IN THE MATTER OF A GRIEVANCE under the *Labour Relations Act, 1995* and pursuant to a collective agreement

BETWEEN:

CHARTWELL HOUSING REIT (THE WESTMOUNT, THE WYNFIELD, THE WOODHAVEN AND THE WATERFORD)
(the "Employer")

-AND-

HEALTHCARE, OFFICE AND PROFESSIONAL EMPLOYEES UNION, LOCAL 2220, UBCJA
(the "Union")

Policy Grievance #09-09-21 re Mandatory Vaccination Policy

Before: Gail Misra, Arbitrator

Appearing for the Employer:
John Bruce, Counsel
Mary-Claire Bass, Counsel
Dave Pielas, Director Labour Relations
Terry McCarthy

Appearing for the Union:
Mark J. Lewis, Counsel
Danna Morrison, Counsel
Paula Randazzo, President, Local 2220
Kim Boyle, Vice President and Union Representative
Alvaro Segnitz, Business Representative

Hearings held by videoconference on November 19, 2021 and January 18, 2022

Decision issued: February 7, 2022

DECISION

I. I have been appointed pursuant to section 49 of the *Labour Relations Act, 1995*, to hear a policy grievance filed by the Union on September 8, 2021.

2. The Union grieves on its own behalf and on behalf of its members that the Employer has imposed a mandatory vaccination policy on the employees of the four homes covered by the collective agreement. In particular, the Union claims breaches of Articles 2.02 and 18, and the Employer's past practice. As remedies, among other things, the Union seeks findings of violation of the collective agreement, that the Employer withdraw the mandatory vaccination policy, and full compensation for all those employees adversely affected by the implementation of the policy.

3. As there was no dispute regarding the basic facts underlying the grievance, no evidence was called, but documents were tendered and extensive submissions made. Based on the documents and submissions the facts are detailed below.

FACTS

4. The Westmount, the Wynfield, the Woodhaven, and the Waterford are long term care ("LTC") homes located in south western Ontario. The Union represents Registered Practical Nurses, Personal Support Workers, Restorative Aides, Recreation Workers, Housekeeping staff, Dietary Aides, Laundry staff, and Cooks at these four Chartwell homes, covered by one collective agreement. While the collective agreement expired on June 24, 2020, there is no dispute that it continues in effect due to a statutory freeze until a new agreement is reached. In September 2021 there were 705 employees in the combined bargaining unit.

5. In the past, the Chartwell homes had a "Staff Immunization Program" (the "Immunization Program") in their respective Infection Control Manuals. The effective date of this particular policy was August 2012, but it had most recently been updated in March 2020. Pursuant to the Immunization Program, health care workers at Chartwell homes were "recommended to follow" an immunization schedule that had been outlined by the National Advisory Committee on Immunization ("NACI") and Provincial Vaccination Schedules. The immunization schedules included vaccinations for tetanus and diphtheria; measles, mumps and rubella; influenza vaccines at the beginning of each flu season; Hepatitis B; and Hepatitis A and C.

6. Staff were specifically "encouraged to receive the influenza vaccine each year", and the Immunization Program advised that "staff who are unimmunized will be excluded from work during an influenza outbreak". If a staff member had a medical contraindication to receiving a flu vaccine, they had to provide written documentation to that effect from their physician. Those who refused to get a flu

vaccine had to complete a form and provide it to the Employer to be kept on file. By signing the form the employee agreed that they would be excluded from work during an influenza outbreak, and would only be able to return to work when they had got the flu vaccine and 14 days had elapsed; or, they could prove that they had obtained a prescription for antiviral medication (e.g. Tamiflu or Relenza), and had filled and taken the medication as prescribed; or, the outbreak had been declared over by the Medical Officer of Health or Local Public Health Unit.

7. In a memo dated May 31, 2021, from the Associate Deputy Minister ("ADM") of the Ministry of Long-Term Care, to all LTC home licensees, Erin Hannah noted that while 97% of all LTC residents had been fully immunized, only about 62% of all staff were fully immunized. Among other things, the ADM wrote that "in long term care homes, high vaccination rates also directly protect residents and support the highest quality of life". As such, and in order to "keep the momentum going" she advised that as of May 31, 2021 the Minister of Long-Term Care was issuing a new Directive regarding the "Long-Term Care Home COVID-19 Immunization Policy". All homes were required to have a COVID-19 Immunization Policy for all staff (and some others) which required proof of vaccination against COVID-19, or documented medical reasons for not being vaccinated, or that staff must participate in an approved educational program regarding COVID-19 vaccination. The effective date of the Minister's Directive was July 1, 2021.

8. In response to the Minister's Directive, on June 24, 2021, the Employer promulgated a revised "Covid-19 Vaccination Policy for Staff, Students and Volunteers", which was applicable to all staff working in its LTC residences (the "June 2021 Vaccination Policy"). By a letter dated June 24, 2021, but emailed to all staff on June 25th, the Employer advised staff about this policy; highlighted the requirements of it; highlighted that the deadline was July 30, 2021; and, indicated the consequences of failing to comply with the new policy.

9. In particular, pursuant to the June 2021 Vaccination Policy, Chartwell strongly encouraged all eligible staff to receive a COVID-19 vaccination, unless it was medically contraindicated or there was a valid human rights exception that required accommodation. All existing staff were required to provide the Employer with proof of vaccination by July 30, 2021, or to provide written proof from a physician or nurse practitioner of a medical reason why they could not be vaccinated, or they had to provide proof that they had completed an educational program approved by Chartwell. They were told that if they did not provide proof of one of the three options, they would not be permitted to work or provide services at a Chartwell LTC residence until the requirements had been met. Those who were not fully immunized were required to wear certain personal protective equipment ("PPE"), and to submit to COVID-19 testing prior to each shift.

10. Staff who had received only one dose of a COVID-19 vaccine by the deadline were expected to get their second dose within four months of their first dose, and to provide proof of the second vaccination to the Employer, or to provide proof of a

medical reason why they were not receiving it, or proof of completion of the educational program.

11. The educational program mandated was the "Sunnybrook COVID-19 Vaccine Training Module", which addressed how the vaccines work; vaccine safety related to the development of the vaccines; the benefits of vaccination against COVID-19; the risks of not being vaccinated; and the possible side effects of the vaccines. As well, each person would be asked to meet with a Chartwell Infection Prevention and Control Lead or their manager to discuss vaccine hesitancy.

12. Although the Union was advised by email of the new policy on June 25, 2021, it did not object to the June 2021 Vaccination Policy. As counsel for the Union repeatedly stated in his submissions, HOPE is a union in favour of COVID-19 vaccinations, and would like to see everyone get vaccinated.

13. On August 26, 2021 Chartwell Retirement Residences issued a press release at 10 a.m. indicating that, in a coalition with other national seniors' living operators, including Extendicare, Responsive Group, Revera and Sienna, they were making COVID-19 vaccination mandatory for their respective LTC and retirement home staff across Canada. According to the press release, as of October 12, 2021, staff who were not fully vaccinated would be placed on an unpaid leave of absence, and, as of that date, all staff, new hires, students and agency personnel would be expected to be fully vaccinated. In addition to other rationales for their move to the requirement of mandatory vaccination, the coalition noted as follows in the press release:

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

14. Kim Boyle, the Vice President of the Local, sent Dave Pielas, the Director of Labour Relations for Chartwell, an email (copied to Anthony Faul, Natalie Caputo, and Paula Randazzo) at 11:12 a.m. on August 26, 2021 indicating that she was hearing that some Chartwell managers in the homes were telling staff that there was a mandatory vaccine policy in place and that staff would have to be vaccinated by October 12, 2021 or go on a leave of absence. She asked if that was correct, and if so, that a copy of the policy be sent to her and to the President of the Local, Ms. Randazzo. There is no dispute that this was the first that the Union had heard on this subject, and that the information had come from its members.

15. About an hour later, at 12:23 p.m., Anthony Faul, the Human Resources Manager for Chartwell, responded to Ms. Boyle by email (copied to Mr. Pielas, Ms. Caputo, and Ms. Randazzo) to tell her about the joint press release. He indicated that Chartwell Corporate would send information about the announcement and a copy of the policy to the Union early in the following week. He stated that they appreciated their partnership with HOPE, and looked forward to discussions in the near future.

16. Within six minutes of receiving that message, Ms. Randazzo, the President of the Local, sent a response to Mr. Faul at 12:29 p.m. She reminded him that the Union represented the four homes that are the subject of this grievance, as well as some other Chartwell facilities. She noted that while the Union strongly advocates for all Ontarians to be vaccinated, the law did not yet require it. She also noted that the collective agreements they had with the Chartwell facilities required notice and discussion, which had not occurred. In particular, she noted that the four homes in this case had a collective agreement provision that all new policies must have consultation and agreement of the Union. Finally she stated that the Union would also rely on past practice, and put him on notice that policy grievances would be filed. Ms. Randazzo indicated she would make herself available to meet and/or discuss the issues with the Employer.

17. On the following Monday, August 31, 2021, Mr. Faul, as part of an email, sent Ms. Boyle and Ms. Randazzo and others, a link to the press release as well as attaching a copy of the new Chartwell COVID-19 Policy. He indicated that the policy would be communicated to staff "shortly". The revised Policy was named the "Mandatory Covid-19 Vaccination Policy for Staff, Students and Volunteers" and stated that it would be "Effective September 2021" (the "September 2021 Mandatory Vaccination Policy"). It also specified that the effective date for mandatory vaccination would be October 12, 2021.

18. In the week of August 30, 2021 all staff were advised of the new policy. The September 2021 Mandatory Vaccination Policy applied to all staff, students, volunteers, contract workers, agency staff, physicians, dieticians, and other personal service providers who had direct interaction with residents. It applied not only to Chartwell's Ontario homes, but also those in B.C., Quebec, and Alberta. For existing staff, effective October 12, 2021 all those eligible to receive a COVID-19 vaccine were required to be fully vaccinated, and had to provide proof of one or all required doses or boosters of the vaccines approved by Health Canada. The only alternative was to provide written proof of a medical reason why the person could not be vaccinated, and the effective period for the medical reason (whether permanent or time limited).

19. For those not fully immunized for medical reasons, or those waiting for a second dose, there were enhanced requirements for use of PPE and COVID-19 testing prior to each shift.

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

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

21. The Union filed the policy grievance that is before me on September 8, 2021, and thereafter the parties communicated to set up a Step 2 grievance meeting, which was ultimately held on September 17, 2021.

22. On September 20, 2021 Ms. Randazzo sent Mr. Pielas an email asking if employees who were to be put on a leave of absence effective October 12th would subsequently be terminated from employment on a later date. Mr. Pielas responded that same day to say, on a without prejudice basis, that at that time the Employer's intention was to place unvaccinated employees on an unpaid leave of absence. He indicated that Chartwell would communicate if anything changed.

23. There may have been some further discussion between the parties about the Mandatory Vaccination Policy on September 27, 2021.

24. On October 1, 2021 the ADM for the Ministry of Long-Term Care sent a memo to the LTC home licensees about an "Immunization Policy Update". She indicated that as of August 31, 2021 reporting indicated that 90% of all staff, student placements and volunteers had received at least one dose of COVID-19 vaccine, and 86% were fully vaccinated. Erin Hannah also stated that effective October 1, 2021 the Minister of Long-Term Care had issued a revised Minister's Directive indicating that by November 15, 2021 all existing staff (and others) must provide proof of COVID-19 vaccination, or valid medical exemption. The ADM noted that:

> Moving to a province-wide mandatory vaccination policy is a progressive step that many in the sector have called for, and we know you are well-poised to communicate this rapidly to your teams, residents and families, and ensure that staff are supported to get their first dose as soon as possible in order to meet the November 15th deadline for two doses. <u>Staff, support workers, students or volunteers who choose not to provide proof of vaccination, or proof of a valid medical exemption, by the required date will not be able to attend a long-term care home to work, undertake a student placement or volunteer</u>.
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> (Emphasis in original)

25. As a result of this communication, it became clear that whatever may have been the Union's view about the mandatory nature of the Employer's September 2021 Mandatory Vaccination Policy, as of October 1st the Minister of Long-Term Care had

directed that LTC homes had to have a mandatory COVID-19 vaccination policy for staff and others.

26. As such, the Union indicated at this hearing that it accepts that the Minister, pursuant to his power under s. 174.1 of the *Long-Term Care Homes Act*, *2007,* has through Minister's Directives made COVID-19 vaccinations mandatory for all staff working in long-term care homes, subject only to authorized medical exceptions. The Union is not challenging the constitutionality of the Minister's Directives in this grievance.

27. In addition to the requirement of mandatory COVID-19 vaccination, the October 1, 2021 Minister's Directive also required that LTC home licensees clearly tell everyone affected by the mandatory vaccination policy what the consequences of non-compliance would be. The Directive stated:

> 2.4. Every licensee of a long-term care home shall clearly set out the consequences for individuals who do not provide proof per either subsection 2.1 or 2.2, including that they cannot attend the home for the purposes of working, undertaking a student placement, or volunteering. Any additional consequences shall be in accordance with the licensee's human resources policies, collective agreements, and any applicable legislation, directives, and policies.

28. On October 5, 2021 the Employer sent a letter to each of the bargaining unit members who had not yet complied with the September 2021 Mandatory Vaccination Policy. It reminded the individual that the policy required all eligible employees working at the particular LTC home be vaccinated with an approved COVID-19 vaccine by October 12, 2021. The employee was asked to provide the required written proof of having their vaccination, or that they qualified for a medical exemption. They were told that the education program regarding COVID-19 vaccinations remained available to them. The Employer highlighted in the letter that failure to comply by October 12th would result in the employee being placed on an unpaid administrative leave of absence effective October 13, 2021. The staff member was further warned that "despite being placed on an unpaid administrative leave your continued non-compliance with the policy may result in discipline up to and including the termination of your employment from the Residence".

29. According to the Union, on October 12, 2021, sixteen bargaining unit employees were put on an unpaid administrative leave of absence due to their failure to get vaccinated or provide proof of a medical exemption. They received letters indicating that status, and were told about the Minister's Directive of October 1, 2021, which required staff to be fully vaccinated by November 15, 2021. As such, the Employer extended the deadline to provide proof of being fully vaccinated to November 15, 2021, which, pursuant to the Directive at that time, meant that the proof had to be of having received a second dose of an approved COVID-19 vaccine. As such the employee was advised that within a week of October 13, 2021 they should provide the Employer with an update on their vaccination status. If the

employee was in compliance by then, the Employer would coordinate their return to work. The Employer again reiterated that failure to comply with the policy and the Minister's Directive may result in discipline up to and including termination of employment.

30. On October 12, 2021 the Employer also sent a letter to any employee who had received one dose of a COVID-19 vaccine, and had therefore been permitted to continue working pursuant to the Chartwell policy. The letter advised that in accordance with the Minister's Directive, the employee had to provide proof of having received the second dose of the vaccine by November 15, 2021, or they would be put on an unpaid administrative leave at that point. The Employer also advised these individuals that failure to comply with the policy and the Minister's Directive may result in discipline up to and including termination of employment.

31. By an email dated October 14, 2021 Mr. Pielas advised Ms. Randazzo and others that the Employer had determined that having given employees education on the value of vaccination, as well as warnings about the deadlines for vaccination, and put non-compliant employees on unpaid leaves of absence, the Employer was going to be moving to the disciplinary stage of the September 2021 Mandatory Vaccination Policy. In particular, he indicated that those on leaves of absence would be notified that if they remained non-compliant and were not fully vaccinated by December 10, 2021, their employment would be terminated. He offered to meet with the Union to discuss this matter. It is unclear whether this email message reached Ms. Randazzo or not, but in any event, Mr. Pielas re-sent the same message on October 18, 2021.

32. Following a request from the Union for a response to the grievance, on October 18, 2021 the Employer provided the Union with its response denying the grievance, and asked that the grievance be put in abeyance. By an email dated October 20, 2021, Ms. Randazzo indicated the Union could not do that in light of the Employer's decision to terminate employees for non-compliance with the September 2021 Mandatory Vaccination Policy. Thereafter, on or about October 29, 2021 the Union applied to the Minister of Labour for the appointment of an arbitrator under the expedited arbitration provisions of s. 49 of the *Labour Relations Act, 1995*.

