IN THE MATTER OF:

POLICY GRIEVANCE NUMBER 2022-0001, GRIEVANCE NUMBER 2022-0002 ON BEHALF OF DEREK ANDREW AND GRIEVANCE NUMBER 2022-0003 ON BEHALF OF RORY WARD, ALL DATED JANUARY 12, 2022; AND

AN ARBITRATION OF THE SAID GRIEVANCES;

BETWEEN:

The Administrative and Supervisory Personnel Association,

UNION,

- and -

The University of Saskatchewan,

EMPLOYER

AWARD

APPEARANCES:

For the Union:	Gary L. Bainbridge, KC
For the Employer:	Kit McGuinness and Caroline Seshadri

BEFORE:

T. F. (Ted) Koskie, B.Sc., J.D., Sole Arbitrator

AWARD DATE:

September 4, 2024

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I. INTRODUCTION

[1] The Administrative and Supervisory Personnel Association (the "Union" or "ASPA") has filed three grievances, one policy grievance and two individual grievances, pursuant to its Collective Bargaining Agreement (the "CBA") with the University of Saskatchewan (the "Employer" or "University").

[2] Grievance No. 2022-0001, filed on January 12, 2022 (the "Policy Grievance") alleges that the University altered its vaccination policy, effective January 4, 2022, eliminating the option for Union members to provide negative rapid antigen-tests and instead requiring proof of vaccination to avoid being placed on unpaid leave, in a way that was unreasonable and in violation of Articles 1, 2, 3, 9, 12, 14, 19 and 20 of the CBA. The Union sought the following redress:

> That members who are not vaccinated or have not declared their vaccination status and do not have an approved accommodation be allowed to show proof of a negative rapid test... in order to be eligible to return to campus to attend work, or alternatively be permitted to work from home. In addition, those members placed on unpaid leave as of January 4, 2022, or January 24, 2022, where applicable, be made whole in all respects, which would include, but not be limited to, compensation for lost wages and benefits.

[3] Grievance No. 2022-0002, filed on January 12, 2022 (the "Andrew Grievance") and Grievance No. 2022-0003, filed on January 12, 2022 (the "Ward Grievance") repeat these claims with respect to two individual Union members who were placed on unpaid leaves pursuant to the policy (the "Individual Grievances").

[4] Pursuant to Article 17.4 of the CBA, the grievances were referred to binding arbitration.

[5] The Parties appointed me as the adjudicator to hear and settle the grievances.

II. BACKGROUND

[6] The University is a public university established by *The University Act*, S.S. 1907, c. 24 and governed by *The University of Saskatchewan Act*, S.S. 1995, c. U-6.1. The University employs more

than 6,500 staff and faculty and provides educational services to more than 25,700 students.

[7] ASPA is made up of more than 1,300 members who are involved in a wide variety of jobs on the University campus. These include administrative assistants, computer programmers, student counsellors, coaches, project directors, veterinarians, research officers, family physicians, teachers for second language and others.

[8] These grievances relate to the introduction of a mandatory COVID-19 vaccination policy by the Employer. Although each party submitted their own statement of facts rather than a joint statement, the essential facts underlying these grievances are not in dispute.

[9] In December 2019, a new coronavirus (SARS-CoV-2) was identified in Wuhan China. This corona virus became known as COVID-19. The virus quickly spread to other nations.

[10] On March 11, 2020, the World Health Organization (the "WHO") declared that COVID-19 was a global pandemic. On March 13, 2020, the University announced that all in-person classes and programs would be suspended and delivered digitally until further notice. The University issued a campus-wide directive to its employees, advising them to work remotely. Most University buildings were closed to staff, faculty, students and the public at that time.

[11] COVID-19 vaccines were developed and became available to Saskatchewan residents in the Spring and Summer of 2021.

[12] In September 2021, contemplating a return to on-campus work, the University introduced a "vaccinate or test" policy. Under this policy, all employees–including those working primarily remotely–were required to become vaccinated and provide proof of the same to the University. Proof of having received one dose of an approved COVID-19 vaccine was required by September 7, 2021, and proof of a second dose was required by October 18, 2021. In the alternative, employees would be required to provide proof of a negative COVID-19 rapid antigen test twice per week and complete a daily symptom checklist. Exemptions and accommodations would be considered only if there were medical grounds for the exception, or other grounds recognized in *The Saskatchewan Human Rights*

Code.

[13] The Government of Saskatchewan enacted *The Employers' COVID-19 Emergency Regulations*, S.S. c. S-15 Reg 13, which became effective on October 1, 2021. This statute authorized, but did not require, employers to implement a similar "vaccinate or test" scheme.

[14] On October 26, 2021, the University gave notice that it would be altering the vaccinate or test policy by removing the option to provide proof of a negative rapid antigen test (the "Mandatory Vaccination Policy"). This policy would become effective on January 4, 2022.

[15] On November 16, 2021, the University advised that there would be increased in-person activity on campus in the Winter Term. As a result, staff requirements to work remotely would generally be lifted. Some remote and hybrid work arrangements would still be available, as determined by the unit or department.

[16] The individual grievors here both chose not to disclose their vaccination status. On December 1, 2021, both grievors were contacted by their in-scope Supervisor, David Scarfe, by email to discuss their non-compliance with the mandatory vaccination policy. At a later meeting, the grievors requested a remote work arrangement that would allow them to continue working without needing to comply with the policy. This request was denied. Following the Mandatory Vaccination Policy, both were placed on an unpaid leave on January 4, 2022.

[17] On January 12, 2022, the Union filed the three grievances at issue here.

[18] On February 11, 2022, the University advised that it would be reinstating the vaccinate or test policy and that it would permit all employees who had been placed on unpaid leave to return to work on February 14, 2022.

[19] On February 14, 2022, the Government of Saskatchewan repealed *The Employers COVID-19 Emergency Regulations*.

[20] On April 8, 2022, the University repealed the vaccinate or test policy, eliminating the requirement to provide proof of vaccination or regular negative rapid antigen tests.

[21] In October 2022, both grievors resigned from the University. The parties agree that these resignations were unrelated to the employer's COVID-19 policies and that they are not relevant to these grievances.

[22] I heard testimony from the following witnesses for ASPA:

a) Aditya Manek, then Vice-President of ASPA;
b) Glenn Billingsley, ASPA Member Services Officer;
c) Derek Andrew, Grievor; and
d) Rory Ward, Grievor.

[23] I also heard testimony from the following witnesses for the University:

a) Dr. Darcy Marciniuk, Associate Vice-President of Research and Associate Professor in the College of Medicine;

b) Colin Weimer, Director, Employee Labour Relations;

c) Jonathan Coller, Chief Information Security Officer;

d) Jeff Lindsay, Manager, Safety Resources; and

e) Sarah Poelzer, Human Resources Strategic Business Advisor.

[24] The parties filed comprehensive briefs and supporting documents that were of significant assistance in preparing this award. Both parties were represented by skilled counsel who made additional oral submissions complementing their written material.

III. ISSUES

[25] The issues before me are as follows:

a) Whether the Mandatory Vaccination Policy adopted by the employer was a reasonable exercise of management rights.

b) If the policy was reasonable, whether its application to the grievors was reasonable.

IV. DECISION

[26] For the reasons that follow, I find that the adoption of the Mandatory Vaccination Policy by the University, despite the unique health and safety challenges posed by the COVID-19 pandemic, was an unreasonable exercise of its managerial authority. As a result, I allow the Policy Grievance.

[27] I also conclude the University unreasonably applied the Mandatory Vaccination Policy to the individual grievors. This is because the University had an obligation to consider less intrusive alternatives to achieving its legitimate interests. Those less intrusive options must take account of the impact on employees' interests and mitigate, to the extent possible, the impact of the Employer's policy on those interests. The University failed to do that by making no effort to accommodate the grievors and by denying their reasonable request to continue working remotely.

[28] I therefore allow the Individual Grievances and direct that each grievor be made whole in all respects including, but not limited to, lost wages and benefits for the period they were placed on unpaid leave.

V. REASONS

A. LEGISLATION

[29] The relevant statutory provisions of the *Employers' COVID-19 Emergency Regulations*,

R.R.S., c. S-15.1, Reg. 13, are as follows:

> **Employers' duties re clause 3-8(a) of the Act**
> 4(1) On and after October 1, 2021, an employer may, for the purposes of clause 3-8(a) of the Act, require all of its workers to comply with one of the following:
>
> (a) to:
>
> (i) be fully-vaccinated; and
>
> (ii) if requested by the employer, provide satisfactory evidence to the employer in relation to the worker's vaccinations;
>
> (b) to provide a valid negative COVID-19 test result to the employer at least every 7 days.
>
> (1.1) If an employer requires its workers to comply with one of the requirements set out in subsection (1), the employer shall give each worker the option to comply with either clause (1)(a) or (b), but the worker must comply with at least one of those requirements within the period specified by the employer.
>
> (2) For the purposes of clause (1)(b), a negative COVID-19 test result is valid for 7 days from the date of testing.
>
> (3) A worker is not required to provide a negative COVID-19 test result to the employer if the worker is on vacation, an employment leave or a leave granted by the employer.
>
> (4) If an employer requires its workers to comply with one of the requirements set out in subsection (1) in accordance with subsection (1.1), the employer shall:
>
> (a) provide notice of the requirements to every worker by:
>
> (i) personally giving it to the worker;
>
> (ii) posting it in the workplace;
>
> (iii) posting it online on a secure website to which the worker has access; or
>
> (iv) providing it in any other manner that informs the worker of the requirements;
>
> (b) establish a verification process for collecting and reviewing the evidence provided by the worker in relation to the worker's vaccinations or negative COVID-19 test results;
>
> (c) review the evidence provided by a worker in relation to the worker's vaccinations or negative COVID-19 test results in accordance with the verification process established pursuant to clause (b) to verify that the worker can be at the workplace; and
>
> (d) keep confidential the evidence provided by a worker pursuant to this section.

