

COVID-19 Related Claims Comparison

C OVID-19 related claims are making their way through the Courts and Human Rights Tribunals. Here are a few that will provide support to employers and service providers who have implemented reasonable vaccination and mask policies.

Ontario

On November 9, 2021, an Ontario arbitrator dismissed a policy grievance challenging a mandatory COVID-19 vaccination policy. The Employer, a security guard company, had required all its employees to be fully vaccinated by October 31, 2021 or face potential disciplinary measures, up to and including termination. The policy was challenged by the Union as being unreasonable.

The Employer employed approximately 4,400 security guards and operated at more than 450 client sites in Ontario. A majority of those client sites had mandatory vaccination policies in place requiring exclusively vaccinated security personnel and, in some instances, excluding all non-vaccinated individuals from those sites.

The Employer introduced its vaccination policy on September 3, 2021. The vaccination policy required that all employees be fully vaccinated by October 31, 2021. For a two-dose vaccine, employees had to receive their first dose by September 30, 2021 and their second dose by October 31, 2021. For a single dose vaccine, employees had to receive the dose by September 30, 2021. For employees assigned to client sites that required all personnel to be fully vaccinated before October 31, 2021, those employees had to be fully vaccinated by that earlier date.

The Arbitrator found that the Employer's vaccination policy was reasonable, enforceable and compliant with the Ontario *Human Rights Code* and the *Occupational Health and Safety Act (OHSA)*. The policy was held to strike an appropriate balance between respecting the rights of employees who had not been, or did not wish to be vaccinated, while respecting a safe workplace for the Employer's staff, clients, and members of the public with whom the Employer's security guards interacted.

The Arbitrator decided that by introducing the policy, the Employer was fulfilling its obligations and responsibilities pursuant to s. 25(2)(h) of the *OHSA* to take "every precaution reasonable in the circumstances for the protection of a worker." Moreover, the Arbitrator held that an employee's subjective perceptions of the COVID-19 vaccine were insufficient grounds for an exemption.

The Arbitrator also discussed and distinguished the mandatory COVID-19 vaccination policy with older arbitration decisions pertaining to policies requiring employees to obtain a flu shot or wear a mask. The Arbitrator held that there are differences between influenza and the COVID-19 pandemic and contrasted the higher infection and fatality rates of COVID-19 compared to the seasonal flu.

Finally, the Arbitrator noted that the Collective Agreement contained a provision that required employees assigned to a work site which had a vaccination requirement to receive such vaccination or be subject to a reassignment. The Employer's unilateral introduction of its vaccination policy was therefore a permissible exercise of management rights pursuant to the Collective Agreement.

This is the first decision that we are aware of where a mandatory COVID-19 vaccination policy was upheld and found to be reasonable. Although the Arbitrator considered unique collective agreement language in this decision, this decision still supports the position that mandatory COVID-19 vaccination policies are reasonable if they comply with the *Human Rights Code*.¹

Alberta

In November 2020, a customer of Costco Wholesale Canada Ltd., Peter Szeles, filed a complaint with the Human Rights Tribunal alleging that Costco discriminated against him on the ground of physical disability when they enforced their mandatory mask policy.

When Szeles arrived at Costco's Edmonton location, he was advised by an employee that he would be required to

¹ Ontario Arbitrator Upholds Employer's Mandatory Vaccination Policy - Mathews Dinsdale & Clark LLP

wear a mask to enter the store. Szeles claimed to have a disability which prevented him from wearing a mask and, accordingly, he was exempt from Costco's mask policy. When the employee offered a face shield as an alternative, Szeles refused and an altercation ensued resulting in the police being called to remove Szeles from the store.

Szeles' complaint alleged that Costco's enforcement of their mask policy infringed on his rights under the *Alberta Human Rights Act*. He argued that the alternative of wearing a face shield was not reasonable because it did not offer protection against transmission of COVID-19. He further submitted that the use of a face shield as an alternative to face masks was stigmatizing, was meant to single him out as a person with a disability and would subject him to humiliation.²

Costco responded that they had developed and implemented their policy for the purpose of maintaining a safe workplace for employees, members and guests. Costco's policy required that a face mask or, alternatively, a face shield be worn in the store. They also offered online shopping and home delivery options. Costco maintained that the policy was reasonable considering the severity and dangers of the COVID-19 pandemic and that the alternatives offered were appropriate accommodations. Further, permitting people to enter the store without a mask or shield would constitute undue hardship.

The Human Rights Officer assigned to investigate the complaint agreed with Costco and recommended the complaint be dismissed. Although Szeles appealed the decision, it was upheld.

The Investigator stated that, although Costco's policy could be viewed as having a negative impact on people with disabilities who could not wear masks, there were certain circumstances where limitations on a person's right to be free from discrimination could be justified. These include cases where the policy was instituted for valid reasons and in good faith with a belief that the policy is necessary and the person cannot be accommodated without undue hardship. To establish undue hardship, Costco would have to demonstrate that they had considered other less intrusive options and made every effort to accommodate Szeles.

Unreasonable Policies Not Enforced

The previous cases found vaccine and mask policies were reasonable under the set of facts presented and did not infringe on the human rights of the claimants. However, if policies are not found to be reasonable, the decision may be different as in the following case.

In the case of Electrical Safety Authority (ESA) and Power Workers' Union (PWU), the Employer's mandatory vaccine policy was found to be unreasonable. The policy required all employees to provide proof of full vaccination by December 22, 2021 under threat of disciplinary action that would include unpaid leave and termination. The ESA's previous policy included an alternative to vaccination where the employee could submit to regular COVID-19 testing instead. The ESA did not provide any evidence that the change in policy was necessary because the Employer was unable to provide a safe workplace with the old rules. The reason for the change in policy was because the ESA did not want to have conflicts with mandatory vaccination policies of third-parties with whom they do business.

The Arbitrator warned that his decision "should not be taken as a vindication for those who choose, without legal exemption, not to get vaccinated".³

The reason for his decision were:

1. Workers could work remotely.
2. Work didn't involve contact with vulnerable populations.
3. Employer had previously permitted regular COVID-19 testing as an alternative to vaccination.
4. Employer had not provided evidence any significant change in the working environment that justified the policy change.

The Arbitrator warned that the COVID-19 pandemic is constantly changing so while a policy may be unreasonable at one point it could become reasonable considering new health information or guidance. This means that the reasonableness of a vaccine policy will be determined considering the current context on a case-by-case basis.

² 2021 AHRC 154 (CanLII) | *Szeles v Costco Wholesale Canada Ltd.* | CanLII
³ <https://mathewsdinsdale.com/ontario-arbitrator-issues-new-award-on-vaccination-policy/>