33. On October 18, 2021 the Union also responded to Mr. Pielas' message regarding the prospect of termination of employees. It indicated that the Employer had not discussed the September Mandatory Vaccination Policy with the Union, which it viewed as a breach of Articles 18.4 and 18.5 of the collective agreement, especially as the policy had a disciplinary component that apparently included termination of employment. In the Union's view, this represented a significant change from the former policy.

34. On October 20, 2021 the Employer sent all employees who were non-compliant with the September 2021 Mandatory Vaccination Policy a letter indicating that the employer's records continued to show that the employee had not provided proof of

vaccination or proof of medical exemption. It again reminded employees of the November 15, 2021 Minister's deadline for mandatory vaccination of LTC staff. The Employer requested that the employee advise it within two weeks of the date of the letter of their vaccination status, and it reminded the employee that the COVID-19 vaccination education program was still available to them. The letter gave the employee notice that by December 10, 2021 all staff had to be vaccinated as required by the Policy, as well as the Minister's Directive, and that continued non-compliance *would* result in termination of employment. This was the first clear warning to non-compliant employees that their employment would be terminated if they remained unvaccinated.

35. On November 4, 2021 the ADM for the Ministry of Long-Term Care sent LTC home licensees a memo advising that all LTC staff were being priorized for booster COVID-19 vaccinations in light of the NACI recommendation due to gradual waning immunity after 6 months of receiving the second dose of the vaccine. By that point, residents in LTC homes had already been given the booster shot.

36. The memo went on to indicate that one of the changes to the Minister's Directive issued that day was as follows:

> The Directive will be updated to give staff, support workers, students, and volunteers who show proof of a first dose on or by November 15 until December 13, 2021 to show proof of their second dose. This change reflects 8 weeks (rather than 4 weeks) from the date individuals would have needed to receive their first dose in order to meet the November 15 deadline under the policy announced October 1, 2021. *Homes that voluntarily introduced mandatory vaccination policies with deadlines earlier than November 15 will be able to decide whether any adjustments are needed to their policies without going beyond December 13, 2021.*
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> (Emphasis added)

37. This signaled a change from the original requirement that LTC employees had to be double vaccinated by November 15th to allowing them to have received one dose by then, so long as they received their second dose such that they could be considered double vaccinated by December 13, 2021. The memo went on to clarify that anyone with a single dose of a COVID-19 vaccine could not work in a LTC home. The memo also recognized that some homes may have voluntarily introduced their own mandatory vaccination policies with earlier deadlines.

38. Section 2.4 of the Directive remained the same as in the earlier version. As set out above, that section required a LTC home's mandatory vaccination policy to outline what the consequence of non-compliance could be.

39. In November 2021 Chartwell revised its September 2021 Mandatory Covid-19 Vaccination Policy for Staff, Students and Volunteers. In particular, it added to the "Purpose" section that "where the requirements of a Provincial order or directive exceed the requirements of this Policy, the Provincial order or directive must be

followed". It appears that this was added because at the time of the promulgation of the September 2021 Mandatory Vaccination Policy, the province of Ontario had no mandatory vaccination directive, but as a result of the October and November 2021 Minister's Directives, there was now a provincial mandatory vaccination mandate.

40. By a letter dated November 16, 2021, the Employer advised any employee who had received one vaccine dose, but not yet provided proof of a second dose, that in accordance with the latest Minister's Directive, the deadline for providing proof of a second dose had been extended to December 13, 2021. Employees were again reminded that failure to comply with Chartwell's Policy and the Minister's Directive would result in termination of employment, with the deadline for compliance extended to December 13, 2021 from the original date of December 11, 2021.

41. The Employer also sent letters to those employees who had been on administrative leaves of absence since October 13th because they had not provided proof of any vaccination, nor proof of medical exemptions. Those letters, dated around November 17, 2021, requested that the employee advise the Employer within two weeks of the date of the letter of their vaccination status, reminded those individuals of the mandatory vaccination requirements in both the Chartwell Policy and the Minister's Directive; reminded them of the deadlines; and advised them that if they didn't comply by December 13, 2021, their employment would be terminated.

42. In late November and early December 2021 further letters were couriered to the employees who had been on unpaid leaves of absence since October 12, 2021. The three letters sent to Woodhaven employees, dated November 30, 2021, requested that the particular employee attend at a disciplinary meeting, to be held by telephone, on December 13, 2021 as they had still not provided the Employer with proof of full vaccination or of medical exemption. The employee was advised of their right to have union representation at the meeting. They were also advised that failure to call in at the appointed time would leave the Employer with no option but to conclude that the employee remained unvaccinated at that time, which would result in the termination of their employment.

43. A similar letter was couriered to three employees of the Wynfield on December 2, 2021, and to eight employees of the Westmount on December 3, 2021. One more such letter was sent to a Westmount employee on December 7, 2021. Thus, it would appear that in total 15 letters were sent to employees covered by the Union's collective agreement.

44. On December 13, 2021 the three Woodhaven employees were terminated from employment. The letters sent to each employee outlined that the Employer had just cause for the termination as a consequence of the employee's failure to comply with the Chartwell Mandatory Vaccination Policy and the Minister's Directive regarding mandatory vaccination of LTC home workers. The Employer outlined that it had provided education regarding COVID-19 vaccinations, and had sent reminders to

each employee of their obligation to comply with the Employer's policy, the first on October 12th when the employee had been put on the administrative leave of absence for non-compliance, and further reminders that had followed in November 2021. In two of the termination letters, the Employer noted that those employees had failed to attend the discipline meeting, so the Employer had concluded that they had not complied with the mandatory vaccination requirements.

45. Also on December 13, 2021 nine Westmount employees were similarly terminated from their employment for cause, for essentially the same reasons as outlined above. In that workplace, two of the nine employees had failed to attend at the disciplinary meeting so the Employer had concluded that they had not complied with the mandatory vaccination requirements.

46. On December 15, 2021 two of the Wynfield employees were similarly terminated from employment, for essentially the same reasons as outlined above. In that home, one of the two employees had attended the discipline meeting and one had not, so for that individual, the Employer had concluded that they had not complied with the mandatory vaccination requirements.

47. The Minister's Directive regarding the "Long-Term Care Home COVID-19 Immunization Policy" was amended again on December 31, 2021. At that juncture the Minister directed that all LTC homes' policies must require that employees get a third dose of COVID-19 vaccines in order to come into or work in a LTC home. For the purposes of this case, the most relevant section of the latest Directive, which sets the deadlines for proof of third doses (or proof of a medical exemption) states as follows:

> 1.2 Subject to section 1.5, every licensee of a long-term care home shall ensure that no staff, support worker, student placement or volunteer who have not met the requirements of section 2 attends the home for the purposes of working, undertaking a student placement, or volunteering, as follows:
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> a. Staff, support workers, student placements, and volunteers who are eligible for a third dose prior to January 1, 2022 must meet the applicable requirements set out in section 2 by January 28, 2022;
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> b. Staff, support workers, student placements, and volunteers who are eligible for a third dose on or after January 1, 2022 must meet the applicable requirements set out in section 2 by March 14, 2022.

48. Only LTC staff who are under 18 years of age are currently exempt from the requirement of a third vaccine dose by the deadlines set in the December 31, 2021 Minister's Directive (s. 2.4).

49. Clearly, the requirement for mandatory vaccination of LTC home workers (and others) continues as the pandemic evolves, new waves of infection occur, and there remain ongoing concerns for the health and safety of everyone, but particularly for those more vulnerable people who live in long-term care homes. In light of the Omicron variant of COVID-19, and concerns about its transmissibility, in order to improve their protection against the virus, the Minister directed that LTC home residents begin receiving a fourth dose of an mRNA vaccine if at least three months had elapsed since their third dose.

50. Following issuance of the December 31, 2021 Minister's Directive, on January 6, 2022, Chartwell sent each of its employees a letter outlining the need for them to get a third dose of a COVID-19 vaccine in order to keep working in a LTC home. The deadlines from the Directive were given, and staff were advised to provide proof of receipt of the booster to their manager or Infection Control Lead. A "Frequently Asked Questions" page was attached to the letter to explain what a COVID-19 booster is; why someone should get a booster; etc.

IMPACTS OF COVID-19 ON THE FOUR HOMES AND ON THE ONTARIO LONG-TERM CARE SECTOR

51. The Employer prepared detailed information regarding the impact of COVID-19 infections at the Westmount, the Wynfield, the Woodhaven, and the Waterford, as well as information on the impact of the pandemic on the LTC sector in Ontario more generally.

52. Since the beginning of the pandemic in early 2020, there have been numerous outbreaks in the four homes in question here. The following are summaries of some pertinent data for each home:

> The Waterford: There have been five outbreaks, the first commencing on April 19, 2020. The fifth and most recent outbreak commenced on January 11, 2022 and is still ongoing. In all, 107 residents have been infected; 87 staff have been infected, with 7 still pending PCR confirmation as of the date of the January 2022 hearing; and there have been 18 deaths, all apparently among residents as there was no evidence in this case that any staff member had died as a result of COVID-19 infection.
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> The Westmount: There have been five outbreaks, the first commencing on April 2, 2020. The fifth and most recent outbreak commenced on December 23, 2021 and is still ongoing. The two longest outbreaks lasted approximately two and a half months each. In all, 86 residents have been infected; 82 staff have been infected, with 1 still pending PCR confirmation as of the date of the January 2022 hearing; and there have been 19 deaths, all apparently among residents as there was no evidence in this case that any staff member had died as a result of COVID-19 infection.

The Woodhaven: There have been four outbreaks, the first commencing on April 20, 2020. The fourth and most recent outbreak commenced on January 1, 2022 and is still ongoing. The longest outbreak lasted approximately three months, although all the others were relatively short. In all, 67 residents have been infected; 100 staff have been infected, with 12 still pending PCR confirmation as of the date of the January 2022 hearing; and there have been 13 deaths, all apparently among residents as there was no evidence in this case that any staff member had died as a result of COVID-19 infection.

The Wynfield: There have been four outbreaks, the first commencing on May 13, 2020. The fourth and most recent outbreak commenced on December 18, 2021 and is still ongoing. The current outbreak is the longest yet at this home, at about one month as of the date of the January 2020 hearing. In all, 27 residents have been infected; 38 staff have been infected, with 3 still pending PCR confirmation as of the date of the hearing; and there has been one death of a resident as a result of COVID-19 infection.

53. In Wave 1 of the pandemic the median duration of an outbreak in Ontario LTC homes was 14 days. In Wave 2 it was down to 5 days. Nonetheless, as is clear from the Employer's data, at the four homes in question here, there have been a number of outbreaks that have been far longer than that.

54. Although the Employer provided the cumulative case count for all Ontario LTC homes for both the periods between April 24, 2020 and November 9, 2021, and for April 24, 2020 to January 13, 2022, the more pertinent data is that from before the dates the Employer terminated the fourteen non-compliant employees in mid-December 2021. As of November 9, 2021, there had been 15,643 resident positive cases and 3,824 resident deaths. As of that same date, there had been 7,409 staff positive cases, and 13 staff deaths.

55. There are considerable restrictions imposed in a LTC home when there is an outbreak. These negatively impact the quality of life of residents and staff workloads.

56. Some of the negative impacts on residents include the following:

- They are isolated in their rooms
- There may be preventative wandering barriers for residents with cognitive disabilities
- Staff must use gloves, gowns, procedure masks and eye protection within two meters of any resident in the outbreak area
- Residents must be cohorted (so may not be in their regular rooms)
- Visitors are restricted to only Essential Visitors/Designated Caregivers (and there may only be one such person)
- Non-urgent medical appointments are re-scheduled
- Communal dining is modified or suspended

- Indoor social activities are modified or suspended

57. Some of the negative impacts on staff include the following, most of which increase their workload:

- Since all residents in an outbreak area are considered infected or potentially infected, they must don and doff PPE every time they are interacting with such residents
- Each resident must be screened at least once every day
- Since residents have to be cohorted, it means staff may have to move them from their own rooms to new rooms
- Equipment must be thoroughly cleaned and disinfected between use
- Meals must be given to residents in their rooms, not in communal areas
- With only one designated caregiver allowed in, staff have fewer people helping with the general care and well-being of residents

58. Based on the data presented in this case there is little doubt that the vast majority of symptomatic COVID-19 cases among LTC health workers is made up of those who are either partially vaccinated or unvaccinated. In the period from December 14, 2020 to June 30, 2021, of the total of 2,737 health care workers who got COVID-19, 112 were partially vaccinated and 2,287 were unvaccinated. The latter unvaccinated workers made up 83.6 per cent of the total. As of data collected between December 14, 2020 and June 30, 2021, no vaccinated and PPE protected LTC home workers had been hospitalized due to COVID-19 infection. The numbers indicate the high degree of vaccine efficacy for LTC home workers.

59. While the Delta and Omicron variants were found by scientists to be more infectious than earlier variants of COVID-19, the COVID vaccines have proven to be highly effective in reducing symptomatic disease, severe infection, and transmission.

60. In her January 14, 2022 memo to LTC home licensees regarding "Clarification on Immunization Policy and an update to the COVID-19 Guidance Document", the ADM for the Ministry of Long-Term Care stated as follows regarding the reasoning underlying the need for LTC workers to get third doses of COVID-19 vaccines:

> Third doses provide important protection from COVID-19. It is important for you and your leadership to communicate this to your team members. About 64% of LTC staff have a third dose based on COVax data. Based on home reported outbreak information provided to the Ministry directly, among positive staff cases, about 7% have 3 doses and about 93% have two doses (based on information from January 12th [2022]).

61. The Employer submitted evidence regarding the exacerbated staffing shortages during the pandemic. However, it is unclear how this assists in considering the issues before me in this case since Chartwell has introduced a policy that has the

potential of leading to, and in this instance did lead to, the termination of fourteen of its LTC workers.

THE COLLECTIVE AGREEMENT

62. The following provisions of the collective agreement were referred to in the parties' submissions:

> Article 1 – Purpose
> 1.2 It is recognized that employees wish to work together with the Employer to secure the best possible care and health protection for residents.
>
> 1.3 The Employer and the Union recognize that the attitude, ability and efficiency of all employees affect to a large extent the care, welfare, safety and comfort of the residents of the Home.
>
> Article 2.2 – Management Rights
> The Union acknowledges that it is the exclusive right and function of the Employer to manage and direct its operations and affairs in all respects and, without limiting or restricting this right and function:
>
> (a) To determine and establish standards and procedures for the care, welfare, safety and comfort of the residents of the facility;
> (b) To maintain order, discipline and efficiency, and to make, alter, and enforce reasonable rules and regulations to be observed by the employees; …
> (c) To hire, classify, direct, promote demote, transfer, discipline, suspend and discharge employees; provided that a claim of discriminatory classification, promotion, demotion, discipline or suspension, or a claim by an employee who has completed probation that he has been discharged without just cause, may become the subject of a grievance and be dealt with as hereinafter provided.
> (d) To exercise any of the rights, powers, functions or authority which the Employer has prior to the signing of this Agreement except as those rights, powers, functions or authorities are specifically abridged or modified by this Agreement.
> (e) The Employer shall exercise these rights in a fair manner consistent with this Agreement.
>
> Article 7.9 – Infection Prevention Control
> The Employer will use its best efforts to make all affected direct care employees aware of residents who have serious infectious diseases. The nature of the disease need not be disclosed. Employees who are not direct care employees will be made aware of special procedures required of them to deal with these circumstances. The parties agree that all employees are aware of the requirement to practice universal precautions in all circumstances.
>
> Where the Employer identifies high risk areas where employees are exposed to infection or communicable diseases for which there are available protective medications or procedures they shall meet to discuss the treatments, medications

> that [are] available and the extent of coverage available for such treatments and or medications the Employer will provide.
>
> It is understood that each employee is responsible for following prescribed policies and procedures and recommendations of the Employer related to the above. Failure to do so may result in the employee being responsible for the total costs of treatments medication etc.
>
> Article 10 – Seniority
> …
> Loss of Seniority
> 10.10 An employee shall lose all service and seniority and employment deemed terminated if she:
>
> > …
> > (b) Is discharged and the discharge is not reversed through the grievance or arbitration procedure;
> >
> > (c) has been laid off for twenty-four (24) calendar months;
> > …
>
> Article 18 – Miscellaneous
> …
> 18.4 Prior to effecting any significant changes in rules or policies which affect employees covered by this Agreement, the Employer will discuss the changes with the Union and provide copies to the Union.
>
> 18.5 Existing rights, privileges, benefits, practices and working conditions shall be continued to the extent that they are more beneficial and not inconsistent with the terms of this Collective Agreement unless modified by mutual agreement of the Employer and the Union.