[30] The relevant statutory provisions of the *Saskatchewan Employment Act*, S.S. 2013, c. S-15.1 are as follows:

General duties of employer
3-8 Every employer shall:

(a) ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer's workers;

...

Protection from liability re employers and COVID-19 measures
9-10.1(1) In this section, "good faith effort" includes an honest effort, whether or not that effort is reasonable.

(2) Subject to the regulations, no action or proceeding lies or shall be commenced or maintained against an employer with respect to any act or omission of the employer if:

(a) the employer acted or made a good faith effort to act in accordance with The Public Employers' COVID-19 Emergency Regulations or The Employers' COVID-19 Emergency Regulations; and

(b) the act or omission of the employer does not constitute gross negligence.

(3) Subsection (2) applies regardless of whether the cause of action on which the proceeding is purportedly based arose before, on or after the day on which this section comes into force.

(4) Any action or proceeding mentioned in subsection (2) that is commenced before the day on which this section comes into force is deemed to have been dismissed, without costs, on the day on which this section comes into force.

(5) No person is entitled to any compensation or any other remedy or relief for the extinguishment or termination of rights pursuant to this section.

(6) This section applies, with any necessary modification, with respect to a person who is vicariously liable for the acts or omissions of another person if subsection (2) negates the liability of the other person in relation to the act or omission.

(7) The Lieutenant Governor in Council may make regulations for the purposes of this section, including regulations respecting the scope of protection provided pursuant to subsection (2) or imposing terms and conditions on the protection.

(8) A regulation made pursuant to subsection (7) may be made retroactive to a day not earlier than October 1, 2021.

B. THE CBA

[31] The relevant portions of the CBA are as follows:

ARTICLE 2 - MANAGEMENT OF THE UNIVERSITY

The Association recognizes that the management of the University and the direction of the workforce are vested exclusively with the University. The University agrees that the exercise of its management

and directory functions will be consistent with the terms of this Collective Agreement.

ARTICLE 14 - DISCIPLINE

The University will ensure that performance and misconduct problems are addressed constructively providing for fair and equitable treatment for all members.

The University reserves the right to discipline any member for just cause. Just cause can result from unacceptable performance of duties or misconduct.

14.1 Progressive Discipline

The University endorses the concept of progressive discipline in situations of poor performance or misconduct.

In normal circumstances, performance concerns including corrective action will be first discussed with the member. If the member is unable to meet expectations, then progressive discipline will be followed.

Discipline for misconduct should be progressive, however should the circumstances dictate the employer may initiate disciplinary action as deemed appropriate.

In instances of serious allegations of misconduct or negligence, employees may be suspended pending investigation where the Employer deems it necessary to remove the employee from the workplace to investigate specific allegations. Suspensions pending investigation are not considered discipline and will not result in a loss of regular wages for the employee.

14.1.1 Letter of Warning

A letter of warning will be provided to the member in a meeting with an Association representative present outlining the gap between expectations and current performance or conduct and the corrective action required. A reasonable period of time must be provided to the member to allow them to achieve the stated expectations.

14.1.2 Letter of Reprimand

If a member's performance or conduct continues to be unacceptable, a letter of reprimand documenting the gap between expectations and current performance or conduct will be provided to the member with an Association representative present.

The letter will indicate a reasonable time frame in which the member will be given the opportunity to improve, the corrective action and consequences if the expectations are not met.

14.1.3 Suspension

If a member's performance or conduct continues to be unacceptable, they may be suspended without pay. In a meeting with an Association representative present, the member will be advised in writing of the effective date and length of suspension from duties, giving reasons for the action. Copies of the letter will be provided to the Association.

If the suspension is successfully grieved by the Association and the member is reinstated, the suspension will be removed from the member's official Employee file and the member shall be compensated for salary and benefits lost between the date of suspension and the

date of reinstatement.

14.1.4 Dismissal

The University reserves the right to dismiss any member for unacceptable performance or misconduct after every reasonable attempt to help the member meet expectations has been exhausted.

In normal circumstances, a letter of dismissal outlining the reasons for and the date of the dismissal will be provided to the member in a meeting with an Association representative present.

The Association will be advised in advance of any dismissal action being taken and a copy of the letter will be provided to the Association.

In the event the member does not attend a scheduled meeting pursuant to this Article, the notice of discipline will be mailed to the member's last known address, with a copy provided to the Association.

If the Association grieves, the member will be deemed suspended without pay until the grievance procedure is concluded. In the event the grievance procedure results in the member being reinstated, the salary and benefits lost between the date of suspension and the date of reinstatement will be determined as part of the settlement of the grievance.

14.2 Disciplinary Letters

Disciplinary letters must form part of the official employee file (Article 18).

A disciplinary letter will be removed from the official employee file after two (2) years of acceptable performance or conduct regarding the issue(s) in question. While the letter is on file, it may be used to support future discipline on the issue(s) outlined in the letter.

C. ANALYSIS

1. Whether the mandatory vaccination policy adopted by the Employer was a reasonable exercise of management rights.

a) Standard of Review

[32] No provision of the CBA directly addresses employee vaccination. The University did not previously require employees to be vaccinated as a condition of employment. The University concedes that it adopted its policy unilaterally. It was not the result of any bargaining process.

[33] Where an employer adopts a rule or policy that affects employee rights, the policy must satisfy

the requirements identified in *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.*[1] Those elements are:

a) the policy must not be inconsistent with the CBA;

b) it must not be unreasonable;

c) it must be clear and unequivocal;

d) it must be brought to the attention of the employee before the employer can act on it;

e) the employee concerned must have been notified that a breach of such rule could result in their discharge if the rule is used as the foundation for discharge; and

f) such a rule should be consistently enforced by the employer from the time it was introduced.

[34] The parties focussed their argument on whether the adopted policy was reasonable. It was established by the University, and uncontested by the Union, that:

a) the policy was clear and unequivocal;[2] and

b) that both the policy and the consequences for breaching it had been brought to the attention of the two individual grievors .[3]

[35] To decide whether a policy is reasonable, arbitrators and courts must consider the interests of the parties and weigh them proportionally. This interest-balancing approach is universally accepted across a wide-body of arbitral and judicial decisions, including those referred to by the University and

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[1]1965 CanLII 1009 (ON LA) [KVP]

[2]Exhibit E-28

[3]Exhibits E-15, E-21, E-23 to E-34 & Exhibits U-7, U-9 & U-10

the Union in this grievance.

[36] In *Communications, Energy and Paperworkers Union of Canada* v *Irving Pulp & Paper Ltd.*,[4] the Supreme Court of Canada recognized and adopted the "balance of interests" approach established in *KVP*. *Irving* emphasized the importance of arbitral recognized employee rights, like those at issue here. When an employer unilaterally adopts a policy that may infringe on those rights, the employer bears the burden of justifying the infringement of those rights.

[37] *Association of Justice Counsel* v *Canada (Attorney General)*[5] reiterated the *KVP/Irving* framework. In that decision, the court discussed the impact of the arbitrator's analysis of the available alternatives to the employer's policy:

> While I agree that an employer does not need to prove there were no other alternatives, the availability of realistic, but less intrusive, means to meet organizational needs may be a relevant consideration in the balancing of interests assessment, alongside the nature of the employer's interests and the policy's impact on employees (Irving, at para. 27). Evidence that no such alternatives were available would have supported the respondent's position that the directive was a necessary response . ... [6]

[38] *Insurance Corporation Of British Columbia* v *Moveup*[7] described the inquiry into the reasonableness of a COVID-19 vaccination policy this way:

> It is well established that employees do not abdicate their privacy rights by entering an employment relationship. Management rules that intrude on an employee's privacy rights must be justified. The standard of arbitral review of such intrusions is one of reasonableness. This review involves the evaluation and balancing of competing of the impugned intrusion, the purpose of the rule, the extent to which the rule achieves a legitimate workplace purpose, and whether there are less intrusive means available to achieve that purpose, among other relevant contextual facts.[8]

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[4] 2013 SCC 34 (*Irving*)

[5] 2017 SCC 55 (CanLII) (*Association of Justice Counsel*)

[6] *Ibid* at para. 47

[7] 2023 CanLII 88219 (BC LA) (*ICBC*)

[8] *Ibid* at para. 47

[39] The University contends the Mandatory Vaccination Policy it adopted was a reasonable exercise of management rights under Article 2 of the CBA. It emphasized its interest in protecting the health and safety of their workplace and employees.

[40] The Union argues that the Mandatory Vaccination Policy was an unreasonable and unnecessary approach given the available alternatives. It pointed to the potential negative impacts of the policy on the grievors' privacy rights, personal autonomy, bodily integrity and livelihoods.

[41] The interests at stake in these grievances are very important to both parties. I agree with the Union that the individual rights of employees are implicated by the Mandatory Vaccination Policy. However, those rights have generally not been treated as absolute. In the context of a global pandemic, the University was entitled to take action to protect the health and safety of their workplace.

[42] *In Electrical Safety Authority* v *Power Workers' Union*,[9] one significant decision rendered during the early days of the pandemic, Arbitrator Stout described the balancing of interests in this way:

> 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), 2001 CanLII 62124 (AB GAA), 104 L.A.C. (4th) 240 (Smith).
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> ...
>
> 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.
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> 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.
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> However, in other workplace settings where employees can work remotely and there is no specific

[9] 2022 CanLII 343 (*ESA*)

> 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.
>
> It must also be noted that the circumstances at play may not always be static. The one thing we have all learned about this pandemic is that the situation is fluid and continuing to evolve. What may have been unreasonable at one point in time is no longer unreasonable at a later point in time and vice versa.[10]

b) The Effect of Provincial Legislation

[43] The Union argues that *The Employers' COVID-19 Emergency Regulations* (the "*Emergency Regulations*") created a requirement that employer initiated COVID-19 policies provide a testing option as an alternative to any vaccination requirement. In support of this proposition, it referred to the government's decision to amend *The Saskatchewan Employment Act* to provide liability protections for employers who adopt a vaccinate or test model in section 9-10.1 (the "*SEA Amendment*").

