IN THE MATTER OF AN ARBITRATION

BETWEEN:

TEAMSTERS LOCAL UNION 847 (the Union)

AND

MAPLE LEAF SPORTS AND ENTERTAINMENT (the Employer)

Concerning the grievance of Steve Wideman (the grievor)

Appearing for the Union:	Lisa Triano – Counsel
Appearing for the Employer: A	Andre Nowakowski – Miller Thomson LLP
Sole Arbitrator:	Norm Jesin
Hearing Date:	January 5, 2022
Date of Decision:	January 12, 2022

AWARD:

INTRODUCTION AND FACTUAL BACKGROUND

1. The grievance in this case alleges that the Employer has violated the collective agreement and any relevant statutes by placing the grievor on an unpaid leave of absence "due to undisclosed vaccination status". The facts giving rise to the grievance are not in dispute and may be described as follows:
2. The Employer operates a number of professional sports teams. The grievor is employed at the Employer's Scotia Bank Arena in Toronto. The arena is home to two of the sports teams owned by the Employer. The arena is also used as a venue for concerts and other events. The arena is utilized for events for approximately 200 dates per year.
3. The grievor is employed in the Employer's conversion division. He has been employed in this capacity for approximately ten years. The grievor works with a team of other employees to convert the arena from one type of event to another. During the conversion process there could be up to 100 people working at event level. It is not disputed that the grievor would be required to work in close proximity with other employees and may from time to time work in the presence of the players from one or the other of the two sports teams.
4. On September 1, 2021, the provincial government announced that subject to limited exceptions, patrons at events held at the arena would be required to be fully vaccinated

by approved vaccines for Covid 19. (The exceptions are not relied on by the Union in this case and are not relevant to the matter at issue.) The following day, the Employer implemented a policy requiring its employees to be fully vaccinated no later than October 31, 2021. In its policy document, the Employer described the vaccine requirement as "one of the critical measures in controlling the spread of COVID-19". Under the policy any information regarding an employee's vaccine status and/or underlying medical information was to be anonymized and kept confidential. Employees were to be required to disclose their vaccine status through a secure portal operated by a third party. Access to the information would be available only to a limited number of employees on a "need to know basis" and would be expunged from the employee file when no longer needed. Any breach of the confidentiality of this information by a person with access to the information would result in discipline up to and including discharge.

5. There is no dispute that the employees were fully informed of the requirement to be fully vaccinated by October 31, 2021 (This meant that they would have been required to receive the second dose on or before October 18, 2021) and that they were being required to disclose their vaccine status by that date. Employees were also informed that if they were not fully vaccinated by that date, of if they failed to disclose their vaccine status by that date, they would be placed on an indefinite unpaid leave of absence and might be subject to termination. Furthermore, in direct email correspondence between the grievor and management, dated October 19, 2021, the Employer confirmed that the policy would apply to all employees including conversion employees and further that,

failure to disclose vaccine status would result in the employee being placed on unpaid leave and or being terminated.

6. In addition to considering the requirement for patrons to be vaccinated, the Employer relied on a number of factors as supporting its decision to implement this policy. Those factors included the following:
   - In April of 2021, there was an outbreak of Covid-19 in the arena in which 8 employees tested positive for Covid 19.
   - In August, 2021, the Toronto Medical Officer of Health issued a News Release strongly recommending local employers to institute vaccine policies to protect employees and the public from Covid-19.
   - In August, 2021, the provincial Ministry of Health released statistics establishing that Covid-19 vaccines offered substantial protection against hospitalization and particularly against serious illness.
7. In spite of the Employer's policy the grievor has refused to disclose his vaccinated status as required by the policy. The Employer has responded to this refusal by placing the grievor on unpaid leave of absence. The grievance asserts that by keeping the grievor out of work in these circumstances the Employer has violated the grievor's seniority rights, as well as other relevant provisions of the collective agreement and statute.

SUBMISSIONS OF THE PARTIES:

8. The Union asserts that Article 13.01 and 13.05 of the collective agreement entitle the grievor to work opportunities by seniority. Article 13.01 provides in part as follows:

> The Company will provide full-time employees first preference to select their days off and shift preference prior to scheduling part-time employees in accordance with the following:
> (1) seniority;
> (2) the Company determines shifts available and available days off based on business demands; (3) employee has the skill and ability to perform the work of the available shift;
> once posted, the schedule is deemed final with respect to employees days off and shift preference.

Article 13.05 (a) further provides as follows:

> 13.05 a) Except as is otherwise specifically provided in Sub-Clause 13.05 (b) hereof, an employee who is required to report for work shall receive at least eighty (80) hours pay at his gross rate, provided that he is available to perform eighty (80) hours of work in such pay period. Such guarantee shall only apply for a maximum of ten (10) pay periods commencing with the first pay period in November each year. Except for the period described herein the Company will otherwise schedule full-time employees to 40 hours of available work per week by seniority provided that the employees have made themselves available;

9. Counsel for the Union submits that the obligation on the Employer to provide employees work opportunities by seniority is mandatory and there is nothing in Article 13.01 which allows the Employer to deny an employee's entitlement to work by seniority on the basis of a failure to disclose vaccine status. Counsel submits that the failure to disclose vaccine status does not affect whether the employee has the skill and ability to perform the available work. Furthermore, counsel insists that Article 13.05 provides for a guaranty of 80 hours pay per pay period which has been denied to the grievor.