UNION SUBMISSIONS

63. As was noted at the beginning of this decision, each party made lengthy submissions. While I will attempt to outline counsels' arguments, their respective reviews of the jurisprudence will not be recounted.

64. The Union relied on the following jurisprudence in making its arguments: *Tung-Sol of Canada Ltd. v. United Electrical, Radio and Machine Workers of America, Local 512 (Collective Agreement Grievance)*, [1964] O.L.A.A. No. 9, 15 L.A.C. 161 (R. W. Reville); *Chartwell Seniors Housing REIT (Wynfield, Waterford, Westmount & Woodhaven) and Healthcare, Office and Professional Employees Union, Local 2220*, (Unreported Interest Arbitration award dated March 17, 2014, D. Randall, Chair); *KVP Co. v. Lumber & Sawmill Workers' Union, Local 2537 (Veronneau Grievance)*, [1965] O.L.A.A. No. 2, 16 L.A.C. 73 (J. B. Robinson); *Canadian Union of Public Employees, Metropolitan Toronto Civic Employees' Union, Local 43 v. Metropolitan Toronto (Municipality)*, (1990) 74 O.R. (2d) 239 (Ont. C.A.); *Sault Area Hospital v. Ontario Hospital Assn. (Vaccinate or Mask Grievance)*, [2015] O.L.A.A. No. 339, 262

L.A.C. (4th) 1 (J. Hayes); *St. Peter's Health System v. Canadian Union of Public Employees, Local 778 (Flu Vaccination Grievance)*, [2002] O.L.A.A. No. 164, 106 L.A.C. (4th) 170 (G. J. Charney); *Chinook Health Region and U.N.A., Local 120*, [2002] A.G.A.A. No. 105, 113 L.A.C. (4th) 289 (T. Jolliffe); *Carewest v. Alberta Union of Provincial Employees (Nasr Grievance)*, [2001] A.G.A.A. No. 76, 104 L.A.C. (4th) 240 (P.A. Smith); *United Food and Commercial Workers Union, Canada Local 333 and Paragon Protection Ltd. (COVID-19 Vaccination Policy grievance)*, (Unreported decision dated November 9, 2021, F.R. Von Veh); *Electrical Safety Authority and Power Workers' Union, Grievance re COVID-19 Vaccination Policy*, (Unreported decision dated November 11, 2021, J. Stout)(the "November 2021 *ESA* decision"); *Ontario Power Generation and Power Workers' Union, Re OPG-P-185*, (Unreported decision dated November 12, 2021, J. C. Murray); *Norquest College v. Norquest College Faculty Assn. (Policy Grievance)*, [2021] A.G.A.A. No. 62 (Andrew C.L. Sims); *Toronto Hospital and O.N.A.*, [1994] O.L.A.A. No. 68, 41 L.A.C. (4th) 196 (P. Knopf).

65. As the Union described it, the core rule in the September 2021 Mandatory Vaccination Policy is that "Chartwell requires all eligible Staff to receive COVID-19 vaccine, unless it is medically contraindicated". The Union is in favour of vaccinations. Notwithstanding whatever may have been the Union's original arguments about the mandatory nature of the policy, once the Minister of Long-Term Care exercised his power pursuant to s. 174.1 of the *Long-Term Care Homes Act, 2007* (the "LTHCA") on October 1, 2021 to make COVID-19 vaccinations mandatory for all staff and others working at LTC homes in Ontario, subject to certain medical exceptions, the Union recognizes that mandatory vaccination is now the legal requirement. It is not challenging the constitutionality of the Minister's Directive in this grievance.

66. The Union takes issue with the policy to the extent that it makes failure to get vaccinated disciplinary. It is the Union's position that the portion of the policy that makes failure to get vaccinated a disciplinary offence, that may lead to dismissal, is unreasonable, is a violation of the collective agreement, and should not be allowed to stand. Pursuant to the policy, on October 12, 2021 the Employer put 16 bargaining unit members on unpaid administrative leaves because of their failure to provide proof of vaccination. Thereafter, on October 20, 2021 the Employer advised those employees that if they remained unvaccinated by December 10, 2021, their employment would be terminated. Due to the Minister's Directive of November 4th, that deadline for compliance was moved to December 13, 2021. Fourteen bargaining unit members were subsequently terminated from employment following December 13, 2021, for just cause as they did not comply with the policy.

67. The Union points to the Minister's Directive of October 1, 2021. At s. 2.4 the Minister required every licensee of a LTC home to clearly set out the consequences of non-compliance with the mandatory vaccination requirements, including that they could not attend at the home to work, as well as any additional consequences that may arise out of the licensee's human resources policies, collective agreements, and any applicable legislation, directives and policies. The Union does not dispute

that employees who did not prove their vaccination status had to be put on unpaid administrative leaves. However, the Union argues that they should not have been subject to being disciplined or terminated from employment, as that was not a requirement of the Directive, and is contrary to the Employer's collective agreement obligations, which the Directive recognized would be applicable.

68. The Union argues that the policy should be found to be unreasonable based on the arbitral jurisprudence regarding employer promulgation of rules and policies, and the emerging jurisprudence regarding COVID-19 vaccinations. The Union relied on the *KVP* decision, cited above, as the standard against which the Employer's policy should be tested for reasonableness. In particular, it asserts that one must consider the reasonableness of the nature of the response for non-compliance with the policy, in this case termination of employment. It argues there is no legitimate and important management interest in discharging the individuals affected based on the facts in this case.

69. The Union relied particularly on the November 2021 *ESA* decision, cited above, for the proposition that Arbitrator Stout's finding that a nuanced approach is appropriate in the COVID-19 situation, and that there should be a balancing of the concerns of both employers and workers. is correct.

70. The Union asserts that applying that approach to this case, the most difficult aspect has already been addressed for me as the Minister has declared that it is in the interest of the public, residents of LTC homes, their families, and the vast majority of people who are vaccinated that the staff in these homes be fully vaccinated. Thus while Arbitrator Stout recognized that individuals have the right to security of their person, and therefore to decide what they take into their bodies, the balancing of that right with those of the public interest, pursuant to the Minister's Directive, has been found to weigh in favour of the requirement of mandatory vaccination if one wants to actively work in LTC.

71. However, the Union argues that is not the only balancing of interests that is required. It is also necessary to balance the interests of the Employer with those of the employees, and in this regard the Union asserts it is difficult to understand what the Employer interest is in a rule that leads it to terminate its employees rather than let them remain on an unpaid administrative leave of absence, when following its own deadline, it had no monetary obligations for those employees, and they were no longer accruing seniority. Pursuant to Art. 10.9, an employee only continues to accumulate seniority and have their benefits paid for the month that the leave commences and one month following, provided that the employee continues to pay tier portion of the cost sharing arrangement. Thereafter, if an employee wishes to have continuing benefits coverage, they must pay the full cost of the benefit premium. The Union states that in this instance, the Employer's payment for benefits would have expired in mid-December 2021 in any case since the affected employees had been put on unpaid leaves of absence in mid-October. As well, their seniority would have stopped accruing at that juncture.

72. The Union points out that of the 705 employees in the bargaining unit, the number who have not been vaccinated represents under 2 per cent. As such, draconian action was not needed, so the Union asks what the Employer concern to be addressed is here, and why an administrative leave would not have been appropriate. It points out that the staffing shortages in these workplaces is staggering, so it asks why the Employer would terminate people who are a valuable resource rather than leaving them on a leave of absence until they can come back to work. The Union asserts further that leaving the small number of affected employees on unpaid leaves of absence would not preclude the Employer from filling the vacancies left as there is nothing to impede it from hiring other workers.

73. By contrast to the Employer's unclear interests in the balancing exercise, for the affected employees, the Union argues that they stood to lose their employment when they had done nothing wrong. When the affected employees were hired there was no requirement that they be vaccinated; they have worked for years to accumulate seniority; they decided for various reasons that they would not take the COVID-19 vaccination, and took the consequences of being put on leaves of absence without pay; but now, they are being terminated from employment and losing their seniority in a climate where it is impossible to know what the future holds as regards the pandemic. The Union argues that these employees should have been given the time and opportunity to change their minds, and should have been encouraged to do so without setting hard and fast deadlines after which they were to lose their jobs. As the Union put it, some people change their minds in what it described as the "Paul on the road to Damascus" moment, after the illness or death of another family member. It argues that leaving employees on a leave of absence for a period akin to layoff would allow for such a possibility, rather than outright discharge.

74. The Union argued that instead of dismissing employees, as the September 2021 Vaccination Policy contemplated, the Employer could have laid people off for up to 24 months, thereby preserving their seniority rights for a reasonable period of time. The Union posits that the COVID-19 situation is an evolving one, and that we don't know what the future will be 18 months from now. It suggests that a Minister may have a different directive in the future, and could change their mind. Hence, the Union suggests that the Employer should have permitted the affected individuals to remain on unpaid administrative leave for an appropriate period of time, which it suggests, could be akin to the period of a layoff.

75. The Union states that while it believes in vaccination, the decision to get vaccinated is a difficult one for some people, and they should have more time to come to the right decision based on changes in their own circumstances or their views. As an example, the Union noted that one of the individuals who has not got vaccinated, and was therefore negatively affected by the application of the policy, is a breastfeeding mother. While the medical evidence is that there is no harm to a child from a breastfeeding mother being vaccinated, the Union states that none of us

would argue that a mother has the right to make a decision about vaccination while breastfeeding. It states that the situation should resolve itself when the mother stops breastfeeding, which she apparently plans to do when her child, who is now 3 years old, starts attending kindergarten.

76. In the balancing of interests between those of the Employer and those of the employees, the Union asserts that the employee interest in the seniority rights for which they have worked hard is important, especially in respect of their work over the last 18 months during the pandemic, when they have been working on the front lines, risking their own health and lives, and have seen people die.

77. The Union asks that, as did Arbitrator Stout in the November 2021 *ESA* decision, cited above, I find that discharging an employee must be the last resort when there is no other reasonable approach that would work to meet an employer's key interest. In this case that point had not been reached as the vast majority of employees had been vaccinated, so that dismissing the tiny minority who had not was draconian and the Union asks that the policy be found unreasonable in that regard.

78. The Union also relies on Articles 18.4 and 18.5, and argues they must be considered in assessing the Employer's actions in the promulgation of this policy. Article 18.4 requires the Employer, if effecting any significant changes to rules or policies, which affect bargaining unit employees, to discuss the changes with the Union and to provide copies to the Union. Pursuant to Article 18.5, all existing rights, privileges, benefits, practices and working conditions are to be continued to the extent that they are more beneficial and not inconsistent with the terms of the collective agreement, unless modified by mutual agreement of the Employer and Union. Based on the Employer's Articles 18.4 and 18.5 obligations, the Union asserts that the Employer could have reached out to the Union to discuss a mandatory vaccination policy, and they could have reached an agreement that would have been something like the layoff 24 month provision.

79. According to the Union, these workplaces have experience with vaccination requirements and had in place a 2012 Immunization Program. Every year during flu season there are flu vaccination requirements for employees. The practice has been that if a flu outbreak is declared by local health authorities, only staff who are vaccinated can work, or if they have taken a course of Tamiflu. Any staff who have neither are put on unpaid leaves until the outbreak is declared over. Failure to get the flu vaccination has never been considered a disciplinary matter, no employee has ever been disciplined in this regard, and no one has been dismissed. [The Employer does not dispute the existence of the Immunization Program or this historic practice.]

80. Another example the Union gave of how the Employer has addressed a mandatory requirement is that of continuing education. Employees who have not met the mandatory continuing education requirement by an appointed date have

historically been told that they will not be scheduled until they can prove completion. According to the Union, no staff has ever been disciplined for failing to meet the mandatory education requirement. [The Employer mildly disputed this was the practice, but no evidence was called to counter the Union's assertion.]

81. With respect to the September 2021 Mandatory Vaccination policy, the Union asserts that despite the availability of vaccines to health care workers for months before the June 2021 Vaccination Policy, the Employer had not required employees to be vaccinated. Employees were only told in late August that they had to be vaccinated in order to work after October 12, 2021. It notes that up to that point, the Employer's June 2021 Vaccination Policy did not require vaccination, and permitted other means of meeting the Employer's COVID transmission concerns, such as enhanced PPE and testing before every shift.

82. In respect of its Art. 18.4 argument, the Union notes that the Employer announced the new policy through a press release on August 24, 2021, without any prior discussion with the Union, or provision of a copy of the new policy, or even provision of a copy of the press release to the Union. The Union argues that given the language of this provision, and the fact that the Employer was introducing a mandatory vaccination policy, with a disciplinary aspect for non-compliance, these were significant changes to the existing policy which required Chartwell to provide the Union with a copy of the proposed policy, and to discuss the changes with the Union prior to effecting them.

83. Based on the evidence, the Union asserts that it was only after the Union had learned about the new policy through its members on August 24, 2021, after the press release, and contacted Chartwell's Labour Relations staff, that any "discussion" began. Even after that point, the Union maintains there was not in fact any meaningful discussion, and the Union was not provided with a copy of the new policy until the following week. According to the Union, the evidence shows that the Employer ignored the Union and did not discuss the new policy at all.

84. It asserts that the Employer had obviously been in discussions with the other large LTC providers for some time before the August 24th press release issued, so it had to have been contemplating what the mandatory vaccination policy would be, as it was to be consistently introduced at all the LTC providers in the coalition. Yet, according to the Union, the Employer ignored its collective agreement obligations to HOPE by failing to discuss the significant policy changes with the Union, or providing it with a copy of the proposed policy prior to effecting it. In addition, and despite Ms. Randazzo alerting the Employer to its Art. 18.4 and 18.5 obligations on August 26th, the Employer went ahead and distributed it to employees in their workplaces before discussing the policy with the Union.

85. It also maintains that having a discussion with the Union about the policy after the grievance had been filed does not meet the collective agreement obligation, and in any event, discussions at the Step 2 grievance meeting are privileged and the

Employer cannot rely on them. As such, the Union asks that the Employer be found to have breached Art. 18.4 of the collective agreement.

86. With respect to Art. 18.5, the Union asserts this is a unique clause, which has long been in the collective agreement, and in fact pre-dates HOPE becoming the bargaining agent. According to the Union, the provision was awarded by Arbitrator Randall in an interest arbitration for the first collective agreement that HOPE reached with this Employer, but HOPE was displacing another union that had previously represented this bargaining unit.

87. The Union argues that the employees covered by this collective agreement had the existing right to security of their own person when it came to vaccines or taking medications, and they were able to make those decisions without being subject to the threat of discipline. In this instance, according to the Union, this was not a theoretical position, as both the immediately earlier June 2021 COVID-19 Vaccination Policy indicates this, but the earlier vaccination policy, which had been in place since at least 2012 for other vaccinations, including the annual influenza vaccine, permitted employees to decline to take the flu vaccine, and to also decline to take the Tamiflu medication, and remain off work on an unpaid leave of absence if there was an officially declared flu outbreak in a home. According to the Union, at no point ever has the Employer hinted or suggested to an unvaccinated employee that they may be disciplined in any way, or terminated from employment. As such, the Union argues the current policy is a sharp contrast to what had been the prevailing right, privilege, practice and working condition of the employees. Therefore, this Employer had to work within its obligation under Art. 18.5 if it wanted to change those prevailing rights, privileges, practices and working conditions.

88. Returning to the example of how the Employer has treated the mandatory requirement of continuing education, the Union reiterated that discipline was never the penalty for non-compliance. Rather, the consequence was that an employee would not be scheduled until they met the continuing education requirement. Anticipating that the Employer may argue that it had never said that it would NOT discipline employees for non-compliance, the Union asserts that in the context of Art. 18.5, “silence is golden”, as that is the long-established practice in these workplaces.

89. The Union therefore argues that had the Employer wanted to change its practice regarding mandatory requirements, which was more beneficial to the bargaining unit employees than a disciplinary response, it had to reach a mutual agreement with the Union as to what the new policy should be as regards the consequences of non-compliance. Since it failed to do so, the Union asserts that the disciplinary component of the September 2021 Vaccination Policy should be declared inoperative as it is in violation of the collective agreement.