[44] The University argues that the *SEA Amendment* and the *Emergency Regulations* do not require employers adopt any particular policy with respect to COVID-19. In its view, the legislature adopted *The Emergency Regulations* to authorize employers to adopt workplace vaccination policies and the *SEA Amendment* to provide a voluntary incentive for employers to do so. It notes there is no language in the *SEA Amendment* or the *Emergency Regulations* that prohibits an employer from adopting a stricter vaccination policy.

[45] A review of Saskatchewan arbitration decisions reveals that the question of whether the *Emergency Regulations* impose an obligation on employers to provide for a testing option has not been considered.

[46] In *Saskatchewan Power Corporation* v *International Brotherhood of Electrical Workers, Local 2067*,[11] Arbitrator Ball considered four grievors who were terminated because of their failure

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[10] *Ibid* at para. 68 and 70-73

[11] 2022 CanLII 139464 (*SaskPower*)

to comply with *The Public Employers' COVID-19 Emergency Regulations*, R.R.S., c. S-15.1, Reg. 12. The vaccinate or test policy established by SaskPower accorded with the *Emergency Regulations* and the *SEA Amendment*. As a result, the case focused on whether non-compliance with the policy constituted just cause for termination and whether the grievances were barred by the *SEA Amendment*.

[47] In *Consumers' Co-operative Refineries Ltd.* v *Unifor, Local 594*,[12] Arbitrator Ish analyzed whether the employer had just cause to terminate two grievors for their failure to comply with a vaccinate or test policy adopted pursuant to the *Emergency Regulations*. The reasonableness of the policy itself was not at issue in the case, only the reasonableness of the discipline.

[48] In *Nutrien* v *United Steelworkers, Local 7916*,[13] Arbitrator Ish was asked to consider whether the *SEA Amendment* precluded six grievances that were filed in relation to the termination of three grievors for their violation of the employer's vaccinate or test policy. The policy was implemented approximately three weeks after the *Emergency Regulations* became effective. Mirroring the logic of Arbitrator Ball in *SaskPower*, Arbitrator Ish also concluded that the cases could proceed to arbitration.

[49] This case, unlike the prior authorities, involves a policy grievance that challenges the reasonableness of a Mandatory Vaccination Policy. The Union argues that the reasonableness of the policy is undermined by its failure to provide for a testing option, which it says was required under the *Emergency Regulations*.

[50] I agree with the Union's argument on this point. *The Emergency Regulations* authorized employers to adopt vaccination or test policies. Although the regulations use permissive language, making clear that employers may choose not to adopt a vaccination policy, section 4(1.1) uses mandatory language – "If an employer requires its workers to comply with one of the requirements set out in subsection (1), the employer shall give each worker the option to comply with either clause

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[12] 2023 CanLII 88216 (*Consumers' Co-op*)

[13] 2024 CanLII 47283 (*Nutrien*)

(1)(a) or (b) ...."

[51] The University's Mandatory Vaccination Policy "required all of its workers to comply" by becoming fully vaccinated, as contemplated by 4(1)(a)(i) but did not "give each worker the option to comply with either clause (1)(a) or(b)" as required.

[52] The University argues that the *Emergency Regulations* provided a minimum standard, but employers could choose to "exceed these standards and take a stricter approach in furtherance of protecting the health and safety of their workers ...."[14] This argument overlooks the deliberate balance struck by the *Emergency Regulations* between workplace safety and employee rights. Under the University's reading of the regulations, there is no effect to 4(1.1), as an employer may simply evade the requirement to allow for a testing option by not providing for one in their own internal workplace policy.

[53] This is further bolstered by comments made by Minister Don Morgan in the Saskatchewan Legislature when the Government of Saskatchewan was considering the adoption of the *SEA Amendment*:

> We are introducing a provision that will provide protection for public- and private-sector employers that comply with the new COVID-19 vaccination regulations. These regulations give the employee the choice of showing the evidence of being fully vaccinated or evidence of a negative COVID-19 test at least every seven days. Mr. Speaker, as the pandemic has continued to impact the lives of all citizens in the province, we made it possible, through our occupational health and safety regulations, for employers to help reduce the risk of COVID-19 in their workplaces. We know that vaccination is one of the best tools to help us through this wave of the pandemic. Therefore we have added a good-faith liability protection provision that will give peace of mind to employers who are looking to protect their employees and the citizens that they serve. [15]
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> ...
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> Hon. Mr. Morgan: "The third amendment introduces a provision that will provide liability protection for public and private sector employers that comply with the new COVID-19 vaccine regulations."
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> ...

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[14]Employer Brief at para. 73

[15]Morgan, Saskatchewan Hansard (22 November 2021)

> Hon. Mr. Morgan: "If the employer chose to not allow the negative test, if they said you must be vaxxed, they would not be able to avail themselves of this section. They may or may not have other defences. But this section only applies to the situation where the employer gave the employee the choice of full vaccination or the negative test."
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> ...
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> Hon. Mr. Morgan: "We had some people, some employers asked us whether we would consider amending it so that the protection would be there if they required only the double vaccination and not a negative test. And we chose not to do that. We were of the view that it was the employee's right to be able to elect which one they wanted to. And we haven't had, that I'm aware of, anybody that's sought anything different. But that was an issue when we went into it."[16]

[54] The University concedes that the Mandatory Vaccination Policy it adopted on January 4, 2022, did not give employees the option to provide a valid negative COVID-19 test result to the at least every 7 days. As a result, it does not meet the requirements of the *SEA Amendment* and the *Emergency Regulations*. The University has not attempted to raise a statutory defence to these grievances.

[55] In any case, I would adopt the reasoning of Arbitrator Ish in *Nutrien*, where he concluded that the *SEA Amendment* was no bar to grievances brought in connection with a workplace vaccination policy:

> It is my conclusion that Section 9-10.1 of the *Saskatchewan Employment Act* does not preclude the grievances from proceeding to arbitration on the merits. While the immunity provision provides liability protection to an employer, neither it nor the Regulations addresses disciplinary consequences for breach of an employer's vaccination or test policy. An interpretation of Section 9-10.1 within the entire context and object of the *SEA*, and particularly Part VI which deals with labour relations (formerly the *Trade Union Act*), leads me to the conclusion that greater clarity in the section, or a different placement of the provision in the *SEA*, would be required to extinguish and override collectively bargained due process provisions. Nothing in this award is intended to be interpreted as a comment on the merits of any of the six filed grievances.[17]

[56] I find that, in Saskatchewan, the *Emergency Regulations* imposed an obligation on employers who chose to adopt COVID vaccination policies to provide a testing alternative. The Mandatory Vaccination Policy adopted by the University did not provide this option, and its reasonableness is

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[16] Human Services Committee, Saskatchewan Hansard (29 November 2021)

[17] *Supra* footnote 13 at para. 59

seriously undermined as a result.

c) The Precautionary Principle

[57] In this case, the Employer advances and relies upon the "precautionary principle" as a justification for the adoption of the Mandatory Vaccination Policy. It referred me to *Central West Local Health Integration Network* v *Canadian Union of Public Employees, Local 966*,[18] *Elementary Teachers' Federation of Ontario* v *Ottawa-Carleton District School Board*,[19] *CKF Inc. and Teamsters Local Union No. 213*[20] and *Power Workers' Union* v *Elexicon Energy Inc.*[21] to support their argument.

[58] Those cases, and others, explain that the precautionary principle stands for the proposition that reasonable efforts to reduce risk need not wait for scientific certainty. In this context, the Employer was entitled to act to mitigate the uncertain harms of COVID-19 on their workplace, and to adopt policies intended to mitigate those harms, even where the efficacy of those policies was uncertain.

[59] However, the existence of a safety risk does not relieve the Employer of its obligation to weigh the impact of their policies on employee interests. This point was made directly in *Sault Area Hospital and Ontario Nurses' Association*[22] that addressed the application of the precautionary principle to mandatory vaccination schemes:

> *Irving* balancing demands nuance and it is not sufficient to claim that scant, weak, "some," or imperfect data is better than nothing. While the precautionary principle ("reasonable efforts to reduce risk need not wait for scientific certainty") surely applies in truly exceptional circumstances, one could not live in a society where only 'zero risk' was tolerated. It cannot be right that a labour

[18] 2023 CanLII 58388 (*Central West*)

[19] 2022 CanLII 53799 (*ETF*)

[20] 2022 CanLII 60954 (*CKF*)

[21] 2022 CanLII 7228 (*Elexicon*)

[22] 2015 CanLII 55643 (*Ontario Nurses' Association*)

> arbitrator should effectively abdicate by simply applying *Dunsmuir*-type deference to expert opinion planted in shallow soil.

[60] I agree that the precautionary principle is not a rule of deference, and it should not be read to tilt the balance of the traditional *KVP/Irving* analysis in favour of safety interests. Instead, the precautionary principle merely recognizes that Employers are acting under uncertain conditions and that they should be permitted to take action, proportionate to the impact on employees, even where scientific uncertainty exists. The Union agrees that the University was entitled to adopt policies to address the impacts of COVID, but it maintains that the Mandatory Vaccination Policy in particular was unreasonable in the circumstances.

d) The Legitimate Interest of the Employer

[61] The University's legitimate interest in adopting a workplace vaccination policy must be narrowly understood. As an employer, the University owed a specific duty to provide for the health and safety of their workplace. At times, the University articulated other reasons for advancing their Mandatory Vaccination Policy:

- to demonstrate "leadership" by the University;
- to protect the wider "university community";
- to address the desire of some stakeholders for a mandatory vaccination policy;
- to help address hospitalization rates; and
- to encourage COVID vaccination more generally

[62] These may be laudable objectives, but they do not contribute to the legitimate interest of the Employer in maintaining a safe workplace. Although the University is entitled to its view that becoming vaccinated against COVID would create benefits for the employee, the university community and the province at-large, it may not just unilaterally implement a policy to advance those goals. Instead, it must substantiate the policy based on the workplace health and safety benefits alone.

