an attempt to restrict the jurisdiction of an arbitrator to make determinations of just cause. Put another way, an employer cannot unilaterally insert a specific penalty provision into a collectively bargained agreement. Such a provision must be negotiated by the parties. A specific penalty is one where the only question to be answered is whether a particular occurrence has taken place. If the event or action is proven, then the consequence (usually discharge) automatically follows.

151. In reviewing these clauses, I consider that they are distinguishable. In the clause before me an unvaccinated employee will be placed on an unpaid leave. At that point, the employee remains on the leave until they comply with the mandatory requirement or they are terminated by the Employer. I see nothing in the provision to suggest that termination is an automatic penalty that cannot be grieved and assessed on a just cause standard.

152. Turning to the second point considered by Arbitrator Misra in her reasonableness analysis, I would simply observe that every case is unique and requires the exercise of arbitral discretion. In the case before me, I have come to a different conclusion and consider the consequences for failure to comply with the Policy to be reasonable. In doing so, I have considered the communications by the Employer with the unvaccinated employees to be appropriate both in terms of the information and resources offered to them so that they might consider their decision respecting vaccination and in terms of the time offered to them so that they might give their decision full consideration with a clear understanding of the consequences for a decision not to comply with the mandatory vaccination policy.

153. While the questions before me have been framed in terms of whether unpaid leaves of absence and, laterally, termination are just cause consequences of non-compliance, I have also considered what would happen under these Collective Agreements if the Policy had simply stated that an employee must be vaccinated in order to attend in the workplace to carry out their duties and responsibilities in accordance with their work schedule. If an unvaccinated employee showed up to work in that circumstance and lied about their status, it would be my expectation that discipline would follow. If that employee showed up to work and disclosed their status and was sent home, at some point the Employer would take the position that the employee was no longer eligible for employment and was simply absent without leave. As well, I note that each of the Collective Agreements include provisions that terminate employee's seniority and deem them to be discharged if they do miss a few shifts (usually three) without notifying the Employer. Finally, I note that if an employee were to apply for a leave of absence under each of the Collective Agreements, virtually all give the Employer unfettered discretion as to whether to grant the leave of absence and, in each case, the leave of absence is for a fixed period with a clear end date. Further, employees who work elsewhere while on leaves of absence are automatically discharged.

154. I raise all the foregoing to underline that the Employer's actions pursuant to its Policy actually provide employees with a clear statement of what will occur when they elect to maintain an unvaccinated status and when those consequences will crystallize. In that respect, the Policy provides greater clarity then that which might occur had the Employer simply said "You have to be vaccinated to attend your scheduled shifts" such that unvaccinated employees not in attendance would be considered as absent without leave or, alternatively, would be applicants for leaves of absence that would not be granted pursuant to the Collective Agreement.

155. I have reviewed the many mandatory vaccination cases that have considered policies that include disciplinary responses for a failure to comply. Save the *Electrical Safety Authority* and *Chartwell* decisions that I have addressed above, I am unaware of any decision suggesting that disciplinary responses, including discharge, would be inappropriate for unvaccinated employees should they not comply with a reasonable mandatory vaccination rule. Indeed, several arbitrators have suggested that placing employees on notice respecting the potential consequence of their decision is a matter of fairness.

156. Turning to the specific questions put to me, I am asked:

ii) Will an unpaid leave <u>typically</u> be an appropriate initial just cause consequence for an employee who decides not to comply with the vaccination requirement policy?; and

iii) Will termination of employment typically be an appropriate just cause consequences for an employee who decides on a sustained basis not to comply with the vaccination requirement policy?

(emphasis added)

157. The parties have jointly requested guidance respecting these issues (I note in *Chartwell* that it was the employer alone asking for such "guidance") and, accordingly, I am answering both questions in the affirmative subject to a few caveats. First, some meaning must be ascribed to the meaning of the word "typically" as it has been used here. Of course, every individual's case is unique to some extent and as I have specifically found that my jurisdiction to make determinations as to whether an individual employee's claim is merited, this ruling cannot be seen to circumscribe that jurisdiction. Second, with respect to termination cases, the parties have not defined, nor have I, what would constitute non-compliance on a "sustained basis", although I hope that my comments in this Award will be of some assistance to the parties.

158. Lastly, it would be remiss of me not to acknowledge that these situations place most, if not all, unvaccinated employees in an untenable situation. As stated by Union counsel, they are really being given a Hobson's Choice – be vaccinated against deeply-held beliefs and convictions that are integral to the individual or be removed from the workplace with the potential for that to become departure to become permanent. For many this represents a financial disaster affecting them and their loved ones as well as feeling like an attack on their personal integrity and identity.

159. Nevertheless, I am obligated to consider the questions put to me and I have determined that the various iterations of the Policy are reasonable and that the consequences for an employee's election not to comply with that Policy will typically be found to meet the just cause test.

160. I remain seized to deal with any matters arising out of this Award, including, but not limited to proceedings pursuant to Phase II.

DATED this 1st day of April, 2022.

Christopher White