EMPLOYER SUBMISSIONS

90. In addition to various excerpts from the OHSA, the LTCHA and its General Regulation, the Employer relied on the following jurisprudence in support of its arguments: *United Food and Commercial Workers Union, Canada, Local 333 and Paragon Protection Ltd. (COVID-19 Vaccination Policy Grievance)*, (Unreported decision of F.R. Von Veh, Nov. 9, 2021); *Electrical Safety Authority and Power Workers' Union, Grievance re COVID-19 Vaccination Policy*, (Unreported decision dated November 11, 2021, J. Stout); *Electrical Safety Authority and Power Workers' Union, Grievance re COVID-19 Vaccination Policy*, 2022 CanLII 343 (ON LA) (J. Stout)(the "January 2022 ESA decision"); *Ontario Power Generation and Power Workers' Union, Re OPG-P-185*, (Unreported decision dated November 12, 2021, J. C. Murray); *Union des Employes et Employeres de Service, Section Locale 800 et Les Services Menagers Roy Ltee. Et al.* (Unreported decision dated November 15, 2021, D. Nadeau)(NOTE: As this lengthy decision is in French, I was unable to read it); *Corporation of the County of Simcoe Paramedic Services and Ontario Public Service Employees Union, Local 303 (J. Wright)*, 2008 CanLII 66623 (ON LA) (P. Knopf); *Canadian Labour Arbitration*, 5th Edition, Brown & Beatty, Chapters 7:3610 - Refusal to follow instructions; 7:3612 - Essential ingredients; *4250915 Canada Inc. o/a Multi Luminaire and Peter Valliere*, (Unreported decision dated September 28, 2021, C. Watson, Employment Standards Officer of the Ministry of Labour, Training and Skills Development under the *Employment Standards Act, 2000*, regarding claim for Termination Pay and Reprisal); *Amalgamated Transit Union, Local 113 et al v. Toronto Transit Commission and National Organized Workers Union v. Sinai Health System*, 2021 ONSC 7658 (Ont. Sup. Court of Justice); *Canada Post Corporation and Canadian Union of Postal Workers*, (Unreported decision dated November 30, 2021, K. Burkett); *Bunge Hamilton Canada and United Food and Commercial Workers Canada, Local 175, (Mandatory Vaccine Policy)*, 2022 CanLII 43 (ON LA) (R. J. Herman); *Teamsters Local Union 847 and Maple Leaf Sports and Entertainment (S. Wideman)*, 2022 CanLII 544 (ON LA) (N. Jesin); *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Limited*, 2013 SCC 34 (CanLII), [2013] 2 S.C.R. 458; *Meridian Automotive Systems v. CAW Canada (Richards Grievance),* [2005] O.L.A.A. No. 517, 144 L.A.C. (4th) 91 (R.J. Roberts); *Toronto (City) v. Canadian Union of Public Employees, Local 79 (Portillo Grievance),* [2011] O.L.A.A. No. 167, 206 L.A.C. (4th) 253 (D. Randall); *Toronto East General Hospital and S.E.I.U. Local 1, ON*, [2004] O.L.A.A. No. 945, 131 L.A.C. (4th) 220 (F. M. Reilly); *Oshawa General Hospital and Nurses' Association Oshawa General Hospital*, [1975] O.L.A.A. No. 16, 10 L.A.C. (2d) 201 (H. D. Brown); *Greater Toronto Airports Authority v. Public Service Alliance of Canada (Cencic Grievance)*, [2001] C.L.A.D. No. 12 (P. Knopf); *International Association of Machinists and Aerospace Workers, Transportation District 140, Local Lodge 2413 v. ASIG Ground Handling Canada Ltd. (McCanna Grievance)*, [2017] C.L.A.D. No. 62, 2017 CarswellNat 2744 (S. Baxter); *Participating Nursing Homes and ONA (Covid-19 Sick Pay)*, 2020 CarswellOnt 15021 (J. Stout); *Sensenbrenner Hospital, Kapuskasing v. Service Employees International Union, Local 204 (Mercier Grievance)*, [2002] O.L.A.A. No. 602, 115 L.A.C. (4th) 434 (G. Brent); *Greater Toronto Airports Authority v. Public Service Alliance of Canada, Local 0004 (Kosta Grievance)*, [2004] C.L.A.D. No. 524, 135 L.A.C. (4th) 179 (G. Brent); *Toronto*

Community Housing Corp. v. Ontario Public Service Employees Union (Security Checks Grievance), [2012] O.L.A.A. No. 587, 227 L.A.C. (4th) 50 (S. Tacon); *Innisfil (Township) v. Communications, Energy and Paperworkers Union of Canada, Local 333-16 (J.T. Grievance)*, [1997] O.L.A.A. No. 1052 (R. L. Levinson);

91. The Employer began its submissions by outlining in detail what it wants me to do should I find in its favour. By way of remedy, the Employer seeks dismissal of the grievance, as well as the following:

- Express notation that the Union is not challenging the constitutionality of the Minister's Directives and revised Directives;
- Confirmation that the Policy constitutes a reasonable workplace rule;
- Confirmation that the unpaid administrative leaves of absence were an appropriate just cause consequence of employees refusing to comply with the reasonable workplace rule in the Policy;
- Confirmation that the terminations were appropriate just cause consequences of the employees refusing to comply with the reasonable workplace rule in the Policy;
- Confirmation that Article 18.5 of the collective agreement has not been violated as alleged, and does not bar the Employer from implementing the Policy without first negotiating the Policy and securing the Union's agreement; and,
- Confirmation that Article 18.4 of the collective agreement has not been violated as alleged and that it does not render the Policy ineffective.

92. As outlined in the facts above, since the first day of hearing on November 19, 2021, the Employer has terminated the employment of fourteen bargaining unit employees for just cause, based on their failure to comply with the September 2021 Mandatory Vaccination Policy. Having heard the Employer's comprehensive list of remedies sought, and since the termination grievances, if any, are not before me, I had queried whether the parties were agreeing that I could rule on whether the individual terminations were for just cause.

93. While conceding that I am only seized of the policy grievance, the Employer advised that it was looking for a "generic just cause" ruling, to provide guidance to the parties on the issue of termination. It seeks a ruling on the "broad based application of the Policy to the fourteen individuals".

94. The Union reiterated that its argument is that the termination aspect of the Policy is unreasonable, and that the implementation of the Policy in light of Articles 18.4 and 18.5 is a violation of the collective agreement. It does not agree with the Employer's position that in a policy grievance the arbitrator should go beyond the four corners of the grievance. If the Policy is found to be reasonable, the Union will have to address how the Employer enforced the policy in respect of each dismissed individual, based on their specific situation.

95. The Employer argues that the Policy does not mandate termination: it indicates that "Employees who fail to comply with this Policy will be placed on an unpaid administrative leave or may have their employment terminated". As such, unlike the mandated consequence of being placed on an unpaid administrative leave for non-compliance, it is only an option open to the Employer to terminate employment of a non-compliant employee.

96. In this case, the Employer points out that the Union has agreed that the unpaid administrative leave aspect of the Policy is not in issue in this grievance. Since it is only the termination aspect of Policy that is in question, the Employer relies on Arbitrator Herman's decision in *Bunge Hamilton*, cited above, for the proposition that termination may be an aspect of the application of a mandatory vaccination policy.

97. The Employer disagrees with the Union's argument, which it characterizes as being that even if the Policy is found to be reasonable on the *KVP* rules, once employees have decided that they will not comply with those rules, there must be a balancing of their interests with those of the Employer, and that alternatives must be considered to help such employees avoid the consequences of their decision not to comply with a reasonable workplace policy. This, the Employer argues, is an unacceptable extension of the balancing aspect of *KVP* in respect of a policy itself, to an assessment of the just cause consequences of not complying with the policy or rule.

98. The Employer's first argument is premised on the fundamental legal principle that an employer has just cause to terminate an employee if the employee does not comply with reasonable workplace rules; where that non-compliance is sustained; and when it strikes at the inherent foundation of the employment. It states that in the jurisprudence there are the concepts of culpable non-compliance and non-culpable non-compliance with a rule. In this instance, the Employer argues that an employee who refuses to comply with the mandatory vaccination policy is engaging in culpable non-compliance, which amounts to misconduct, and can result in termination of employment as the negative consequence of that misconduct.

99. Essentially, the Employer argues that it is a basic contractual requirement of employment that employees must comply with an employer's reasonable workplace rules, and points to the *Bunge Hamilton* and *Irving Pulp and Paper* decisions, cited above. Failure to comply is a breach of the terms of employment, and that is just cause for whatever may be the negative consequences. Culpable non-compliance addresses a refusal to follow rules, and in such situations, except for *Human Rights Code* issues which may be applicable, there is no requirement for a balancing of the interests of the employee and the employer. According to the Employer, the caselaw supports a finding that if an employee does not comply with a rule, they must bear the consequences of breaching the rule. Having a strongly held belief, according to the Employer, is not an acceptable excuse, as was found in the *County of Simcoe*

decision, cited above. In any case, in the situation here, the Employer states there is no issue raised about a religious or medical exemption.

100. The Employer states that the second aspect of this argument is to establish why termination is an appropriate consequence for non-compliance with the Policy in the LTC home setting and in respect of COVID-19, in light of both the health and safety aspects as well as the quality of life of residents of these homes. According to the Employer, maintaining both the health and safety and the quality of life of residents were fundamental aspects of the employment relationship even before COVID. The Employer states that if an individual agrees to work in a LTC home, they accept the values and premise of working in this environment. The requirements are that an employee show up and provide care to residents, and that they ensure the well-being, safety, and quality of life factors for these frail, dependent, vulnerable elderly people in their home. As the Employer put it, the residents are the customers, and employees are coming and working in their home.

101. As well, it argues that being vaccinated is inherent to LTC employment, so that if an unvaccinated employee decides not to comply with a reasonable workplace rule that is fundamental to their employment, that should be just cause for termination under the Policy. In light of the current Minister's Directive that LTC employees get a third vaccination, it is clear that this requirement is not about to go away soon. The Employer is particularly concerned with the need for deterrence through a decision in this case since the deadlines for third doses of the vaccine are imminent, and it claims there are employees who are awaiting issuance of this decision as they are thinking about whether they have to get the booster.

102. The Employer argues that the sequence of events in this case shows what has led to the decision to terminate the employment of those who are non-compliant with a policy that the Employer maintains is reasonable. It states that there had been months of education regarding the vaccines and their safety; there was a counselling session with each unvaccinated employee; there was fair warning given of the need to get vaccinated or be put on an unpaid administrative leave of absence; there were forewarnings about termination being the next step, and then finally the terminations were conducted. It argues that it behaved reasonably by providing employees with fair warning of the consequences of non-compliance at each stage, and that employees had sufficient warning that termination would be the final outcome after all the other steps had been taken. While this particular mandatory vaccination situation is not conducive to actual progressive discipline, it had met its obligation of providing ample warning of the consequences of continuing non-compliance with the Policy. The Employer states it does not have to wait for each employee's "road to Damascus moment".

103. It posits that another aspect of this argument is that just cause is the appropriate potential response to non-compliance in light of the terrible impacts for LTC residents due to COVID-19, and since those impacts are long term, prolonged and indefinite.

104. In what the Employer describes as a culpable non-compliance situation, like this one, there is no balancing of interests. However, if I find there is a non-culpable aspect to the non-compliance, then it argues that in any event, the interests of the Employer, the residents, and the other vaccinated workers outweighs the interests of those who will not get vaccinated.

105. In order to distinguish the culpable non-compliance situations from those that are non-culpable non-compliance cases, the Employer relied on a lot of jurisprudence. In some of the cases, the Employer pointed out that an employee was unable to comply with a rule for non-culpable reasons, such as having travelled and finding that they had to isolate on return even though they were not sick; or inability to pass an exam where certification was a requirement; or inability to get security clearance, which was a requirement of the job, etc. In some of the cases, the Employer noted that while the employee was essentially found to be in the non-culpable and non-compliant category, it was because the employee was in the situation as a result of something happening in their lives outside of work. In such cases, arbitrators have required employers to look for reasonable alternatives, where possible. The Employer argues that is not the situation in this case as these employees were aware of the requirement to be vaccinated, and were simply refusing to comply with the Policy in that regard. As such, the Employer argues the situation here is of culpable non-compliance with a policy, for which there is no requirement to balance interests or look for alternatives to save the employee from the consequences of their conduct.

106. As an example of why this is not a situation in which the Employer had to consider alternatives in its Policy, the Employer pointed to an example to make the point. It stated that if the rule was that an employee had to wear a mask at work, and an employee felt strongly that they should not have to wear a mask, once the rule was established as being reasonable, the failure to comply would be characterized as misconduct, subject to discipline, and if the refusal continued, it would be just cause for termination. According to the Employer, there is nothing special about the vaccination issue, especially where, as here, there are Minister's Directives requiring that LTC employees be fully vaccinated in order to come to the workplace.

107. In the event that I think that there should be a balancing of interests and that the Employer should have to find some alternatives, the Employer points out that there are no alternative positions as every bargaining unit position in the LTC home requires that the employee be vaccinated.

108. Contrary to the Union's argument that no one knows what will happen in 18 months, and that leaves of absence for up to 24 months should be a reasonable alternative, the Employer argues that the current situation is and has been prolonged, and appears to be indefinite, as we are now close to two years into the COVID pandemic, and the Minister's Directives are escalating, not diminishing

requirements for the vaccination of LTC staff. Furthermore, the Minister's Directives, made pursuant to the LTCHA, are not part of the *Emergency Management and Civil Protection Act*, and are not tied to emergency orders, so are not tied to the duration of the pandemic emergency. According to the Employer, vaccinations are only one part of the layering of measures to limit negative health outcomes and hospitalizations, and that without the layer of vaccination, other layers are not as effective. As an example of another layer, the Employer points to the use of PPE, as a layer on top of being vaccinated. On the specific layer of vaccination, the Employer also asserts that if an employee does not have the two vaccinations that are already required, it is not possible to layer on the third booster, or the fourth that is likely to be required as residents are already at the fourth vaccination at this juncture.

109. The Employer argues it should not have to wait for "Paul on the road to Damascus" moments for those who have had months to consider their vaccination situation while on unpaid leaves of absence already.

110. The Employer responded to the Union's position that the Employer suffered no losses as a result of having put the non-compliant employees on unpaid leaves of absence in October and terminating them in December, when they would no longer have been eligible to accrue seniority or enjoy paid benefits coverage. According to the Employer, while that timing worked out at that time, because the Employer wanted to give all employees time to understand the new Policy, and to get vaccinations in time, that will not be the situation going forward. In particular, it points out that the deadline for having received third vaccinations is approaching and it should not be required to give non-compliant employees two month leaves of absence again now that the Policy has been in place for some time.

111. In the Employer's view it is prejudicial to those employees who comply with the Policy, and continue to work, to have those not working accumulating seniority, as despite working, they get no seniority advantage. In response to the Union's position that the non-compliant employees should be allowed to maintain their seniority on indefinite leaves of absence, the Employer points out that while those employees would be off, they would still retain ownership of their respective positions in the bargaining unit, their posting entitlements, and their scheduling line. They would have the right to apply for and get a position for which they would have more seniority than someone who would be back-filling at work for them while they are off. As an example, if a day shift job got posted, a senior non-compliant employee on a leave of absence would be able to bid and get the job. While these are rights that accrue to employees pursuant to the collective agreement, the Employer points out that to those who have complied with the policy, and are working, it would appear that the non-compliant workers were being rewarded for bad behaviour.

112. According to the Employer, it is short-staffed, but there would have to be people back-filling for the non-compliant workers. Those individuals would have to decide whether to take a non-compliant worker's position as they would be taking a

risk that the person could decide to come back at any time. Since many LTC home workers have more than one job, taking a temporary back filling full time position at one of these homes and giving up their other part time job would be risky. The Employer characterizes these as recruitment and retention issues. If the non-compliant worker is dismissed, their job can be posted as a permanent full time job, which makes it much more attractive to potential applicants.

113. The Employer also stated that there are morale issues involved for those who have complied and keep working through the pandemic and outbreaks. They see that they are working, while those on leaves of absence are not working through what is generally the longer outbreak season of the winter, and that the non-compliant workers would be able to preserve their rights until the outbreaks are over and then return.