[63] This argument was elaborated on in *Teamsters Local Union No. 31* v *Purolator Canada Inc.*[23]:

> Whereas protection from infection had a workplace safety consequence which justified the policy, protection from serious illness was a public health benefit, which had either minimal or no specific workplace safety consequence. It could not, I find, be used to support the reasonableness of the Safer Workplaces Policy... [24]
>
> ...
>
> Firstly, the employer placed unvaccinated employees on leaves of absence as opposed to terminating them. This means that the employment relationship persisted. The employer continued to be obliged under statute and the collective agreement to take every reasonable precaution to ensure their safety and well-being, because they continued to be employees. It was the affected employees themselves, not an abstract workforce in a utopian workplace, to whom the employer owed its statutory and collective agreement safety obligations and the equitable application of its corporate values.
>
> Secondly, enforcing the mandate does not mean forcing all employees to be vaccinated. It means excluding the unvaccinated from the workplace on grounds of safety. It is not a punishment for non-compliance. It is a safety measure, and it can only be justified as a safety measure. What safety benefit or improvement was achieved by excluding them from the workplace as of June 2022? This is the correct, indeed the only question to be addressed. It is the foundation for analysis of this issue. Did this exclusion constitute a reasonable precaution to ensure their safety and well-being and the safety of others in the workplace?[25]
>
> ...
>
> The question has to be asked: Does keeping that worker away from work seem like a reasonable and proportionate workplace safety measure?
>
> The reality in this case was that the employer continued to maintain as of June 2022 a safety measure which by then did no more than marginally improve the serious illness statistics of an abstract idealized workforce and did absolutely nothing to improve the safety and wellbeing of the employees actually affected. These employees chose to stand up for their personal autonomy and bodily integrity and were met with the devastating consequence of continued denial of their livelihood.
>
> When that kind of so-called improvement in workplace safety is balanced against that kind of adverse impact, the *Irving/KVP* scales tip heavily against the alleged improvement in workplace safety.[26]

[64] The University had different obligations to its employees in a labour relations context than it

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[23] 2023 CanLII 120937 (*Purolator*)

[24] *Ibid* at para. 38

[25] *Ibid* at para. 277-278

[26] *Ibid* at para. 285-287

did to the wider community. In choosing to adopt a single policy that would apply to all employees, and also students and other members of the public, the University relied on a variety of interests. However, only maintaining the health and safety of its workplace can justify the adoption of the Mandatory Vaccination Policy and it is that narrower interest that must be weighed against the employees' rights under the *KVP/Irving* analysis.

e) The Continuing Reasonableness of the Policy

[65] The Union submits that at the time the University adopted its Mandatory Vaccination Policy in January of 2022, that approach did not align with the then-current state of the best medical evidence. To bolster this argument, the Union relies extensively on the analysis of Arbitrator Glass in *Purolator*.

[66] The position taken in *Purolator* was that the workplace vaccination mandate at issue had been reasonable, but had become unreasonable by June of 2022 because of the onset of the Omicron variant and increasing data suggesting that vaccination had minimal impact on transmission rates of COVID.

[67] It is worthwhile to reproduce some portions of that opinion:

> *KVP* and *Irving* which are the leading authorities in this sphere recognize the need to weigh in the balance the interests of the affected employees against the interests of the employer, when determining the validity of the policy. It is my task as adjudicator to determine if the interests of the employer encapsulated in the policy failed to outweigh the interests of the affected employees at any point over the duration of the policy including but not restricted to its implementation. If they did the grievances succeed. The only question would then be a matter of quantum.
>
> B. The Continued Reasonableness of the Policy: Chronology is Key
>
> The SWP lasted from its deadline for compliance which was effectively December 25, 2021, until its suspension as of May 1, 2023. Throughout that quite lengthy time frame the policy had to continue to pass the *KVP* and *Irving* tests. The balancing exercise in question required the employer to participate in a continuing assessment of the effectiveness of its policy in achieving its goals and furthering its interests as against the interests of the affected employees. The adjudicator in a case of this nature acts in a sense as the referee who must continually weigh those interests in the balance and depending on the outcome reach a conclusion as to whether or not the policy or rule in question at any given time is reasonable. That continuing exercise had in this case to be carried out over a considerable period, and it has been my task to evaluate the balance being struck, to determine how

reasonable the SWP has been at any given point in time. The hourly paid grievors' claim for compensation based on their being unreasonably banned from the workplace is a continuing one from January 1, 2022, until May 1, 2023.

The scales metaphor is highly appropriate to describe the process, and as will be shown in the fuller section of the award, I identify a tipping point at which what was reasonable graduated to what was no longer reasonable, regarding the employer's continuing enforcement of the SWP.

C. Employer Reasons why the SWP was Reasonable

I identify the four main reasons which the employer says support or justify the banning of unvaccinated workers:

1) Allowing unvaccinated workers into the workplace endangered other workers already there because they are more likely to be infected and then pass it on to other workers.

2) Third-party and customer requirements for Purolator employees especially couriers, attending their premises to be vaccinated render the policy operationally necessary.

3) Vaccination provides protection against serious illness if infected, so unvaccinated workers bring with them into the workplace an increased risk (for them) of serious illness.

4) Unvaccinated workers are more infectious once infected than vaccinated workers.[27]

...

Reason number one is gone by June 2022. While there were some marginal dissenting voices, the overwhelming medical opinion by the spring of 2022 was that a two-dose vaccination after 25 weeks was effectively useless to protect against Omicron infection. All the vaccinated workers at Purolator would have completed their two dose vaccinations at least 25 weeks prior to the end of June 2022. Thus, by that time unvaccinated workers presented no more threat of infecting others than 2 dose vaccinated workers.

Reason number two is gone by June 2022. No meaningful evidence was supplied by the employer to establish there were any third-party requirements by then. Given the then current environment including the lifting in June 2022 of the Federal vaccine mandate (strongly relied on by the employer to support implementation of the SWP), and a multiplicity of mandates and restrictions being lifted by then, there was a heavy obligation to verify that these third-party requirements remained in place if they were to continue to be used as justification for the ban. There was, I must confess, a shocking absence of interest on the part of the employer in finding out the status as of June 2022, and no effort was made to provide the necessary evidence at the hearing.

Regarding reason number three, while vaccination continued to provide this desirable public health outcome, banning unvaccinated workers from the workplace after June 2022 did nothing for their safety and contributed nothing to the safety of the others working there. It was not a reasonable and proportionate workplace safety measure.

By the late spring of 2022, only reason number four was arguably still in place as a valid reason for continuance of the SWP. But with its questionable validity, standing on its own, it was, as I have said, wholly inadequate to justify the banning of unvaccinated workers with its sweeping adverse consequences of loss of livelihood. The employer's own expert pointed out that it was never listed

[27] *Ibid* at para 21-22

> by public health authorities as a reason to get vaccinated.
>
> The *KVP/Irving* balancing of interests by June of 2022 became heavily weighted against the ban.[28]
>
> ...
>
> The net message from Dr. Kalyan's and Dr. Rebick's evidence was that the possible vaccination benefit of reduced infectiousness was not clearly established. Whatever the benefit, the effectiveness of the vaccines waned noticeably along with protection against infection. It was not listed by the health authorities as a reason to get vaccinated. It was also insufficiently established to cross a reasonable threshold over which to activate the precautionary principle.
>
> In these circumstances this unproven possible benefit was nowhere near adequate, standing alone, by the late spring of 2022, to justify a workplace vaccine mandate when balanced against the massive adverse impact of depriving the grievors of their livelihood by placing them on unpaid LOAs.[29]
>
> ...
>
> In any event there were no conclusions provided on this aspect of the case. This however takes nothing away from her conclusion which I consider to be correct, that vaccine effectiveness against infection was so minimal that it was wrong to continue to exclude unvaccinated employees from the workplace. I agree with the position of the union that this decision represents a watershed moment in the history of arbitral response to the evolution of the virus and the implications of the overwhelming data emerging in vaccine science. These developments were critical components in a new balance that needed to be struck in assessing the reasonableness of a workplace vaccine mandate.[30]

[68] The conclusion reached by Arbitrator Glass, based on the extensive expert evidence presented to him, was that in June of 2022, the Mandatory Vaccination Policy became unreasonable because of the changing circumstances of the pandemic. Although his careful and comprehensive review of that evidence and the relevant authorities is valuable, it is not determinative of the issues before me.

[69] I accept the Union's submission that a policy that was reasonable when adopted may become unreasonable over time.

[70] Dr. Marciniuk testified for the University regarding the data their Pandemic Response Team

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[28] *Ibid* at para. 25-29

[29] *Ibid* at para. 214-215

[30] *Ibid* at para 345

("PRT") received and reviewed.[31] This included:

- a letter from Dr. Jasmin Hasselback with the Ministry of Health advising that it adopt a mandatory vaccination policy;

- modeling data prepared by Dr. Marciniuk regarding the rate of COVID infection within the University community; and

- Saskatchewan Health Authority data analytics and projections showing that those who were vaccinated were much less likely to be hospitalized.