114. On the issue of why termination is appropriate in this Policy, the Employer points out that the very least I must decide whether termination is *an* appropriate response subject to the requirement that it be for just cause. It argues that in this case, where the residents are the customers, and one of the requirements of working in their home is that an employee be vaccinated, but that employee says their preference is not to be vaccinated, then following education, counselling, warning, being put on an unpaid leave of absence, being warned about termination, and then finally being terminated, that termination is a reasonable response at that point.

115. In response to the Union's assertion that the Minister's Directive did not specify that failure to get vaccinated would lead to termination of employment, the Employer agrees that is true, but states that the Directive did not say that employees could or must not be terminated. The Employer points out that the government knows how to address that issue, as it did when it passed a regulation that LTC home workers could only work at one site early in the pandemic. The regulation expressly protected the employment of workers so that once they had made their primary selection of where they would work, their employment status was protected at their second site.

116. The Employer argues that the fundamental nature of LTC employment includes the Residents' Bill of Rights, which references these homes as the residents' homes. According to the Employer, optimizing the quality of life of residents is the core of the work. Part of that, even pre-COVID, was the requirement in s. 229(10)(5) of the General Regulation under the LTCHA (O. Reg. 79/10) requiring that a LTC home licensee ensure that it has a staff immunization program in accordance with evidence-based practices, and if there are none, then in accordance with prevailing practices. In the current environment, the Employer argues that it is part of evidence-based practices to require COVID-19 vaccination.

117. In response to the Union's argument that the prevailing practice through the Immunization Program had been that if an employee did not get the flu vaccine, and

there was an outbreak in a home, they would not be scheduled until the outbreak was declared over, the Employer points out that those outbreaks may have been for two weeks. It argues that the COVID-19 pandemic is fundamentally different from the flu, and in the developing context of the variants, including Omicron, this is not a short lived transient situation, but has already gone on for two years. The Employer again points out that the Minister's Directives are not time limited, which suggests that the vaccination requirements may be in place for LTC homes indefinitely.

118. Relying on the requirements of the *Occupation Health and Safety Act* ("OHSA"), the Employer argues that just as it has an obligation to take every reasonable precaution reasonable in the circumstances to protect the health and safety of its employees (s. 25(2)(h)), so too do employees have an obligation to work in compliance with the provisions of the Act (s. 28(1)(a), which includes the precautions the Employer takes to protect their health and safety.

119. The Employer also relied on the Preamble of the LTCHA, which states that the people of Ontario and the government "believe in resident-centred care"; "affirm our commitment to preserving and promoting quality accommodation that provides a safe, comfortable, home-like environment and supports a high quality of life for all residents of long-term care homes". At Part 1 of the Act, the Employer notes that it states:

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

120. Referring to the Residents' Bill of Rights, which is in Part Two of the Act, at s. 3(1), the Employer drew particular attention to #18, which states that "every resident has the right to form friendships and relationships and to participate in the life of the long-term care home". In this regard, it argues that if a LTC home worker makes personal decisions that cause them to be away from work longer, or cause staff shortages, because they don't want to get vaccinated, that has an impact on the residents' quality of life as well as on other employees.

121. The Employer relies on the Purpose clause of the collective agreement to suggest that the parties themselves have stated that the intention is to secure the best possible care and health protection for residents (Art. 1.1). In its view, that must include vaccinations where they are necessary and mandated. They have also recognized that "the attitude, ability and efficiency of all employees affect to a large extent the care, welfare, safety and comfort of the residents of the Home" (Art. 1.3).

122. Article 7.9 addresses Infection Prevention and Control. The Employer points to the section of the Article that states "it is understood that each employee is

responsible for following prescribed policies and procedure and recommendations of the Employer related to the above", which includes how to deal with residents who may have serious infectious diseases, the requirement to practice universal precautions; and high risk areas where employees are exposed to infectious or communicable diseases for which there are procedures, etc.

123. The Employer also relies on Art. 10.10, which addresses the loss of seniority. In this regard, the Employer notes that if an employee, without satisfactory reason, refuses to continue to work, or return to work during an emergency which seriously affects the Employer's ability to provide adequate patient care, they lose all service and seniority, and their employment will be deemed terminated (Art. 10.10(d)). As well, if an employee is absent and, without reasonable excuse, fails to return to work upon the termination of an authorized leave of absence, they lose all service and seniority, and their employment will be deemed terminated (Art. 10.10(f)).

124. Finally, in respect of the collective agreement, the Employer relied on a Letter of Understanding addressing "Infection Prevention Control", which states that infection control is a standing agenda item on all Labour Management, Occupational Health and Safety Committee meetings.

125. The Employer asserts that having fewer staff available for sick residents during outbreaks causes higher work demands on those who are at work as there is tray service to rooms, deep cleaning required, less family caregivers around to help, staff have to work overtime, including double shifts, and there are more sick calls from workers. It is therefore physically, mentally and emotionally exhausting for staff, so that by not being vaccinated and not attending at work, those unvaccinated employees are contributing to the shortage of staff in their respective homes. The Employer argues that these individuals agreed to work in the LTC home environment; yet they are now saying they don't want to get vaccinated. While the Employer is not suggesting that they should be forced to get vaccinated, there are significant negative consequences of those employees' decisions on their co-workers and the residents, and ultimately there must be consequences for those employees' exercise of their choices.

126. Relying on the COVID-19 impacts statistics provided, the Employer points out that there have been outbreaks in the homes, and there are again such outbreaks. It argues there is good medical research evidence that the booster third vaccination is helpful, even for breakthrough cases of COVID infection. Vaccination helps to limit the chance of hospitalization or an infected person ending up in an Intensive Care Unit. Deaths among the elderly have been vastly reduced through the vaccination programs, but the Employer points out that there are still quality of life issues for residents when there are outbreaks and they are locked down in their rooms.

127. With respect to the Union's reliance on Art. 18.5, the Employer argues there has been no violation of this provision of the collective agreement, as what the Union is seeking is an effective veto on any exercise of the Employer's management

rights, which are specific rights it has under the collective agreement. According to the Employer, the Union is claiming that this article gives them a veto over the employer making any changes to reasonable workplace rules, even if the Employer has statutory obligations under the OHSA and the LTCHA.

128. While the Employer accepts that it is a provision commonly found in first collective agreements in order to ensure that if the parties forgot to bargain about something that had been a right or privilege or benefit in their first round of negotiations, it is not lost, it argues that it was not meant to be a veto on management rights or on emerging environmental issues.

129. The Employer points out that the Policy is not inconsistent with the terms of the collective agreement because Art. 3 gives the Employer exclusive management rights to establish standards and procedures, and to make, alter and enforce rules to be observed by employees, so long as it does so in a fair manner. It argues that it would take the clearest of language, and a more explicit and express provision, to restrict management rights on fundamental issues. Otherwise, the Employer asks what would be the point of having the Management Rights provision of the collective agreement if it had to negotiate every exercise of management rights to make or change a reasonable workplace rule.

130. In any event, the Employer argues that Art. 18.5 applies to a more beneficial existing right, privilege, benefit, practice or working condition. In the circumstances of this case, getting the COVID-19 vaccination is more beneficial than any aspect of the collective agreement.

131. The Employer argues that if Art. 18.5 means what the Union asserts, then what would be the point of having Art. 18.4, which requires the Employer, before effecting any significant changes in rules or policies that affect employees, to discuss the changes with the Union and to provide it with copies.

132. The Policy, according to the Employer, is a manifestation of its obligations under the OHSA and the LTCHA, which are legislated requirements which it cannot contract out of by saying that it is subject to the agreement of the Union. Similarly, the Employer asks rhetorically whether the Union position based on Arts. 18.4 or 18.5 could reasonably be believed to stand in the way of implementation of the Minister's Directive regarding mandatory COVID-19 vaccination.

133. The Employer relies on past practice to assert that it has not in the past negotiated every rule change with the Union. In the most recent past, it had not negotiated with the Union about the June 2021 Vaccination Policy, and in fact at no time had the Union indicated that was required.

134. With respect to the Union's reliance to Art. 18.4, the Employer argues that this provision is simply designed to give the Union notice of a significant rule or policy change, to discuss the changes with the Union, and to provide it with a copy before

"effecting" such changes. The provision does not speak to proposed changes, but rather ones that the Employer has already determined are required.

135. On a plain reading of Art. 18.4, the Employer argues that it is also not a consultative provision. Relying on the past practice just two months earlier, the Employer notes that the Union did not claim any breach of Art. 18.4 when it was provided with a copy of the June 2021 Vaccination Policy, it simply thanked the sender. In any event, the Employer maintains that the requirement is to discuss with the Union and provide it with a copy, before the employer "effects" any significant change. On the facts of this case, the Employer maintains it sent the Union the September 2021 Mandatory Vaccination Policy before the Policy was put in effect, which it claims occurred on October 12, 2021. The Employer also asserts that there were written discussions about the new policy following the August 24, 2021 press release.

136. According to the Employer, it could not have told the Union about the impending policy before August 24, 2021 as it was working with the other LTC home providers and they had to announce the mandatory vaccination policy together. Furthermore, the Employer asserts at that time they all said that the mandatory vaccination policy would take effect on October 12, 2021. For its part, Chartwell sent the Union the Policy on the Monday after the Friday press release; indicated it valued the Union's role; and advised the Union that the Employer would be rolling out the policy to employees over the course of that week.

137. The Employer asserts that since the Union filed its grievance in early September, it did not try to set up a meeting with the Union to discuss the Policy as it knew that they would be meeting in the course of the grievance process. While not relying on the actual discussions the parties had at the Step 2 grievance meeting, the Employer asserts they did discuss the Policy at that time, and the Union made its views known.

138. The Employer also relies on the fact that in Mr. Pielas' communication to Ms. Randazzo on October 14, 2021, he told her about the decision to advise employees on administrative leaves of absence for non-compliance with the mandatory vaccination policy that they would be terminated from employment in December. He offered to meet to discuss this with her. According to the Employer, the Union did not take Mr. Pielas up on his offer, but instead asked for the Employer's Step 2 response and indicated it would be proceeding to arbitration. The Employer maintains that it was not for a lack of trying on its part that there was no discussion about the Policy.

139. The Employer asks that the grievance be dismissed. However, even if it is found that the Employer breached Art. 18.4, the Employer argues that the result should be a declaration and a directive that the Employer comply with the provision in the future.

UNION REPLY SUBMISSIONS

140. The Union states in reply that most of what the Employer argued is irrelevant to the context of this Employer, this Union, and this grievance. It argues that context is everything, and that the arguments should be refocused on the provisions of the collective agreement, in particular Articles 18.4 and 18.5. It states that the Union did not accept that the Policy was reasonable, and from the time it was advised of the new policy, it has opposed it. In particular, it took issue with the disciplinary aspect of the Policy. In practice, the Union asserts that all the evidence shows that discharge is a pillar of the Policy, and that the Employer had no intention of, nor did it consider what was appropriate in each individual case of an employee who was ultimately discharged. As such, the Union maintains that the Policy in this regard is unreasonable.

141. The Union clarified that it is not seeking to have me exceed my jurisdiction. It is simply asserting that whatever the core principles of a contract of employment may be, they cannot override what parties have negotiated or been awarded in their collective agreement. In light of Arts. 18.4 and 18.5, the bargaining unit employees had rights. While there had always been consequences for failure to comply with a policy, no policy prior to the September 2021 Mandatory Vaccination Policy had ever indicated that failure to adhere to the policy could lead to the disciplinary penalty of loss of employment.

142. The Union asserts that the Employer's submissions about all the negative consequences that flow from employees not getting vaccinated and being off work apply equally in principle, to the impact of flu outbreaks, yet the Employer had never put in place as draconian a policy regarding flu vaccinations.

143. While the Union agrees that care for residents and concern for fulfilling their needs should be at the center of the relationship, it takes offence at the Employer's suggestion that the non-compliant employees are shirking their work during the outbreak season and would just come back to work when COVID-19 disappears. It points out that the 14 who were discharged were long term employees, who had spent over a year and a half working in the worst COVID-19 conditions in these homes, putting their own health and safety at risk. Furthermore, the Union pointed out that vaccines had been available for health care workers from about February 2021 on, but the Employer had no trouble with them coming to work unvaccinated until suddenly in late August 2021 it changed its mind. According to the Union, the Employer has not explained what changed at that juncture to make it so vital that employees get vaccinated.

144. The Union is not disputing that the Employer can have reasonable rules and policies and that discipline may be a consequence for breach of such policies. However, it argues that there is something quite different about a policy regarding COVID-19 vaccination, as that entails the security of the person, and what one is

willing to put into one's own body. It relies on Arbitrator Stout's November 2021 *ESA* decision, cited above.

145. In addressing the Employer argument that it has management rights to discipline an employee for willfully or culpably refusing to comply with a policy, the Union states that while it has that management right, it is also required under Art. 18.5 to preserve employees' beneficial working conditions. Since the working conditions at these homes included a vaccination policy that did not resort to discipline for non-compliance, but rather mandated being put on an administrative leave of absence without pay, the Employer's management rights to change that privilege, practice or working condition are restricted.

146. Contrary to the Employer argument that the Union is seeking a veto on the Employer right to promulgate new rules or policies, the Union asserts it is not saying that the Employer cannot change the rules: it is saying that based on Art. 18.5, the Employer must come to the Union and the parties can negotiate about the changes that the Employer is seeking, as it did regarding the return to second workplace protocols following the government's mandate that health care workers could only work in one facility earlier in the pandemic. None of the jurisprudence that the Employer relied on had a provision like Art. 18.5.

147. The Union asserts that the Employer was dismissive of Art. 18.4 in its submissions. However, the Union maintains that the Employer has obligations under that provision to provide a copy to the Union, and to discuss significant changes in policy with the Union in advance, which it did not do in this instance. The Employer never discussed the policy with the Union even after it had announced it, and sent the Union a copy. Discussions after the filing of the grievance do not meet the obligation. The Union argues that in light of Art. 18.5, it was particularly relevant that a discussion should have occurred as the significant change in the policy concerned existing rights, privileges and working conditions.

148. With respect to the Employer's reliance on the Union's acceptance of the June 2021 Vaccination Policy as indicative of past practice, the Union argues there is insufficient evidence before me to conclude on the basis of one example that there is a meaningful past practice. In any event, the June 2021 Vaccination Policy did not impose significant changes as people could continue to work even if not vaccinated, and they were not subject to discharge, so the Union did not feel that there was a breach of Art. 18.5.

ANALYSIS AND DECISION

149. In reaching a decision I have reviewed the parties' extensive submissions, all the documents tendered, and the jurisprudence relied upon.

150. I begin by observing that while a number of mandatory COVID-19 vaccination decisions have addressed various workplace settings, none that was brought to my

attention involved the long-term care home sector, or the health care sector in general. While those working in hospitals, and especially in Intensive Care and COVID units, have borne an inordinate burden, it is the residents and staff in LTC homes who have suffered more in this pandemic than perhaps anywhere else.

151. It is common knowledge that since the beginning of the pandemic two years ago the residents of long-term care homes have suffered extreme illness; a high mortality rate before vaccines became available; lengthy lockdowns in which residents were unable to see their family and friends; many died without being able to see their family members; in some homes due to staff shortages, they lived under terrible conditions regarding their personal needs; they lost the ability to even see their friends within their LTC home; there were no or limited recreational options when they were confined to their rooms; and much more.

152. There is no doubt that access to COVID-19 vaccinations has led to major improvements in the health and quality of life of all Canadians, but most particularly for those living in congregant settings, and especially for frail elderly persons living in LTC homes. The Ontario government recognized the need to achieve higher immunization rates among all those persons working, doing a student placement, or volunteering in LTC homes through its October 1, 2021 Minister's Directive regarding mandatory vaccination. The objectives of that Directive were described as follows:

> Achieving high immunization rates in Ontario's long-term care homes through vaccination is part of a range of measures and actions that can help prevent and limit the spread of COVID-19 in homes. Vaccination against COVID-19 helps reduce the number of new cases, and, most importantly, severe outcomes including hospitalizations and death due to COVID-19 in both residents and others who may be present in a long-term care home.
>
> The objectives of this Directive are to:
> - set out a provincially consistent approach to COVID-19 vaccination requirements in long-term care homes;
> - maximize COVID-19 immunization rates in long-term care homes;
> - ensure that individuals have access to information about COVID-19 vaccination; and,
> - increase accountability and transparency through public reporting of immunization rates in long-term care homes.