[71] The University relied on this expert evidence when it decided to adopt a Mandatory Vaccination Policy. This evidence is not unassailable–the cases referenced by the parties include diverse testimony and conclusions about the efficacy of vaccination, what was known about COVID transmission and when, and the viability of rapid antigen testing, masking and other alternatives to a Mandatory Vaccination Policy. Whether the evidence relied upon provides a sufficient justification for a given policy depends on the facts of each case.

[72] The Union disputed the necessity of a Mandatory Vaccination Policy in January 2022. During the cross-examination of Dr. Marciniuk, it was conceded that:

- COVID vaccination was not 100% effective;
- that someone who had received a vaccine could nonetheless contract and spread COVID;
- that voluntary vaccination rates were already high amongst employees; and
- that existing vaccination had waning efficacy against new COVID variants.

[73] The Union further argued that the fact that the University had adopted a vaccinate or test model from September 7, 2021, until January 4, 2022, was proof that the Mandatory Vaccination Policy was unnecessary.

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[31] Testimony of Dr. Darcy Marciniuk; Employer Brief at para. 66

[74] The University responded by referencing the changing situation–rising COVID infection rates throughout the Fall, additional information regarding the efficacy of the vaccine, demand from some stakeholders to require vaccination, and difficulty in obtaining compliance with rapid antigen-testing.

[75] The prior adoption of a vaccinate or test model does not necessarily preclude the Employer from making alterations to that policy to require vaccination at a later date. Whether the Mandatory Vaccination Policy was reasonable at the time it was adopted is an independent question.

f) Conclusion Regarding Reasonableness

[76] I have reviewed the authorities provided by the parties and concluded that the University's adoption of a Mandatory Vaccination Policy was an unreasonable exercise of managerial authority.

[77] I recognize that the balance of cases have concluded that, although the employees' interests are substantial, in the context of the COVID-19 pandemic, they must yield to the need to provide a safe workplace and to maintain the operation of the business. In many of these cases, employer policies were narrowed, or particular applications of discipline were held to be unreasonable, while the policy itself was upheld.

[78] A useful summary of relevant decisions was provided in *Purolator*, and I reproduce it here for convenience. These authorities are representative of the decisions made by numerous arbitrators with respect to the adoption of a wide range of COVID policies.

> Employer counsel provided a summary of 24 relevant decisions claiming that they support the reasonableness of Purolator's Safer Workplace Policy. They are useful in providing the dates of the awards and some highlights of what was decided. I reproduce the summary here.
>
> (a) In *United Food and Commercial Workers International Union, Local 333* v *Paragon Protection Ltd.*, dated November 9, 2021, arbitrator von Veh upheld a policy which subjected unvaccinated employees to additional health and safety precautions, and liable for disciplinary action up to and including dismissal. Arbitrator von Veh rejected the union's argument that a vaccination policy constituted forced vaccination.
>
> (b) In *Bunge Hamilton Canada, Hamilton, Ontario* v *United Food and Commercial Workers Canada, Local 175*, dated January 4, 2022, Arbitrator Herman upheld a vaccination policy which required an employee to attest to their vacation status, or be placed on unpaid leave.

The decision of Arbitrator Herman stands for the following propositions:

(i) COVID-19 represented a serious health and safety risk.

(ii) In assessing the reasonableness of a policy, the context at the time of the implementation is critical.

(iii) A policy requiring disclosure of vaccination status or proof vaccination does not constitute an unreasonable intrusion upon the privacy of an employee.

(iv) An employer is justified in implanting a vaccination policy in compliance with third-party requirements.

(v) An employer is not required to split its workforce where doing so would cause operational problems for the employer.

(vi) An employer can rely on the precautionary principle to prevent the spread of COVID-19 in the workplace.

(c) In *Maple Leaf Sports and Entertainment* v *Teamsters, Local 847*, dated January 12, 2022, Arbitrator Jesin upheld a policy which placed unvaccinated employees on unpaid leave and might be subject to termination. The decision of Arbitrator Jesin stands for the following propositions:

(i) An employer is entitled to require disclosure of an employee's vaccine status to the extent necessary to administer its vaccination policy.

(ii) Being vaccinated against COVID-19 can be a necessary qualification for performance of work.

(d) In *Power Workers' Union* v *Elexicon Energy Inc.*, dated February 4, 2022, Arbitrator Mitchell upheld a vaccination policy which required an employee to attest to their vacation status, or be placed on unpaid leave and be subject to discipline up to and including termination. Arbitrator Mitchell held the policy was consistent with the employer obligations under the *Occupational Health and Safety Act* to take every reasonable precaution in the circumstances for the protection of a worker. Arbitrator Mitchell's decision stands for the following propositions:

(i) The nature of an employer's business is a crucial consideration in deciding whether a policy is reasonable. An employer who provides an essential service is entitled to enact policies to ensure a healthy workforce to be able to deliver such services.

(ii) The precautionary principle and the statutory codification thereof justifies the implementation of a vaccination policy.

(iii) In striking an appropriate balance between rights and interests of the employer, and rights and interests of employees, the basis upon which an employee objects to vaccination is important. An employee's interests can be less significant if there is a lack of objective reasonableness behind the objection.

(iv) An employer has an independent statutory obligation to take every reasonable step to protect the health and safety of its employees. An employer cannot defer to the government, and decline to act simply because the government has not required

it to do so.

(v) The arrival of Omicron not only did not undermine the reasonableness of a vaccination policy but highlighted its importance.

(vi) What policies other employers may adopt is not relevant to an arbitrator's decision whether a particular policy is reasonable.

(e) In *Coca Cola Canada Bottling Inc.* v *Teamsters, Local 213*, dated July 11, 2022, Arbitrator Noonan held a policy which led to the suspension without pay and termination of unvaccinated employees was reasonable. The decision of Arbitrator Noonan stands for the proposition that, in the absence of scientific certainty, the best evidence available to an employer is guidance from qualified public health officials.

(f) In *Toronto District School Board* v *CUPE, Local 4400*, dated March 22, 2022, Arbitrator Kaplan held a vaccination-or-unpaid leave policy was consistent with section 7 of the *Canadian Charter of Rights and Freedoms*, and a reasonable exercise of management rights. The decision of Arbitrator Kaplan stands for the following propositions:

(i) Section 7 of the *Canadian Charter of Rights and Freedoms* is not implicated in a mandatory vaccination policy.

(ii) The assessment whether a vaccination policy is reasonable must be done in accordance with expert opinion.

(iii) An employer may implement a vaccination policy pursuant to both its statutory obligations under the occupational health and safety legislation, as well as its management rights clause.

(g) In *BC Hydro and Power Authority* v *IBEW, Local 258*, dated March 31, 2022, Arbitrator Somjen held a vaccination-or-unpaid leave policy was reasonable. The decision of Arbitrator Somjen stands for the following propositions:

(i) A precautionary approach to the pandemic was justified. An employer was not required to wait until the negative consequences of COVID-19 were felt before acting.

(ii) An Arbitrator should rely on public health guidance in deciding whether the requirement of vaccination is reasonable.

(h) In *Extendicare Lynde Creek Retirement Residence* v *UFCW, Local 175*, dated April 1, 2022, Arbitrator Raymond held a vaccination policy which placed unvaccinated employees on an unpaid leave of absence and made them subject to further disciplinary action to be reasonable. The decision of Arbitrator Raymond stands for the proposition that an employer has an independent right to implement workplace vaccination policies, and loosening or removal of public health requirements does not render an otherwise reasonable policy unreasonable.

(i) In *Maple Leaf Foods Inc.* v *UFCW, Local 175*, dated April 10, 2022, Arbitrator Chauvin held a vaccination-or-unpaid leave policy with option for termination was reasonable. The decision of Arbitrator Chauvin stands for the following propositions:

(i) The nature of the workplace is an important factor in deciding whether a vaccination policy is reasonable.

(ii) The precautionary principle and its statutory recognition are of paramount importance.

(iii) A vaccination policy does not violate an employee's privacy rights or bodily autonomy.

(iv) The arrival of the Omicron variant does not render a policy unreasonable.

(v) Loosening or removal of public health restrictions does not make an otherwise reasonable policy unreasonable.

(j) In *Canada Post Corporation* v *Canadian Union of Postal Workers*, dated April 27, 2022, Arbitrator Jolliffe held a policy which required all employees to attest to their vaccination status, and placed those who were not fully vaccinated on an unpaid leave was reasonable. The decision of Arbitrator Jolliffe stands for the following propositions:

(i) In the case of differing expert opinion, the testimony of an expert with medical education, experience, and leadership should be preferred.

(ii) The arrival of the Omicron variant, far from removing the need of the vaccination policy, made such a policy all the more necessary.

(k) In *CKF Inc.* v *Teamsters Local Union No 213,* dated May 25, 2022, Arbitrator Matacheskie held it was reasonable for the employer to remove unvaccinated employees from the workplace by placing them on an unpaid leave of absence. The decision of Arbitrator Matacheskie stands for the following propositions:

(i) The relevant question is not whether vaccination had reduced effectiveness, but whether there was evidence available to an employer that vaccination was not effective in preventing infection with Omicron.

(ii) An employer is justified in considering public health guidance, including orders from British Columbia's Provincial; Officer of Health, which continued to state unvaccinated individuals are at a higher risk of transmitting COVID-19 to others.

(iii) The application of the precautionary principle supports the reasonableness of a vaccination policy.

(iv) The standard of decision making for an employer is not correctness, but reasonableness.

(l) In *Alectra Utilities Corporation* v *Power Workers' Union*, dated June 9, 2022, Arbitrator Stewart held a vaccination policy which contemplates disciplinary action for noncompliance was reasonable. The decision of Arbitrator Stewart stands for the following propositions:

(i) The emergence of the Omicron variant not only does not make a vacation policy unreasonable, but, to the contrary, makes it all the more necessary.

(ii) The loosening or removal of public health interventions does not make an otherwise reasonable policy unreasonable.

(m) In *Elementary Teachers' Federation of Ontario* v *Ottawa-Carleton District School Board*, dated June 21, 2022, Arbitrator Flaherty held the removal of unvaccinated and unexempted teachers from the workplace was a reasonable exercise of management rights. The decision

of Arbitrator Flaherty stands for the following propositions:

(i) Whether other employers in the same industry have implemented a vaccination policy is an irrelevant consideration.

(ii) A policy is not unreasonable because it has exceeded what is required by the government.

(iii) The loosening or removal of public health interventions does not make an otherwise reasonable policy unreasonable.

(iv) Vaccines were safe and effective, and application of the precautionary principle supporting a vaccine policy.

(n) In *UNIFOR, Local 973* v *Coca-Cola Canada Bottling Ltd.*, dated March 17, 2022, Arbitrator Wright upheld a vaccination policy which put unvaccinated employees on an unpaid leave of absence. Arbitrator Wright's decision stands for the following propositions:

(i) The nature of a workplace, and the risk of transmission of COVID19 in that workplace, is a relevant consideration in deciding whether a vaccination policy is reasonable.

(ii) A vaccination policy can be reasonable even if its application would place an employee in a difficult decision.

(o) In *Wilfred Laurier University* v *United Food and Commercial Workers Union*, dated July 22, 2022, Arbitrator Wright held a policy pursuant to which to employees were placed on unpaid leave for failure to be fully vaccinated was reasonable. The decision of Arbitrator Wright stands for the following propositions:

(i) An employer is justified in relying on guidance from public health officials

(ii) The loosening or removal of public health interventions does not make an otherwise reasonable policy unreasonable.

(p) In *Toronto Professional Fire Fighters' Association, I.A.A.F. Local 3888* v *Toronto (City)*, dated August 26, 2022, Arbitrator Rogers held a vaccination policy requiring fully vaccinated status as a condition precedent for a fire fighter's continuing to report for work was and continued to be reasonable. The decision of Arbitrator Rogers stands for the following propositions:

(i) The nature of the workplace is an important consideration. In a diverse and unpredictable environment, the hierarchy of controls and the precautionary principle justify a vaccination policy.

(ii) There is no doubt that vaccination is a significant contributor to an employer's ability to control workplace transmission of COVID-19.

(iii) An employee's reasons for declining vaccination are an important consideration in striking the appropriate balance.

(q) In *Coast Mountain Bus Company* v *Unifor, Local 111*, dated September 19, 2022, Arbitrator de Aguayo upheld a policy that placed unvaccinated employees on an unpaid leave. The decision of Arbitrator de Aguayo stands for the following propositions:

(i) An employer is entitled to rely on the effectiveness of vaccination against serious illness to justify a vaccination policy.

(ii) An employer is justified in relying on the precautionary principle.

(iii) An employer is justified in relying on public health guidance.

(r) In *Coca-Cola Canada Bottling Limited* v *United Food and Commercial Workers Union Canada, Local 175*, dated September 12, 2022, Arbitrator Herman upheld a policy that placed unvaccinated employees on unpaid leaves, even after Omicron became the prevalent variant.

(s) In *British Columbia Rapid Transit Company Ltd.* v *Canadian Union of Public Employees, Local 7000*, dated October 13, 2022, Arbitrator Noonan held removal of public health mandates did not render an otherwise reasonable policy unreasonable.

(t) In *Cameco Corporation, Port Hope Facility* v *United Steelworkers, Locals 8562 and 13173*, dated November 14, 2022, Arbitrator Chauvin held a policy that placed unvaccinated employees on an unpaid leave, and which terminated them after 6 weeks, was reasonable.

(u) In *Toronto (City)* v *Toronto Civic Employees' Union, CUPE, Local 416*, dated November 21, 2022, Arbitrator Herman held a policy which required employees to be fully vaccinated against COVID-19 was reasonable. The decision of Arbitrator Herman stands for the proposition an employer is not limited to prevention of transmission of COVID-19 in the workplace to justify a vaccination policy. Pursuant to its statutory obligations, an employer may consider the consequences of an infection on an employee in deciding whether to implement a vaccination policy.

(v) In *Unifor, Local 1999* v *Reliance Comfort Limited Partnership*, dated January 2, 2023, Arbitrator Rogers upheld a policy according to which an employee who remained unvaccinated was liable to actions up to and including, but not limited to, restricting access to the workplace, placing the employee on an unpaid leave of absence, and/or modifying or terminating their contract of employment.

(w) In *Lakeridge Health* v *CUPE, Loal 6364*, dated April 26, 2023, Arbitrator Herman held an employer was justified in requiring employees to be vaccinated and that it was reasonable to place unvaccinated employees on an unpaid leave of absence. Importantly, Arbitrator Herman found that in certain circumstances, continued refusal to be vaccinated may treated as disciplinary misconduct and justify termination of employment.

(x) In *Central West Local Heath Integration Network* v *Canadian Union of Public Employees, Local 966*, dated June 29, 2023, Arbitrator Goodfellow held a vaccination policy which contemplated dismissal for non-compliance was reasonable.[32]

[79] I conclude that the University was entitled to act, according to the precautionary principle, to protect the health and safety of their workplace. However, I find that the *Emergency Regulations* adopted in Saskatchewan impose an obligation on employers to provide a testing alternative to

[32] *Supra* footnote 23 at para. 319

mandatory vaccination policies. The University, in pursuing their legitimate interest in workplace health and safety, decided to abandon this testing alternative in January 2022. In doing so, it relied on both expert evidence and wide-ranging set of interests but failed to consider:

a) the *SEA Amendment* and *Emergency Regulations*;

b) its unique labour relations obligations to unionized employees; and

c) the availability of less intrusive alternatives that would also have satisfied their health and safety objectives in the workplace.

[80] I find that in all of the circumstances, the University's Mandatory Vaccination Policy was unreasonable.

2. If the policy was reasonable, whether its application to the grievors was reasonable.

[81] Having concluded that the Mandatory Vaccination Policy was unreasonable, it may not be necessary to resolve whether that policy was applied reasonably to the individual grievors. Nonetheless, the parties made substantial arguments on this question that deserve to be evaluated and doing so will provide additional clarity regarding the appropriate balancing of interests in this case.

[82] The Union argues that, even where an employer policy is found to be reasonable, it must still be applied reasonably to the individual grievors. The Union submits that there were available accommodations that could have been, and therefore must have been, extended to the grievors before they were disciplined by being placed on an indefinite unpaid leave. The Union argues that disciplining the grievors by placing them on an unpaid suspension was unreasonable.

[83] The University claims that it was not required to make attempts to accommodate the grievors. It relies on the employer's general authority to dictate the location of an employee's work and the conclusion of Mr. Coller that the grievors were required to be able to access campus, and thus

comply with the Mandatory Vaccination Policy, as a component of their work duties. The University also maintains that the grievors were not disciplined when they were placed on unpaid leave.

[84] Whether the unpaid suspensions at issue here were disciplinary in nature is not essential to this award. Regardless of the attributed reason for placing the grievors on suspension, I have held that the policy rationale for doing so was unreasonable.

[85] That said, the Union and the Employer both made submissions on this point and the Union argues that the failure to invoke the disciplinary procedures laid out in the CBA render the suspensions unreasonable, so this argument should be addressed.

[86] The test for whether an employer's action is disciplinary in nature, or whether it is "disguised discipline" as it is referred to in some authorities, was established in *Dufferin-Peel Roman Catholic Separate School Board* v *Ontario English Catholic Teachers' Association*.[33] There, Arbitrator Knopf laid out the following criteria:

a) whether the employer intended to impose discipline;

b) the impact upon the employee's career;

c) the employees [sic] stated intention as to whether the document would be relied upon to support disciplinary action in the future;

d) whether the alleged incident could amount to culpable behaviour;

e) whether there was an intent to punish or correct undesirable behaviour through the imposition of the sanction;

f) whether the substance of the document is an expression of employer disapproval

[33] 1998 CanLII 19057 (*Dufferin*)

(non-disciplinary) or a punitive measure intending to correct (disciplinary); and

g) whether the document sets out standards to meet in the future and is prospective in nature (non-disciplinary) or has an immediate effect upon the grievor (disciplinary).[34]

[87] In my view, an unpaid suspension of indefinite duration is presumptively disciplinary in nature. Moreover, this was not a case where the employee was asked to remain away from the workplace while a matter was investigated or some other administrative purpose achieved.

[88] The University argues that it did not intend to impose discipline on the grievors by suspending them. It maintains that the suspension was not intended to negatively impact on their career, that the suspensions would not be relied upon to support further disciplinary action in the future. Rather, the University says that the excluding the grievors was simply a necessary health and safety measure.

[89] The Union argues that the University intended to punish or correct the undesirable behaviour of the grievors–namely their refusal to become vaccinated. It says that the University made its disapproval of the grievors' choice plain and that its primary purpose was to ensure that employees became vaccinated, not to protect the safety of the workplace.

[90] I find that the unpaid suspensions here had a disciplinary character. The University expressed, on numerous occasions, their desire that employees become vaccinated, even when the policy allowed for a testing alternative. It was made clear to staff that a response, up to and including termination, could follow as a result of their refusal to comply with the University's vaccination policies. The impact on the grievors here was significant–they lost their income for an indefinite period with no guarantee that the Employer would allow them to return to work. These suspensions must be justified with a view toward whether the discipline imposed was justified in the circumstances.