153. It is also worth noting what the Chief Medical Officer of Health for Ontario, Dr. Kieran Moore, stated when revising the "COVID-19 Directive #3 for Long-Term Care Homes under the Long-Term Care Homes Act, 2007" on December 17, 2021. In that version of the Directive Dr. Moore was updating the required Infection and Prevention Control (IPAC) practices for LTC homes and retirement homes. One of the reasons for the Directive was stated as follows:

> AND HAVING REGARD TO residents in long-term care homes and retirement homes being older, and more medically complex than the general population, and therefore being more susceptible to infection from COVID-19;

154. The goal of the Directive was described as follows:

> NOTE: The goal of this Directive is to minimize the potential risks associated with the ongoing COVID-19 pandemic in Ontario in all long-term care homes (LTCHs) and retirement homes (RHs) while balancing mitigating measures with the need to protect the physical, mental, emotional, and spiritual needs of residents for their quality of life. …

155. These concerns for the quality of life of people living in LTC homes are rooted in the reality that such homes are the places of residence for many elderly people. The LTCHA encapsulates these concerns in its Preamble, which states that the people of Ontario and their government "believe in resident-centred care" and "affirm our commitment to preserving and promoting quality accommodation that provides a safe, comfortable, home-like environment and supports a high quality of life for all residents of long-term care homes". Section 1 of the Act states that the fundamental principle to be applied in the application of the LTCHA is that "a long-term care home is primarily the home of its residents and is to be operated so that it is a place where they may live with dignity and in security, safety and comfort and have their physical, psychological, social, spiritual and cultural needs adequately met".

156. This is the overall context in which this case must be decided. However, the context for the purposes of this grievance arbitration also includes the collective agreement, policies and practices that govern the relationship between this Employer, this Union, and the workers in the four LTC homes at the center of this grievance.

157. Since this case is about a mandatory COVID-19 vaccination policy, it is also important to reiterate that the Union strongly supports vaccinations, and stated clearly and unequivocally that it would like to see all its members be fully vaccinated. It points out that 98% of its members in the four homes have been vaccinated, which should be seen as a triumph of the various efforts that have been made to convince these LTC home workers that they should get vaccinated.

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158. Based on a review of the grievance and the parties' submissions, there are three questions to be answered:

1. Did the Employer breach Article 18.4 of the collective agreement when it promulgated the September 2021 Mandatory Vaccination Policy in late August 2021?

2. Did the Employer breach Article 18.5 of the collective agreement when it included in the Policy the disciplinary penalty of termination of employment?

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

Did the Employer breach Article 18.4 of the collective agreement when it promulgated the September 2021 Mandatory Vaccination Policy in late August 2021?

159. For ease of reference, Article 18.4 is reproduced again here:

> 18.4 Prior to effecting any significant changes in rules or policies which affect employees covered by this Agreement, the Employer will discuss the changes with the Union and provide copies to the Union.

160. Based on the evidence before me, as outlined below, I find that the Employer was effecting significant changes in its vaccination policy when in August 24, 2021 it announced publicly that it would be moving to a mandatory vaccination regime, and that effective October 12, 2021 anyone not yet vaccinated would be put on a leave of absence without pay or may be terminated from employment.

161. The June 2021 Vaccination Policy, to which the Union had not objected, was specifically addressed to COVID-19, and was not related to the general Immunization Program that had been in place since at least 2012. It envisaged employees providing proof of COVID-19 vaccination by July 30, 2021, or written proof of medical exemption, or proof that the employee had completed an educational program. Anyone who did not provide proof of any of these three options would not be permitted to work until the requirements were met. Those who were not fully immunized were also required to wear PPE and to submit to COVID-19 testing prior to every shift, even after such precautions may no longer be mandated by health authorities.

162. The Employer, as part of a coalition with other national senior's living operators, announced through a press release issued on August 26, 2021, that "as of October 12, 2021, staff who are not fully vaccinated will be placed on an unpaid leave of absence". It is to be remembered that at that juncture, the Ontario government had not mandated vaccination for LTC home workers, so the coalition of LTC home companies was acting on its own initiative.

163. There is no dispute that prior to this press release being issued the Employer had not alerted the Union of its intention to change its June 2021 Vaccination Policy to one requiring mandatory COVID-19 vaccination by the October deadline, and that

the consequence of non-compliance would be an unpaid leave of absence. As is clear from a review of the September 2021 Chartwell Mandatory Vaccination Policy, the penalties for non-compliance also included the option of termination of employment, however that was not mentioned in the press release.

164. While the Employer argued that it was not actually "effecting" the changes to the policy until October 12, 2021, that is simply not the case. As soon as it announced the policy in the media, it was telling the public, its employees, and the Union that effective that day, Chartwell workers had to either be vaccinated by October 12th, or they would not be able to work anymore. As well, some managers in homes represented by HOPE were telling bargaining unit members that day that effective October 12th they would be put on leaves of absence if they were not vaccinated by that date. The effective date of the policy change was therefore August 26, 2021, to the extent that the announcement appears to have been intended to put employees who had not yet got vaccinated, or not fully vaccinated, on notice that they had seven weeks to bring themselves into compliance. October 12th was the deadline by which they had to do that or suffer the consequences.

165. While I understand that the Employer felt it could not discuss the impending change with the Union before August 26th because it was working with other companies in the coalition, and they wanted to make a joint public announcement, it is noteworthy that even on August 26, 2021, after the issuance of its press release, the Employer did not discuss the changes with the Union and did not provide a copy of the new policy to the Union. Only in response to an email from the Union Vice President that day did anyone in Human Resources confirm that there was going to be a new policy, indicate that the Union would be provided with a copy the following week, and that the Employer looked "forward to discussions in the near future" (August 26, 2021 email from A. Faul, Human Resources Manager to Kim Boyle, VP of the HOPE).

166. Despite the President of the Local contacting Mr. Faul back almost immediately on August 26th reminding him of the Employer's collective agreement obligations to discuss policy changes of this magnitude prior to implementation, and offering to make herself available to meet or discuss the changes with the Employer, Chartwell did nothing that day. It was not until August 30, 2021 at 1:55 pm that Mr. Faul sent Ms. Boyle a copy of Chartwell's September 2021 Mandatory Vaccination policy, and he advised her that it would be "communicated to staff shortly". However, as is clear from Ms. Boyle's email to Mr. Faul on August 26th, the Union was already aware from some of its members that managers at some homes had been communicating the policy to bargaining unit members as of August 26, 2021. In any event, in his August 30, 2021 email Mr. Faul did not make any mention of discussion with the Union regarding the policy prior to it being formally communicated to staff.

167. It was not until the Union received the policy itself that it saw that the Employer not only intended to place non-compliant workers on an unpaid

administrative leave, but that such employees may be subject to termination from employment. The policy stated:

> Employees who fail to comply with this Policy **will be placed on an unpaid administrative leave** or may have their employment terminated.
> (Emphasis in original)

168. Any discussions that may have occurred after the filing of the grievance on September 8, 2021 are not material to the Employer's obligation that it "will discuss the changes with the Union" prior to effecting any significant changes to a policy or rule.

169. For the purposes of Art. 18.4, I find that the changes in the policy were significant, as unlike the previous June 2021 Vaccination Policy, it was no longer going to be possible for an employee to remain unvaccinated, but keep working if they complied with the education, testing and PPE requirements. Instead, if they remained unvaccinated, they were going to be put on an unpaid leave of absence in a few weeks, or they were under the threat of termination of employment. None of Chartwell's prior immunization policies had included a threat of termination of employment for failure to get vaccinated.

170. Based on the evidence, I also find that the Employer failed to provide the Union with a copy of the new policy, and discuss the changes with the Union, prior to effecting the significant changes it had made to its COVID-19 vaccination policy. As such, I find that the Employer violated Article 18.4 of the collective agreement.

171. In the *Toronto Hospital* decision, cited above, the arbitrator dealt with a grievance about both an employer's process for initiating a new policy regarding confidentiality and about the policy itself. In that instance the language of the collective agreement regarding the introduction of a new policy was very similar to what is before me in this case at Art. 18.4, with the only difference being that in the language before me it states "any significant changes", whereas the ONA language applied to "any changes". Article 18.06 in that agreement stated:

> 18.06 Prior to effecting any changes or policies which affect nurses covered by this Agreement, the Hospital will discuss the changes with the Association and provide copies to the Association.

172. Arbitrator Knopf stated as follows in this regard (at para. 3):

> The purpose of Article 18.06 is for the parties to be able to discuss and learn from each other about their respective interest and positions with regard to policies. Failure to abide by such a provision of the collective agreement not only amounts to unfortunate labour relations but it also makes the kinds of litigation that this case has become more inevitable. Given the concession of the Employer and the facts as presented by the parties, the Board of Arbitration declares that the Employer violated Article 18.06 in its failure to meet with the Association prior to implementing the confidentiality policy.

> Further, the Board orders that the Hospital abide by both the language and the spirit of Article 18.06 in the future.

173. Unlike in the case before me, in that instance the hospital had conceded that it failed to abide by the collective agreement regarding the development of, and notification to, the union regarding a confidentiality policy (para. 2) and had not provided the union with a copy of the new policy prior to implementing it. As such, it does not appear that arguments were made in this regard. At para. 35 of the decision the arbitrator declared that the hospital had violated the provision of the collective agreement by failing to meet with ONA prior to implementing the confidentiality policy, and ordered that it "abide by both the language and spirit" of the article in the future.

174. That is not the situation before me. Here the Employer did not concede that it had breached Art. 18.4, although based on the evidence before me it is clear that it had done so, and I have so found.

175. However, unlike the faculty association in the *Norquest College* decision, cited above, which sought damages for a college's failure to abide by a provision that the parties make "an earnest effort to settle issues" arising out of the application of the collective agreement, and to do so "fairly and promptly through discussion", the Union in this case has not sought damages. In any event, in that case although the grievance was upheld, the majority declined to award damages based on the particular circumstances before them.

176. Therefore, in respect of Art. 18.4, I make the following declaration and order:

- I declare that the Employer violated Art. 18.4 of the collective agreement when it failed to discuss with the Union its significant changes to its COVID-19 vaccination policy, and failed to provide the Union with a copy of that policy prior to effecting the changes; and,

- I order that in the future the Employer abide by the language and spirit of Art. 18.4.

Did the Employer breach Article 18.5 of the collective agreement when it included in the Policy the disciplinary penalty of termination of employment?

177. The Union argued that the Employer violated Art. 18.5 when it promulgated the disciplinary aspect of the September 2021 Mandatory Vaccination Policy without first reaching an agreement with the Union about this significant change to the existing rights, privileges, benefits, practices or working conditions of bargaining unit members. For ease of reference, Art. 18.5 is reproduced again here:

> 18.5 Existing rights, privileges, benefits, practices and working conditions shall be continued to the extent that they are more beneficial and not inconsistent with the terms of this Collective Agreement unless modified by mutual agreement of the Employer and the Union.

178. From the parties' 2014 interest arbitration award, *Chartwell Seniors Housing REIT*, cited above, I note that while it was a first collective agreement for HOPE with this Employer it was not in reality a first agreement to the extent that LIUNA Local 1110 had represented this bargaining unit previously, and had been displaced by HOPE. The term of HOPE's first collective agreement was from June 25, 2012 to June 24, 2014. What is now Art. 18.5 (then referred to as 19.05 in the interest arbitration award) was specifically awarded to the Union as a "status quo" provision in the 2014 interest arbitration award. Since the parties have had a number of rounds of bargaining (and perhaps interest arbitration) since that time, it is difficult to accept the Employer's assertion that Art. 18.5 was just a provision awarded in the parties' first collective agreement, intended to ensure that some prevailing practice or benefit did not get lost in the shuffle to reach a first collective agreement between parties who are "new" to each other.

179. Application of this provision to the circumstances before me requires interpretation of the words used in Art. 18.5. It has long been accepted that when arbitrators are faced with a language interpretation issue, unless there is evidence to the contrary, they should assume that the language before them should be read in its normal or ordinary sense, unless that would lead to an absurdity or inconsistency with the rest of the collective agreement, or unless the context reveals that the words were used in some other sense. If the language is not ambiguous, and does not lack clarity in meaning, effect must be given to the words used notwithstanding the result that may ensue.

180. The first consideration then in this instance is to ascertain whether there was an existing practice or working condition regarding employee vaccinations that was more beneficial to the bargaining unit than what the Employer promulgated in its September 2021 Mandatory Vaccination Policy.

181. As already noted, for the purposes of this grievance the Union accepts the mandatory nature of this policy because, since the time that the Employer implemented its September 2021 Mandatory Vaccination Policy, the October 1, 2021 Minister's Directive requires that LTC home employees be vaccinated in order to enter a home or work. As such, the mandatory aspect of this policy can no longer be questioned because it is now government-directed.

182. Prior to August 26, 2021, pursuant to either the Immunization Program (from at least 2012 on, last updated in March 2020) or the June 2021 Vaccination Policy introduced during the COVID-19 pandemic, it appears that bargaining unit employees were not subject to discipline if they chose not to be vaccinated. I say "appears' because under the Immunization Program, the most specific protocol

regarding vaccine refusal was with respect to flu vaccinations. Thus, while it is not clear whether employees could refuse other vaccinations that may be government or Employer recommended, they could refuse annual flu vaccinations. There were consequences for doing so, but the Immunization Program did not include a disciplinary penalty. If such unvaccinated workers also refused to take Tamiflu or some other flu antidote, they were held out of work during a flu outbreak in a home, until the outbreak was declared over. The Union's undisputed evidence is that while employees were put off work if unvaccinated, no employee had ever been disciplined for failing to get a flu vaccine. It is noteworthy that the 2012 Immunization Program and this practice pre-dated HOPE's 2014 first collective agreement for these Chartwell homes, and continued thereafter.

183. With respect to the COVID-19 vaccines, as outlined in the evidence, the June 2021 Vaccination Policy did not require an employee to get vaccinated, and offered other options. Nothing in that policy indicated there would be disciplinary penalties for failing to get vaccinated or for failing to get the required vaccine education, or if the employee would not get tested before each shift. Only if an employee accepted none of the options on offer by the deadline of July 30, 2021, was the person to be put off work until the requirements had been met.

184. The Union also pointed to the Employer's practice regarding mandatory continuing education. If employees did not finish their mandatory education before a deadline, they may be held out of the schedule until they did, but there were no disciplinary penalties for failing to meet the mandatory requirement.

185. The Employer argued that these policies or practices did not indicate that the Employer *could not* invoke discipline if an employee failed to comply with a policy. While that is true, there was no evidence in this case that it had in fact invoked disciplinary sanctions at any time, particularly regarding its vaccination policies. As the Union put it, in the context of Art. 18.5, "silence is golden", as the consistency between what the program or policy said, and what the Employer actually did, is what establishes what the existing practice or working condition had been.

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

187. Was the existing practice and working condition inconsistent with the terms of the collective agreement? Apparently not, as the Employer had exercised its management rights to institute its Immunization Programs previously, and the June 2021 COVID-19 Vaccination policy as recently as June 2021; and, both had set the

consequences in each policy, without a grievance from the Union claiming a breach of the collective agreement.

188. Pursuant to Art. 18.5 then, such existing practice and working condition regarding vaccinations, which was more beneficial, and not inconsistent with the terms of the collective agreement, "shall be continued" "unless modified by mutual agreement of the Employer and the Union".

189. As is obvious from the review above of the facts in this case as they relate to Art. 18.4, there was no discussion with the Union before the Employer imposed the September 2021 Mandatory Vaccination Policy. Furthermore, as was clear from Ms. Randazzo's email to the Employer, at the time the Union did not agree with either the mandatory nature nor the disciplinary aspect of the new policy. Hence, on August 26, 2021 immediately after the Union became aware of the press release, Ms. Randazzo put the Employer on notice of the Union's belief that under Art. 18.5, the Employer had to discuss the new policy and get the agreement of the Union. However, there was no meaningful discussion with the Union about the new policy. To the extent that the parties may have had a discussion at the Step 2 grievance meeting, it is clear that no agreement was reached as the Union forwarded this grievance to expedited arbitration after it received the Employer's denial of the grievance.