[91] Returning to whether the application of the policy to the grievors was reasonable, *Association of Justice Counsel* makes clear what *Irving* established–"the availability of realistic, but less intrusive,

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[34] *Ibid*

means to meet organizational needs may be a relevant consideration in the balancing of interests assessment, alongside the nature of the employer's interests and the policy's impact on employees."[35]

[92] The Union relies on *Teal-Jones Group* v *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers' International Union, United Steelworkers, Local 1- 1937*[36] and *Alberta Union of Provincial Employees* v *Alberta*[37] to provide further support for the argument that the Employer is required to make efforts to mitigate the impact of their policy on employees:

> What is really at issue in this proceeding is not that Michener adopted a single site policy. It is the manner in which they did so, and the fact that nothing was done to attempt to mitigate the effects on employees whose wages from Michener were insufficient to support their families and who were now denied the opportunity to supplement those wages with secondary employment.
>
> I am satisfied on the evidence before me and based on jurisprudence provided to me that Michener was not unreasonable or unfair in adopting a single site policy for its employees. Covid 19 was dangerous especially to vulnerable individuals in care settings. The CMOH relying on public health experience and resources issued a strong recommendation to facilities such as Michener that they adopt such a policy. To protect its residents and its staff, Michener adopted the policy recommended by the CMOH and cannot be faulted in doing so. Clearly in these extraordinary circumstances extraordinary precautions were appropriate. While generally speaking, workers' lives outside of work in the absence of specific restrictions in a Collective Agreement are not subject to control by an employer, outside employment which affects performance can be regulated by an employer. That is acknowledged in the Public Servant Code of Conduct. While I reject the submissions of the Employer that the secondary employment in this instance may result in poor performance as a basis for rejecting the grievance, I do agree that the safe delivery of care services to these vulnerable residents is an essential component of the work performed by these employees, and that working at more than one congregant living facility was identified as creating a risk to vulnerable residents and to staff. That in itself justifies the restriction on outside employment in these perilous times.
>
> However, I am not satisfied on the evidence before me that the manner of implementing the policy and the failure to take any steps to mitigate the effect on adversely affected employees was reasonable and fair.
>
> What Michener did significantly impacted the lives of employees outside the hours they were obliged to work at Michener. In *Association of Justice Counsel*, the Court observed that an important aspect of the balancing exercise is whether the policy affected employees lives outside of their normal working hours. While Michener did provide some jurisprudence respecting the right of the Employer to impose some conditions on outside employment, the theoretical possibilities alluded to by the Employer were not demonstrated to be applicable in this case. While the Employer did raise the fact

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[35] *Supra*, footnote 6

[36] 2021 B.C.C.A.A.A. No. 138 (*Teal-Jones*)

[37] 2021 CanLII 36173 (*AUPE*)

> that outside employment could be restricted in the case of performance concerns, there was no evidence to the effect that such a concern played any role in the decision with respect to the implementation of the single site policy or any evidence at all that there had been any specific identification of such performance concerns with respect to any individual. If such was the case the appropriate method of dealing with such a concern is to deal with the individual whose performance is at issue rather than utilizing it as a defence of a blanket prohibition on outside employment.
>
> In imposing its policy Michener did not appear to involve the Union in any discussions about how to implement the policy in a fashion which would have a less draconian effect on its employees. Michener was either unaware or paid no attention to the mitigative steps which applied to facilities mandated to impose a single site policy. While Michener consulted with Alberta Health Services on what secondary employment would be permissible inthe face of the CMOH's strong recommendation there was no consultation or discussion with other operators or AHS or with the government department responsible for its facility with respect to how to mitigate the effect on the workers denied secondary employment. On the evidence it appears that the issue of that adverse impact on its employees was not even considered by Michener until the Alberta Labour Relations Board complaint in late June 2020. Even then its response focussed on the inconsistency and uncertainty of the employee evidence. In the final result it decided to continue with its method of filling vacant shifts as it had in the past even though it appears that at least some assignment of those vacant shifts to affected employees was possible because it in fact occurred.[38]

[93] I agree with the Union that, especially given the significant employee interests at stake, the University was required to consider and attempt to mitigate the impacts of the Mandatory Vaccination Policy on the grievors.

[94] In *Consumers' Co-op*, Arbitrator Ish held that the employer lacked just cause for the termination of two employees who had refused to comply with a vaccinate or test policy. In so concluding, he addressed the need for employers to consider less intrusive alternatives when implementing a unilateral policy which implicates employee rights:

> The main reason for this conclusion is that the employer's response ignored a fundamental finding of the Court in Irving Pulp & Paper. As Arbitrator Rogers set out in the Toronto Firefighters 2022 case, at para. 312, in reference to Irving Pulp & Paper: "The Court accepted that, in determining reasonableness, labour arbitrators would 'assess such things as the nature of the employer's interests, any less intrusive means available to address the employer's concerns, and the policy impact on employers'." CCRL's interests could have been addressed by the continued removal of the two non-compliant grievors from the workplace without resort to dismissal from employment. Although the financial impact on the employees would be comparable in an unpaid leave of indefinite duration, it would be less than the ultimate impact of the termination of their employment. It is difficult to see what the prejudicial impact on the employer would have been by allowing Mr. Rubin and Mr. Shuparski to remain on an unpaid leave of absence. When the interests of these two employees are balanced against the interests of the employer, they tilt in favour of the employees because they

[38] *Ibid* at para. 96-98

> ultimately would sacrifice considerably more than would the employer. This lack of balance leads me to conclude that the preferred course of action would have been simply to allow the grievors to remain on an unpaid leave of absence. I arrive at this conclusion aware that the reasons for non-compliance by the grievors were not overly compelling since submitting to the relatively benign rapid antigen test minimally affects interests of bodily integrity or personal privacy. Notwithstanding this factor, in determining liability only at this stage (as requested by the parties) the balance of interests operates in favour of the grievors.
>
> It is true, as the employer witnesses attested to, when the request for unpaid leaves of absence was made by the Union President, and at the time of the terminations of the grievors, it was impossible to know with any certainty how long the COVID Pandemic would continue and how long it would be necessary to continue the employer's Vaccination Policy. Nevertheless, in the days surrounding the termination of the grievors, the Premier of the province publicly indicated that the days of COVID restrictions were likely coming to an end (see para. 27 above). Also, at the time of the terminations Ms. Dagnone in a communication to all refinery staff on January 25, 2022, included the following sentence: "We do anticipate the situation will improve by mid to end of February". While it is correct that it was not known how long the restrictions would continue, they were perceived to be temporary.[39]

[95] Although the University delegated the decisions regarding individual employee work arrangements to their departments and managers, the University did not instruct that any efforts be made to accommodate individuals who were not in compliance with the Mandatory Vaccination Policy. In contrast to this obligation, Mr. Coller testified that there was no effort made to accommodate the grievors.[40] It appears that the University did not consider what, if any, efforts could be made to mitigate the effects of the Mandatory Vaccination Policy on employees.

[96] The question of whether the Employer had available a less intrusive means of achieving the objective of workplace safety, and whether it acted appropriately to mitigate the impact of the Mandatory Vaccination Policy are questions of fact. I will now consider whether it was reasonable for the University to place the grievors on unpaid leave rather than make some form of accommodation.

a) Alternatives to Unpaid Leave

[97] The Union argued that the University could have easily accommodated the grievors with

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[39] *Supra* footnote 12 at para. 130-131

[40] Testimony of Jon Coller

minimal disruption to its operations. It offered two alternatives to placing the grievors on unpaid suspension, either of which the Union concedes would have been reasonable.

[98] The first alternative was to simply permit the grievors to continue under the vaccinate or test policy as it had done up until that point. For the reasons given earlier in this award, the University was required to provide this testing alternative under the *Emergency Regulations* in force at the time.

[99] The second alternative requested by the grievors before the adoption of the Mandatory Vaccination Policy, was that they be carved out of the policy by being allowed to work exclusively from home.

[100] Mr. Andrew and Mr. Ward both testified about their employment with the University and their workplace responsibilities throughout the pandemic.

[101] Mr. Andrew worked as a senior Network Programmer Analyst. He worked in the Information Communications Technology (ICT) department for forty-three years.

[102] Mr. Andrew testified that he was primarily responsible for the phone system, which is based on the computer network. Before the pandemic, he had remote access to his work systems, but he also worked on campus, particularly if he needed to respond to an unexpected issue.

[103] Mr. Andrew testified that, at the outset of the pandemic, he was instructed to work from home, although his status was set to "hybrid." Mr. Andrew accessed campus approximately five times between March 13, 2020 and September 2021.

[104] Mr. Andrew met with David Scarfe in December of 2021, when they discussed Mr. Andrew's non-compliance with the Mandatory Vaccination Policy that would soon be going into effect. Mr. Andrew was advised to submit a request to change his status to remote work–which he did. That request was denied by ICT, who consulted with Human Resources.

[105] Mr. Ward was a Network Programmer Analyst in the ICT Department for approximately thirteen years. He testified that he specialized in DNS and DHCP, which facilitate network traffic. He testified that he was responsible for the operation and maintenance of these systems and would work with the system vendor to resolve issues. Before the pandemic, he primarily worked on campus during regular hours, although he infrequently had to attend to issues that took place after hours.

[106] Mr. Ward was similarly instructed to begin working from home in March of 2020. He too met with David Scarfe in December of 2021 to discuss his unvaccinated status. Mr. Ward was advised to submit a request for an exemption, but reported that he had already done so and it had been rejected.

[107] Both grievors testified that they had worked in an essentially fully remote capacity from March of 2020 until December of 2021 and could have continued to do so with few if any changes to their work routines.

[108] The Union argued that the possibility that the grievors would need to attend campus was speculative and unlikely. It claimed that there had been no issues with this work arrangement and were unlikely to be any in the future. It also suggested that, if there was an issue that required a technician to be on campus, that other individuals in the department would have been available.

[109] The Union also claims that the grievors were not required to be available outside work hours, and thus had no obligation to be available on an emergency basis.