190. The Employer argued that the Management Rights clause has to have meaning, and is a collective agreement term with which it would be inconsistent to find that there were existing practices and working conditions that would hamper the Employer's management rights.

191. In the normal course, that may well be a good argument. However, these parties, in this collective agreement, in the Management Rights clause itself, have at Art. 2.2(d) recognized that the Employer may only "exercise any of the rights, powers, functions or authority which the Employer *has prior to* the signing of this Agreement *except* as those rights, powers, functions or authorities are specifically abridged or modified by this Agreement" (emphasis added). That clause must also be given its plain meaning, read in the context of the rest of the collective agreement.

192. In this agreement, Art. 18.5 is a provision that specifically abridges the Employer's exclusive right "to make, alter and enforce reasonable rules and regulations to be observed by employees" to the extent that those employees may have enjoyed existing practices or working conditions that were more beneficial to them. In such instances, the collective agreement provides at Art. 18.5 that the Employer and Union would have to reach mutual agreement on how the particular more beneficial aspect could be modified.

193. As the Union indicated in its submissions, this is an unusual provision, and neither party provided any case law where a similar provision had been interpreted.

I note again, the Union's insistence that it is not an anti-vaccination union, and it wants all its members to get vaccinated. The only aspect of the September 2021 Mandatory Vaccination Policy with which it takes issue now is that an employee who is non-compliant with the policy is subject to being terminated from employment, rather than being left on an unpaid leave of absence, as had been the existing practice or working condition.

194. As noted above, the Union is not objecting here to the mandatory aspect of the policy in light of the Minister's Directive requiring mandatory vaccination for all LTC home employees in order for them to enter a home. However, it points out that the Directive did not indicate that employers should terminate the employment of those who do not comply: The Minister instead indicated that employers had to consider their collective agreements, which in this instance, the Union states envisages the Employer getting the Union's agreement if it wants to change the established practice and working condition these employees have enjoyed as regards vaccination policies. As such, the Union requests that the disciplinary aspect of the policy be declared inoperative as it is a violation of the collective agreement.

195. Having considered the collective agreement language, and for all the reasons outlined above, I find that the Employer breached Art. 18.5. The employees of this bargaining unit had enjoyed a more beneficial practice and working condition regarding the consequence of remaining unvaccinated; that practice or working condition was not inconsistent with the terms of the collective agreement; and the parties have not agreed to modify that practice or working condition. I therefore make the following declaration and orders:

- I declare that the Employer violated Art. 18.5 of the collective agreement when it failed to continue the existing practice or working condition of putting employees on an unpaid leave of absence when they failed to comply with a vaccination policy, and failed to discuss with the Union the new disciplinary aspect of the September 2021 Mandatory Vaccination Policy, in order to try to reach a mutual agreement.

- I order that in the future the Employer abide by the language of Art. 18.5; and,

- I order that unless the parties agree otherwise, the statement "or may have their employment terminated" as it applies to these HOPE bargaining unit members, be struck from the September 2021 Mandatory Vaccination Policy, the November 2021 revised version of this Policy, and any other revision of this particular policy.

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

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

197. In *Irving Pulp & Paper*, cited above, the Supreme Court of Canada cited with approval the *KVP* test, and as well noted that an employer's unilaterally imposed rule or policy has to be "reasonable". Writing for the majority, Abella J. stated:

> 22. When employers in a unionized workplace unilaterally enact workplace rules and policies, they are not permitted to "promulgate unreasonable rules and then punish employees who infringe them" (*Re United Steelworkers, Local 4487 & John Inglis Co. Ltd.* (1957), 7 L.A.C. 240 (Laskin), at p. 247; see also *Re United Brewery Workers, Local 232, & Carling Breweries Ltd.* (1959), 10 L.A.C. 25 (Cross)).
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> 23. This constraint arises because an employer may only discharge or discipline an employee for "just cause" or "reasonable cause" — a central protection for employees. As a result, rules enacted by an employer as a vehicle for discipline must meet the requirement of reasonable cause (*Re Public Utilities Commission of the Borough of Scarborough and International Brotherhood of Electrical Workers, Local 636* (1974), 5 L.A.C. (2d) 285 (Rayner), at pp. 288-89; see also *United Electrical, Radio, and Machine Workers of America, Local 524, in re Canadian General Electric Co. Ltd. (Peterborough)* (1951), 2 L.A.C. 688 (Laskin), at p. 690; *Re Hamilton Street Railway Co. and Amalgamated Transit Union, Division 107* (1977), 16 L.A.C. (2d) 402 (Burkett), at paras. 9-10; Ronald M. Snyder, *Collective Agreement Arbitration in Canada* (4th ed. 2009), at paras. 10.1 and 10.96).
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> 24. The scope of management's unilateral rule-making authority under a collective agreement is persuasively set out in *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1965), 16 L.A.C. 73 (Robinson). The heart of the "*KVP* test", which is generally applied by arbitrators, is that any rule or policy unilaterally imposed by an employer and not subsequently agreed to by the union, must be consistent with the collective agreement and be reasonable (Donald J. M. Brown and David M. Beatty, *Canadian Labour Arbitration* (4th ed. (loose-leaf)), vol. 1, at topic 4:1520).
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> 25. The *KVP* test has also been applied by the courts. Tarnopolsky J.A. launched the judicial endorsement of *KVP* in *Metropolitan Toronto (Municipality) v.C.U.P.E.* (1990), 1990 CanLII 6974 (ON CA), 74 O.R. (2d) 239 (C.A.), leave to appeal refused, [1990] 2 S.C.R. ix, concluding that the "weight of authority and common sense" supported the principle that "*all* company rules with disciplinary consequences must be reasonable" (pp. 257-58 (emphasis in original)). In other words:

> The Employer cannot, by exercising its management functions, issue unreasonable rules and then discipline employees for failure to follow them. Such discipline would simply be without reasonable cause. To permit such action would be to invite subversion of the reasonable cause clause. [p. 257]

26. Subsequent appellate decisions have accepted that rules unilaterally made in the exercise of management discretion under a collective agreement must not only be consistent with the agreement, but must also be reasonable if the breach of the rule results in disciplinary action (*Charlottetown (City) v. Charlottetown Police Association* (1997), 1997 CanLII 4577 (PE SCAD), 151 Nfld. & P.E.I.R. 69 (P.E.I.S.C. (App. Div.)), at para. 17; see also *N.A.P.E. v. Western Avalon Roman Catholic School Board*, 2000 NFCA 39, 190 D.L.R. (4th) 146, at para. 34; *St. James-Assiniboia Teachers' Assn. No. 2 v. St. James-Assiniboia School Division No. 2*, 2002 MBCA 158, 222 D.L.R. (4th) 636, at paras. 19-28).

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

> Determining reasonableness requires labour arbitrators to apply their labour relations expertise, consider all of the surrounding circumstances, and determine whether the employer's policy strikes a reasonable balance. Assessing the reasonableness of an employer's policy can include assessing such things as the nature of the employer's interests, any less intrusive means available to address the employer's concerns, and the policy's impact on employees. [I.F., at para. 4]

198. The *KVP* test is found at para. 34 of that decision, cited above:

> Characteristics of Such Rule
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> 34. A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:
>
> 1. It must not be inconsistent with the collective agreement.
> 2. It must not be unreasonable.
> 3. It must be clear and unequivocal.
> 4. It must be brought to the attention of the employee affected before the company can act on it.
> 5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
> 6. Such rule should have been consistently enforced by the company from the time it was introduced.

Effect of Such Rule re Discharge

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

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

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

199. Based on the evidence before me I am satisfied that the policy as it relates to mandatory vaccination is clear and unequivocal; it was brought to the attention of all employees in the bargaining unit, and particularly those who were going to potentially be negatively affected by it, before it was acted upon; by mid to late October 2021 and thereafter on a few occasions, the potentially affected employees were advised that they would be discharged based on the rule; and, since the introduction of the September 2021 Mandatory Vaccination Policy, it has been consistently applied to the extent that the terminations of the fourteen individuals in December 2021 were the first Employer applications of the new policy.

200. This leaves the *KVP* questions of whether the policy is consistent with the terms of the collective agreement and is reasonable.

201. In the normal course I would have to first address the question of whether having a mandatory vaccination policy is reasonable in all the circumstances. When reviewing mandatory vaccination policies in the current COVID-19 context, arbitrators have in each instance, considered the particular facts and circumstances of the case before them when deciding whether it is reasonable for an employer to introduce such a policy, or impose certain consequences for non-compliance with the policy.

202. As an example, in the November 2021 *Electrical Safety Authority* decision Arbitrator Stout wrote as follows:

> [14] Context is extremely important when assessing the reasonableness of a workplace rule or policy that may infringe upon an individual employee's rights. The authorities reveal a consensus that in certain situations, where the risk to health and safety is greater, an employer may encroach upon individual employee

> rights with a carefully tailored rule or policy, see *Carewest v. AUPE* (2001), 104 L.A.C. (4th) 240 (Smith).
>
> [15] In cases where the rule or policy involves health and safety, one must consider the obligations that arise under the *Occupational Health and Safety Act*, including an employer's obligation to "take every precaution reasonable in the circumstances for the protection of the worker," see s. 25(2)(h). This statutory obligation fits neatly within the *KVP* test, which is grounded in a contextual analysis and a balancing of interests approach to determine the reasonableness of any rule or policy.
>
> [16] 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.
>
> [17] 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.

203. In this case, as a result of the October 1, 2021 Minister's Directive, and the Union's acceptance of the Minister's authority to issue that mandatory vaccination directive, the mandatory nature of the Employer's policy is not a live issue. As such, there is no dispute that the mandatory nature of the September 2021 Mandatory Vaccination Policy is reasonable.

204. The Union is also not disputing the policy provision regarding non-compliant employees being put off work on an unpaid administrative leave of absence, because that had been the practice at this Employer in the past for non-compliance with vaccination policies. In any event, pursuant to the Minister's Directive, a non-compliant worker could not attend at the home if not vaccinated by the provincial deadline of November 15, 2021. However, the Union argues that it is the nature of the Employer response for non-compliance with the policy, to the extent that it results in termination of employment, that is unreasonable. It argues there is no legitimate or important management interest in requiring the disciplinary response of termination when the policy already had, and continues to have, the unpaid administrative leave of absence penalty for non-compliance.

205. I have found earlier that the Policy, as it relates to the inclusion of the termination of employment provision, is a violation of Art. 18.5 of the collective agreement. It can therefore, on its face, be found to be inconsistent with the terms of the collective agreement. Notwithstanding that finding, and in the event that I am wrong in that regard, it is nonetheless necessary to consider whether it is reasonable to include in the policy the alternative penalty that an employee may be terminated for non-compliance.

206. Arbitrator Stout found in the November 2021 *Electrical Safety Authority* case, cited above, that the employer's mandatory vaccination policy was not reasonable in part because it contained a provision for discipline and discharge for failing to get vaccinated. Based on the facts before him, he found that the vast majority of the work being done by the ESA employees was being done remotely, and for those unvaccinated employees who had to be at the workplace or elsewhere, the testing regime or other reasonable means were working. The arbitrator noted that there was no evidence of any actual problems in the workplace that could not be addressed, and stated as follows:

> 36. In my view, disciplining or discharging an employee for failing to be vaccinated, when it is not a requirement of being hired and where there is a reasonable alternative, is unjust. Employees do not park their individual rights at the door when they accept employment. While an employer has the right to manage their business, in the absence of a specific statutory authority or specific provision in the collective agreement, an employer cannot terminate an employee for breach of a rule unless it meets the *KVP* test and [is] found to be a reasonable exercise of management rights.

207. In *Bunge Hamilton*, cited above, a union filed a policy grievance about a new COVID-19 vaccination policy. The employer had introduced the policy on November 9, 2021 after being advised a week earlier by its landlord, the Hamilton Oshawa Port Authority ("HOPA"), that effective January 24, 2022, anyone coming on the HOPA properties had to be fully vaccinated against COVID-19, or provide certified medical contraindication of an inability to be vaccinated. The employer's new policy required that employees provide proof of vaccination by no later than January 24, 2022, and reminded employees that to be considered fully vaccinated they had to have completed their final dose two weeks before. Failure to provide proof of full vaccination status by the deadline would lead to the employee being put on an unpaid leave of absence until they provided proof of full vaccination, or if they didn't intend to provide proof of vaccination, pending final determination of their employment status, up to and including termination of employment.

208. The union objected to the policy on a number of grounds, including claiming it was unreasonable because it envisaged unvaccinated employees being put on unpaid leaves of absence, or being disciplined or terminated from employment. The arbitrator denied the grievance. He found that the requirement to disclose vaccination status was reasonable because while it envisaged non-compliant employees being put on an unpaid leave of absence, it did not stipulate that they were being put on a disciplinary suspension, nor did it say they would be terminated. Rather, it indicated they were being put on an unpaid leave of absence pending a final determination of their employment status, which may include discipline or termination.

209. In this regard, Arbitrator Herman wrote:

> 30. With respect to the references in the Vaccine Policy to discipline and

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

210. The decision in *Maple Leaf Sports and Entertainment*, cited above, also addressed a mandatory vaccination policy, albeit in the context of a particular grievor who had been put on an unpaid leave of absence due to his undisclosed vaccination status. The employee worked at the Scotia Bank Arena, one of the venues operated by the employer where its professional sports teams play. His job was to assist in the conversion of the arena from one type of event to another, so he had to work in close proximity with up to 100 people. After the Ontario government announcement on September 1, 2021 that patrons to events would have to be fully vaccinated or provide proof of certain exceptions, the employer issued a policy the next day requiring that all its employees had to be fully vaccinated by October 31, 2021. Employees were told that if they were not fully vaccinated by the deadline, or had not disclosed their vaccination status by that date, they would be put on an indefinite unpaid leave of absence and may be subject to termination. The grievor refused to disclose his vaccination status by the deadline, and was put on unpaid leave of absence.

211. Arbitrator Jesin denied the grievance and stated as follows:

> 19. It is clear that the weight of authority supports the imposition of vaccine mandates in the workplace to reduce the spread of Covid 19. That is particularly so where employees work in close proximity with other employees, as they do in this case. The authority to impose such mandates arises not only from management's right to implement reasonable rules and regulations but also from the duty of employers to take any necessary measures for the protection of workers as set out in OHSA. Indeed, the Union has emphasised that it is not challenging the Employer's vaccine mandate in this case but is only seeking to protect the employee's right to keep personal medical information private.
>
> 20. It seems to me that that by opposing the disclosure of vaccine status the Union is indeed challenging the vaccine mandate. I do not see how the Employer can enforce a vaccine mandate without requiring disclosure of an employee's vaccine status. Without that information it cannot ensure that all employees are vaccinated. In that regard the arbitral authority makes it clear that Employers are

> indeed entitled to seek disclosure of an employee's vaccine status to the extent necessary to administer a vaccine policy in the workplace, particularly if the information is secured and protected from unnecessary disclosure. I endorse and agree with those authorities. I also accept that the Employer has put procedures in place to secure and adequately protect the confidentiality of any such information.
>
> 21. I do not agree with the Union's contention that the seniority rights accorded in Article 13 are being denied. Rather, the Employer has established that being vaccinated for Covid 19 is a necessary qualification for the performance of work within the bargaining unit. Such a determination is reasonable given the pandemic that presently exists. More fundamentally, it is a reasonable and appropriate approach to fulfilling its duties under OHSA for the protection of all workers in its employ. Furthermore, the Employer in this case has taken appropriate steps to protect the confidentiality of any information that is disclosed under its policy.

212. What is clear from a review of these decisions is that arbitrators have accepted that a mandatory vaccination policy will likely be found to be reasonable in the current COVID-19 context and having regard to employers' responsibilities to maintain a safe and healthy workplace for all employees. They have also found reasonable those policies that included putting employees on notice that if they remain unvaccinated (or those who fail to disclose their vaccination status or don't have a medical exemption) they will be subject to being placed on an unpaid leave of absence, and may be subject to termination of employment. What these decisions have not stated is that termination is an automatic outcome for failure to get vaccinated, and in none of the cases had the Employer in fact enacted any terminations of employment.