[110] The Union points out that the grievors, if placed on an unpaid leave, would be similarly unavailable to attend to all of their regular work duties in addition to being absent if they were called on to attend campus in-person. In either case, the grievors would not be on campus.

[111] The Union notes that the return to campus was delayed past January 4, 2022, until February 7, 2022. As a result, during almost the entire length of their unpaid leave, in-person classes had not resumed and most employees were still working remotely.

[112] The Union also notes contradictory statements made by President Stoicheff and Mr. Weimer in which they implied that employees would be able to continue to work remotely where that was possible.

[113] The University advanced the argument, relying on testimony from Mr. Coller and Ms. Poezler, that neither of the grievors could have been accommodated by being permitted to work from home.

[114] Mr. Coller testified that ICT employees, such as the grievors, may be required to access campus during an emergency. Given the importance of the IT systems on campus, Mr. Coller expressed his view that technicians needed to be available to resolve any issues as they arise.

[115] Mr. Coller testified that each of the grievors were primarily responsible for certain systems and that it could be difficult or undesirable if another analyst needed to fill in for them.

[116] The University highlighted a number of scenarios where the grievors would be required to attend campus in person in order to complete their duties and stressed that, owing to their unique skill-sets and responsibilities, other employees would not be able to easily fill in for them.

[117] In *BC Hydro and Power Authority and Powertech Labs Inc.* v *MOVEUP (Canadian Office & Professional Employees' Union Local 378*,[41] Arbitrator Somjen considered this precise issue. His commentary is persuasive and is worth quoting at length:

> During the height of the pandemic, in keeping with public health directions, many of the MoveUP employees at BC Hydro worked from home. A smaller percentage of the Powertech employees also worked from home.
>
> In 2021 both Employers anticipated that many of the COPE employees working remotely could return to some office work, but this plan was delayed due to the advent of the Omicron variant in late 2021.[42]
>
> ...

[41] 2022 CanLII 91093 (*MoveUp*)

[42] *Ibid* at para. 12-13

As set out above, the majority of BC Hydro MoveUP Employees are "mapped" to a hybrid, field or resident position. Only a small minority are classified as remote.

Most remote workers are still required to attend at the office at least one day per week. The exceptions are MoveUP Employees classified as "remote" who work in the following groups:

(a) 6 payroll employees (required to attend the office one day every two weeks);

(b) Approximately 145 Customer Service Account Representatives (required to attend the office once every two weeks); and

(c) Conservation and Energy Management Program Team (who are required to attend the office twice per month).

At Powertech, 20 MoveUP Employees are presently working remotely for one or more days per week pursuant to the Flexible Work Model. No Powertech MoveUP Employees work entirely remotely.[43]

...

Notwithstanding the delay in implementing the Flexible Work Model (the "Model"), MoveUP employees who had been working remotely were required to be vaccinated by November 23, 2021, and if they refused were placed on unpaid leave, even though many would have been able to continue working remotely if they were vaccinated (until April 2022). The Model was implemented on April 11, 2022.[44]

...

The Employers argue that employees are not being "forced" to take a vaccine but have a choice to be vaccinated or placed on a leave of absence without pay. As the Union argues, this understates the reality of the employees' situation.

It is true that employees are not physically forced to take a vaccine but if they refuse and do not have an accommodation, they are placed on an unpaid leave of absence. This has an economic and social impact that makes the Policy more coercive than a simple "choice". This has been recognized in other decisions, as in Elexicon at paragraph 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

[43] *Ibid* at para. 13

[44] *Ibid* at para. 14

> 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.

This issue was also addressed in the IBEW case at paragraph 45.

> At paragraph 19 of the Employers' submission they state:
>
> Further, even remote work is not "safe" for MoveUP Employees. While the chance of workplace transmission is obviously reduced for an employee that never reports to a BC Hydro workplace, COVID-19 continues to spread rapidly in British Columbia. As will be explained further below, unvaccinated MoveUP
>
> Employees working at home may still contract COVID-19 in the community and suffer serious adverse health consequences, even death. Lengthy absence or isolation periods may result in business interruptions for the Employers. There is a "real benefit" to the Employers in having a vaccinated workforce, regardless of where or how employees work.

This suggests that remote work is less safe for employees than working in person together in an office, if vaccinated. The Union argues the opposite: i.e. that working at home, unvaccinated, is more safe because employees can still get Covid in an office environment while vaccinated, but at home they are not exposed to, or exposing other workers.

I do not have before me evidence that compares the relative safety of working at home, unvaccinated, with working in an indoor environment with the vaccination. However, I do not need to determine which of these options is safer; my role is to determine whether there is a practical, less intrusive method that meets the Employers' health and safety concerns.

I can conclude that working at home unvaccinated is less intrusive to the employees and goes a long way to meeting the Employers' concerns.

The fact that many MoveUP employees worked from home from March 2020 through April 2022 demonstrates that these Employers recognized the feasibility of working remotely before and even after the vaccine mandate (between November 23, 2021, and April 11, 2022).[45]

...

The Employers say they have a management right to determine how and where work is performed. I agree with this principle in general terms, even where (as here) there is no management rights clause in the collective agreement. However, as the Union argues, the management right to

[45] *Ibid* at para. 28-32

determine where and how to work is not absolute.

Where there is a unilateral policy, as here, requiring mandatory vaccination, it will be subject to the KVP consideration of reasonableness, even though there is a management right to determine such policies as well as where and how employees should work.

That analysis brings us back to whether the Policy should apply to employees who may be able to work safely from home or outdoors, with appropriate safeguards.

To say management has the right to assign a work location does not answer the question of whether it is reasonable to require all employees to work in an office environment when unvaccinated employees may be able to work safely from home or outdoors.

I accept the Employers' argument that there are advantages to employees working in an office situation at least some of the time but those advantages to the Employers and to employees must be balanced against the significant intrusion on unvaccinated employees.[46]

...

The Employers argue that all employees must be vaccinated because even employees working from home may be required to attend at an office in cases of an emergency. That is a valid concern, but it does not address the circumstances of the 47 employees on leaves. If they were vaccinated, they would be able to attend at an office if required. Since they are on leaves, they are not able to attend in an emergency or at all. If they were allowed to work from home, they could do their regular work but not attend an office in an emergency. In either case these 47 unvaccinated employees cannot attend in an emergency.[47]

...

I agree with the Employers' submission that they have a strong obligation to keep other employees, contractors and the public safe where there may be in person interaction with unvaccinated employees. That was part of the rationale for my decision in IBEW. However, the few cases that review working at home as an alternative to working in person with other employees (for example ESA and Elexicon) find that working at home may be a reasonably less intrusive method of addressing the employer's concerns in some situations. Working at home for unvaccinated employees or working outside with no contact with other employees, contractors or the public (if possible) meets many of the Employer's concerns for the safety of those other persons or these employees.

...

The Employers argue that imposing mandatory unpaid leave is reasonable for unvaccinated employees. I agree that is an appropriate response if there is no practical, less intrusive alternative. The Union argues there is.

I have carefully considered the arguments and excellent submissions of all parties. I conclude that carve outs are not warranted in cases where employees work or live in camp settings such as Site C, or where they must work in offices, labs or other indoor environments with other employees or even if they work outside where they have in person contact with other employees, contractors or the public.

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[46] *Ibid* at para. 37-42

[47] *Ibid* at para 51

> However, I find that carve outs are appropriate and practical for unvaccinated employees who, during the height of the pandemic worked exclusively from home and can continue to do so. This may require some adjustment to the preferred work arrangements of the Employers including under the Model.
>
> I also find that carve outs are appropriate for unvaccinated employees who work outside and have no in person contact with other employees, contractors or the public.
>
> To the extent that the Policy did not provide these less intrusive measures, it is unreasonable, for this small number of employees in the MoveUP bargaining units.[48]

[118] I adopt the views of Arbitrator Somjen. There, as here, a relatively small number of employees sought an accommodation by being permitted to continue working from home. The employees in MoveUp had worked remotely from March 2020 until April 2022, which provided support for the argument that their work duties could be performed remotely. The same is true of the grievors in the present case.

[119] The employer in MoveUp rightly pointed out that it has a managerial right to designate the place of work, but that right is not absolute. There is no doubt that accommodating the grievors may impose some minor difficulty or speculative harm on the University. However, when weighed against the significant intrusion the University's Mandatory Vaccination Policy has on the grievors, it is the Employer's interest that must yield.

[120] MoveUp also directly addressed a situation in which the employer sought to place the employees on an unpaid leave as opposed to permitting them to continue working remotely. There, the employer argued that employees may need to attend at an office in person in the event of an emergency. The reality is that the grievors in this case were completely unavailable, to attend to their regular work duties or to respond in the event of an emergency, for the entirety of the time they were placed on unpaid leave. This was the consequence of the University's decision not to work with the grievors to find a solution that could accommodate the interests of both parties.

[121] The University was required to consider less intrusive available alternatives, and to take account of employee interests by mitigating the impact of their policy. To the extent that it failed to

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[48] *Ibid* at para. 55-60

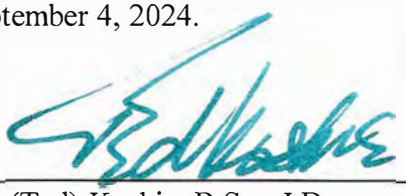
provide reasonable accommodations for the grievors, the policy was unreasonably applied to them.

VI. CONCLUSION

[122] I direct that the Policy Grievance, and the Individual Grievances be allowed, and that each Grievor be made whole in all respects including, but not limited to, lost Wages and benefits for the period they were placed on unpaid leave.

[123] I retain jurisdiction should the parties require additional guidance regarding the within grievances.

Dated at Saskatoon, Saskatchewan on September 4, 2024.



T. F. (Ted) Koskie, B.Sc., J.D.,
Sole Arbitrator