213. It is interesting to note that in the *Ontario Power Generation* decision, cited above, the employer's "COVID-19 Response Instruction" to its employees was upheld as it regarded what should happen to those employees who were unvaccinated, refused to disclose their vaccination status, and would not agree to undergo Rapid Antigen Testing. The employer in that case had advised employees that effective September 23, 2021 unvaccinated workers were required to undergo Rapid Antigen Testing initially once per week, and then twice per week. If an employee refused, they would be placed on an unpaid leave of absence. If, after 6 weeks, the employee did not change their mind and agree to the testing regimen, their employment would be terminated for cause.

214. Arbitrator Murray found as follows (at pp. 6 -7 of the unpaginated decision):

> As noted above, OPG has indicated its intention to place some employees on an unpaid leave of absence. Those potentially affected are unvaccinated employees (i.e. those who identify as unvaccinated and those who decide not to disclose their vaccination status) who refuse to participate in the Rapid Antigen Testing program.

> The Union asserts that sending those unvaccinated employees who refuse to participate in Rapid Antigen Testing is a violation of Article 2A.3. I do not agree. In this situation, where most employees have been vaccinated, and virtually all the rest are willingly participating in the reasonable alternative of Regular Rapid Antigen Testing, employees who refuse to do either can be sent home on an unpaid leave pending completion of the discipline process.
>
> The employees who will be placed on an unpaid leave of absence are refusing to take the necessary and reasonable step of taking a minimally intrusive test that would demonstrate that they are fit to work and do not present an unnecessary risk to their co-workers during a global pandemic that has cost 29,000 lives in this country and at least 5 million world-wide. Given this refusal, the Company is sending them home on an unpaid leave pending completion of the disciplinary process. Unlike other occasions when the Company sends someone home pending potential discipline, in these circumstances, it is completely within the control of the employee to decide when to come back to work. All they need to do is to agree to participate in the Rapid Antigen Testing programme which is designed to reduce the risk they present to their fellow employees by remaining unvaccinated –a test that has been endorsed by the Chief Medical Officer of Health and other appropriate authorities as being safe and effective. I view this as sensible and necessary part of a reasonable voluntary vaccination and testing program.
> …
> The Company has given employees who are sent home without pay 6 weeks to consider whether they are willing to partake in the testing regime like so many of their colleagues. I think it is important for them to understand that, in my preliminary view, in the context presented by this global pandemic, when lives of co-workers are at risk, unvaccinated individuals who refuse to participate in reasonable testing are, in effect, refusing of their own volition to present as fit for work and reduce the potential risk they present to their co-workers. The Company has made it clear that termination of employment at the end of the 6-week period will typically occur. It is important for those individuals who are fired for choosing to not be tested understand that they are very likely to find the termination of employment upheld at arbitration. Effectively, employees who refuse testing will likely have made a decision to end their career with this Company.

215. *Ontario Power Generation* is a case where an arbitrator did uphold as reasonable a termination provision in a COVID-19 policy. However, it is distinguishable from the mandatory vaccination situation before me as it was in the context of a *voluntary* vaccination policy, with the alternative requirement for regular Rapid Antigen Testing. There is a significant difference between a refusal to undergo a test that requires the use of a swab in a voluntary vaccination regime and the requirement to be injected with a vaccine in a mandatory vaccination regime. I agree with Arbitrator Stout in the *Electrical Safety Authority* cases, cited above, that employees do not give up their individual rights to integrity of their person when they accept employment, so that it is unjust to require termination as a penalty for a failure to get vaccinated when there is a reasonable alternative. That reasonable alternative depends on the type of workplace in each instance.

216. The Management Rights clause (Art. 2.2) of the collective agreement before me gives the Employer the exclusive right to manage and direct its operations, including to "make, alter and enforce reasonable rules … to be observed by employees". The restrictions on this right are found at Art. 2.2(d) and (e). Article 2.2(d) clarifies that the Employer's management rights may be specifically abridged or modified by the terms of the agreement. Article 2.2(e) is the Employer's commitment that it "shall exercise these rights in a fair manner consistent with this Agreement".

217. As is common to most collective agreements, the Management Rights provision also states that while the Employer has the right to discharge employees, that right is subject to challenge if an employee claims that they have been discharged without just cause (Art. 2.2(c)).

218. The September 2021 Mandatory Vaccination Policy is categorical in its penalties for non-compliance: a non-compliant employee "will be placed on an unpaid administrative leave *or* may have their employment terminated" (emphasis added). There is no reference to the just cause standard, as the policy envisages only one of two possible outcomes for non-compliance, without any consideration of any other circumstances that may be relevant to a particular employee's situation.

219. The Employer's letters to the fourteen employees who were terminated in December 2021 stated that in Chartwell's view it had just cause to terminate simply based on each employee's non-compliance with the Policy. Based on the evidence regarding the steps that the Employer had taken in giving employees vaccine education, time to consider their situation and to get vaccinated during the leaves of absence after October 12, 2021, along with the various letters advising of deadlines and access to vaccine education, the Employer requested that I provide the parties with a "generic just cause" ruling, to provide guidance to the parties on the "broad based application" of the policy to the fourteen individuals who were terminated from employment. It was seeking some direction about whether, through these actions, it had met the just cause standard. Thus, it is clear that in the Employer's view, non-compliance with the policy along with the various steps it had taken should be sufficient to ground a finding of just cause.

220. Furthermore, one of the Employer's submissions was that it needed to know whether the termination aspect of the policy was reasonable because it is concerned that there will be employees who will not take the third vaccination, as required by the current Minister's Directive, so it should not have to incur the costs associated with putting such employees on a leave of absence before terminating their employment for non-compliance since all employees in the bargaining unit now know about and understand the policy.

221. There is no actual evidence before me of the necessity for termination in the circumstances as they stood in mid-December 2021. The number of workers off work as a result of being non-compliant with the policy amounted to around 2% of

all the workers in the bargaining unit: 14 out of 705. They were distributed among three of the four homes so that three employees were eventually terminated at the Woodhaven; two at the Wynfield; nine at the Westmount, and none at the Waterford.

222. At that juncture the 14 employees had been on an administrative leave of absence for about eight weeks so there were clearly no imminent health and safety issues associated with having unvaccinated workers in the LTC homes. To the extent that pursuant to the provisions of the collective agreement the Employer had had any ongoing financial liability for those on administrative leaves of absence, by mid-December it no longer had to pay its portion of benefit premiums. In my view paying the employer portion of benefit premiums for fourteen employees for two months amounts to a very minor negative impact, especially as the Policy itself envisaged that employees would be put off work on unpaid administrative leaves of absence, so the Employer should have foreseen that it may incur some costs for benefit premiums. Also at that point in mid-December the affected workers were no longer accruing any further seniority.

223. The Employer urged me to find that leaving non-compliant workers on a leave of absence was prejudicial to other workers who have been vaccinated and have therefore continued to work. There is no evidence before me of this alleged prejudice. To the extent that the Employer claims that those on a leave of absence continued to accrue seniority, that is a collective agreement right (Art. 10.9) that any bargaining unit member may enjoy for the first 60 continuous calendar days if they are on a leave of absence for any reason. As such, it is difficult to see how it would be a significant morale issue when it is a negotiated right for all employees.

224. The Employer urged me to consider that there would be morale issues among those who had got vaccinated and continued to work, while others were off but still held their particular position and schedule line. This is not a particularly persuasive consideration as in any event, since the fourteen employees who were terminated from employment had the right to grieve their respective terminations, should they be reinstated they would have to be returned to their particular positions and scheduling lines. Any employee who back fills for someone on a leave of absence, or where a termination is grieved, has to be aware that their position is likely to be temporary and contingent.

225. The Employer expressed concern on behalf of the bargaining unit that if a job was posted, a non-compliant employee on a leave of absence could apply for the position, use their accrued seniority to get the position, and thereby preclude someone who was back filling a job from getting that job. This too is appears to be a scenario that flows from the terms of the collective agreement, under which every employee has the same rights. Even if that occurred, such an employee would not be able to return to work unless they were fully vaccinated. In any event, there was no evidence that in the two months that the fourteen (or originally 16) employees were on unpaid administrative leaves of absence this issue arose.

226. To the extent that the Employer expressed concern about the loss of employees to leaves of absence, I agree with the Union that nothing precludes the Employer from hiring new employees to fill positions left vacant through the back-filling process. It is also an ironic concern in light of the Employer and Union's common view that there is in fact a scarcity of workers to fill LTC home positions, but this Employer terminated apparently long service employees pursuant to its mandatory vaccination policy when it could have kept them on unpaid leaves of absence hoping that they would come to understand that getting vaccinated was their only way back to earning a living in their particular LTC home. In any event, there was no evidence tendered of difficulties in recruitment and retention as a result of fourteen or sixteen employees out of a workforce of 705 being on unpaid leaves of absence between October and December 2021.

227. I cannot accept the Employer's assertion that it would appear to employees still working that those who were on leaves of absence because of failure to comply with the policy were being rewarded for their "bad behaviour". Non-compliant employees who were off work on unpaid leave were not receiving any employment income; after the first two months would not be accruing any seniority (while those working would be accruing seniority); and, would have to pay the full cost for their own benefits (or live without them) after the initial period when the Employer shared in those costs.

228. The Union argued that there must be a balancing of the Employer's interests with those of the employees affected by the termination aspect of the policy. It noted that, if terminated, rather than being left on unpaid leaves of absence, non-compliant employees lose all accumulated seniority and their livelihoods. In this particular case, the Union points out that they lost their livelihoods after just two months of being on an unpaid leave of absence after the Employer's strict application of the mandatory vaccination policy termination provision.

229. As both the *KVP* and *Irving Pulp & Paper* decisions envisage, in considering the reasonableness of a policy, there must be a balancing of the interests of the employer with those of the employee who stands to be disciplined or terminated pursuant to the employer's unilaterally imposed policy.

230. As is clear from our experience of the COVID-19 pandemic over the last two years, circumstances change quickly, and it is difficult to anticipate what may occur next. The evidence in this case demonstrated that well: in March 2020, at the beginning of the pandemic, the Employer changed its Immunization Program; in June 2021 it introduced a new COVID-19 Vaccination policy; and by late August 2021 it introduced the September 2021 Mandatory Vaccination policy in response to concerns about the Delta strain of the COVID-19 virus. We are now dealing with the Omicron variant, and it is impossible to know what comes next.

231. Similarly, the Ontario government and public health authorities have been changing their policies as each new wave of infection occurs or virus strain emerges. New versions of vaccines and medications are being released on an ongoing basis to assist with curbing or treating COVID infections. It is safe to say that the COVID-19 situation is fluid.

232. In this turbulent environment, the two months that the Employer waited before terminating the non-compliant employees was a very short time in which to make an irrevocable decision to terminate the employment of fourteen employees for being unvaccinated. On the evidence of the limited time that the employees were on an unpaid leave of absence, and essentially no time when they had the experience of having neither benefits nor income, it is difficult to evaluate whether being on continued unpaid leave for a longer time could have been an incentive to get vaccinated so that the non-compliant workers could have become compliant and returned to work.

233. In this case the Employer is seeking authorization to terminate employees without having to wait even two months the next time it has to deal with non-compliant employees. In the absence of evidence of any necessity or operational effect on the homes it is difficult to find that the termination provision of the policy is reasonable.

234. Furthermore, the automatic nature of the imposition of termination as a penalty for non-compliance precludes the Union and an employee from relying on any mitigating factors. As was clear from the Employer's letters to both the employees who attended the discipline meetings and those who did not attend their discipline meetings in December 2021, the only reason given for each employee's termination was that they had not provided proof of COVID-19 vaccination or of a medical exemption, and as such the Employer had "no choice but to terminate your employment for just cause". It appears the Employer is abrogating its duty to prove just cause for termination by relying solely on its inclusion of the optional penalty of termination in the policy.

235. I note again that this policy does not, as do some, suggest that non-compliant employees will be put off work on an unpaid leave of absence, *and* may be subject to discipline up to and including discharge. This policy says they will be placed on an unpaid leave *or* may have their employment terminated. Thus, what this Employer is seeking to do is to (as noted from its submissions) simply terminate employees for non-compliance with their mandatory vaccination policy without having to go through the step of the unpaid leave of absence as it has written both options into its policy.

236. Earlier, I have quoted the entirety of para. 34 of the *KVP* decision, cited above, because this is a case where the "Effect of such Rule re Discharge" part of the paragraph, which is not generally included when the *KVP* rules are quoted in the jurisprudence, is instructional. This collective agreement contains a "just cause"

provision in the Management Rights article. As the arbitrator noted in *KVP*, if breach of a rule or policy, like the mandatory vaccination policy in this case, is the foundation for discharge of employees, it cannot on its own be binding on a board of arbitration unless the rule or policy is found to be reasonable, or just cause is established. The existence of the rule or policy itself is not sufficient, and employees' collective agreement rights cannot be impaired or diminished except by agreement of the parties.

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

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

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

240. Furthermore, there is no specific evidence before me of an actual health and safety concern as a result of unvaccinated employees being kept *off* work on unpaid leaves of absence, nor of any operational effect on the homes. This is not a situation where as a result of an unvaccinated employee coming to work there may be an outbreak that would lead to the dire consequences that LTC home residents have experienced with each outbreak.

241. While I have considered here whether, even absent Art. 18.5, the termination provision of the policy is reasonable on its own, I cannot simply ignore that provision of the collective agreement. As I have found that the Employer has violated Art. 18.5, it is material to consideration of whether the September 2021 Mandatory Vaccination Policy could be upheld. The first requirement of the *KVP* test is whether a policy or rule is inconsistent with the collective agreement. I have found that the termination provision of the policy is inconsistent with the collective agreement by virtue of Art. 18.5.

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

243. Despite my findings above, it is important to state that this decision should not be taken by those employees who choose not to get fully vaccinated as indicating that the Employer would never be able to terminate their employment for non-compliance with the policy in question, or indeed any reasonable policy. It is only the automatic application of this policy as it respects discharge that has been found to be unreasonable. Employees must understand that even if their Union and the Employer are unable to reach agreement pursuant to Art. 18.5, the Employer continues to have its Management Right under the collective agreement to terminate an employee for just cause. Hence, employees who remain non-compliant with the policy should not think that they are protected forever from the possibility of being dismissed, as the Employer may at some point do so if it feels it can establish that it has just cause for termination of any particular employee. No employer has to leave a non-compliant employee on a leave of absence indefinitely. At some point, and subject to the Employer warning employees of the possibility of termination, and having considered other factors, it will likely have just cause to terminate the employment of such an employee.

SUMMARY

244. I note again for the record that the Union accepted that in respect of this grievance the Minister, pursuant to his power under s. 174.1 of the *Long-Term Care Homes Act*, *2007,* has through Minister's Directives made COVID-19 vaccinations mandatory for all staff working in long-term care homes, subject only to authorized medical exceptions, and the Union is not challenging the constitutionality of the Minister's Directives in this arbitration.

245. For all the reasons outlined above in each section of this decision, the grievance is upheld.

246. In respect of Article 18.4, I make the following declaration and order:

- I declare that the Employer violated Art. 18.4 of the collective agreement when it failed to discuss with the Union its significant changes to its COVID-19 vaccination policy, and failed to provide the Union with a copy of that policy, prior to effecting the changes; and,

- I order that in the future the Employer abide by the language and spirit of Art. 18.4.

247. In respect of Article 18.5, I make the following declaration and orders:

- I declare that the Employer violated Art. 18.5 of the collective agreement when it failed to continue the existing practice or working condition of putting employees on an unpaid leave of absence when they failed to comply with a vaccination policy, and failed to discuss with the Union the new disciplinary aspect of the September 2021 Mandatory Vaccination Policy, in order to try to reach a mutual agreement.

- I order that in the future the Employer abide by the language of Art. 18.5; and,

- I order that unless the parties agree otherwise, the statement "or may have their employment terminated" as it applies to these HOPE bargaining unit members, be struck from the September 2021 Mandatory Vaccination Policy, the November 2021 revised version of this Policy, and any other revision of this particular policy.

248. Finally, I find that the September 2021 Mandatory Vaccination Policy is unreasonable and inconsistent with the terms of the collective agreement to the extent that it states as an alternative to the option of being put on an unpaid administrative leave that employees who are non-compliant with the policy may have their employment terminated.

249. The grievance is upheld, and I remain seized to address any issues that may arise out of this decision.

Dated this 7th day of February, 2022.

"Gail Misra"
Gail Misra, Arbitrator