10. More fundamentally, the Union submits that an employee's vaccine status is private medical health information and as such should not be subject to disclosure in the

circumstances of this case. Counsel has asserted that the Employer could, as an alternative to requiring disclosure of an employee's vaccine status, simply require an employee to submit to regular rapid antigen testing for Covid-19. Counsel submits that offering employees such an alternative would satisfy any obligation under ss. 25(2)(h) of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (OHSA) to "take every reasonable precaution in the circumstances for the protection of a worker". In making her submission counsel asserted that the Union was not challenging the vaccination mandate in the Employer's policy. Rather, the Union was simply opposing the requirement in the policy for the disclosure of vaccine status on the basis that it is private medical information.

11. In support that the information at issue should be protected from disclosure, the Union relies on the decision of the Supreme Court of Canada in *Dagg v. Canada* (Minster of Finance) 1997 CanLII 358 and the decision of arbitrator R. Kitchen in *Ellis Don Construction Ltd.* 2021 CanLII 50159. Counsel first referred to and relied on the comments of Mr. Justice Cory at paragraph 65 of the *Dagg* decision – in particular his comment that "The protection of privacy is a fundamental value in modern, democratic states." Counsel also noted that in *Ellis Don,* the arbitrator noted that before interfering with privacy rights the Employer must consider "whether there are less intrusive means available to achieve the objective". In that case the arbitrator upheld the right of the Employer to require rapid testing for Covid 19 at the work site notwithstanding that it was found to be "intrusive" on an employee's right to privacy. The arbitrator concluded that upon weighing all of the circumstances presented, the policy was reasonable.

12. The Employer rejects the submission that it has denied the grievor's seniority rights as provided for in Article 13 of the Collective Agreement. Counsel submits that Article 13.05 has no application as there is no guaranty when an employee is not required to attend work. Counsel further submits that employee's right to work is subject to an employee's ability to perform the work in question. The Employer had every right under the collective agreement to establish a requirement that employees be fully vaccinated. In light of the policy, an employee who does not disclose their vaccine status is not able to establish their ability to perform the work in question. Counsel relies on its management rights as set out in Article 4.02 of the collective agreement to establish rules and regulations to be observed by employees.
13. Counsel also submits that it has an obligation under OHSA to take every reasonable precaution for the protection of a worker. Employees are required to be vaccinated not only for their own protection but for other workers with whom they come in contact. Thus, its policy is implemented in furtherance of its duties under OHSA. In that regard, counsel notes that the evidence that it has relied on establishes that the imposition of rapid testing is not as effective as vaccination in reducing transmission of Covid 19.
14. Counsel submits that privacy rights are not absolute and must be balanced against other legitimate interests including the duty and obligation to protect the health and safety of its employees. In that regard counsel relied on a number of authorities in which privacy rights were found to be subject to legitimate health and safety concerns in the workplace. Those authorities included *Paragon Protection Ltd.,* November 9, 2011 (Von Veh); *Canada Post Corporation*, November 30, 2021 (Burkett); *Ontario Power Generation*, November

12, 2021 (John Murray Q.C.); *Electrical Safet Authority*, November 11, 2021 (Stout) and *Bunge Hamilton Canada*, January 4, 2022 (Herman). Vaccine and disclosure mandates were upheld in all of those cases except *Electrical Safet Authority.*

15. In *Paragon Protection Ltd.,* the arbitrator upheld a workplace Covid-19 vaccine mandate in the workplace. The arbitrator found that the imposition of the mandate was within the Employer's authority both under its collective agreement right to make workplace rules and regulations, as well as under its duty under OHSA to take every reasonable precaution to protect its workers. In *Canada Post Corporation* the Union sought a cease-and-desist order to prevent implementation of the Employer's Covid-19 vaccine mandate. The Union proposed the alternative of having employees who wished, undergo daily rapid antigen testing. The arbitrator noted that according to the scientific evidence received, rapid antigen testing was not as effective as vaccines as a means of reducing transmission of Covid-19. In upholding the mandate the arbitrator expressed that this was a case in which privacy of the individual must yield to other interests. (at page 5).

16. In *Electrical Safety Authority* the evidence presented established that the vast majority of the work performed in the bargaining unit could be and was being performed remotely by employees. In the unique circumstances of that case the arbitrator declined to enforce a vaccine mandate that was inconsistent with what he considered as individual privacy rights. Still, at paragraph 37 the arbitrator expressly stated that "An employer may institute a reasonable rule or policy requiring disclosure of medical information to ensure an employee is fit to perform work or safely attend at the workplace." He added that any employee not fit to perform the work available could be placed on administrative leave.

He also added at paragraph 38 that any private medical information so provided "must be kept safe, secure and protected from disclosure".

17. In *Bunge Hamilton Canada,* the arbitrator addressed the employer's requirement that employees disclose their vaccine status. At paragraph 24 the arbitrator stated that "management can generally establish rules that require the production of employees' medical information if necessary in order to protect the health and welfare of other employees, which would be the case here". At paragraph 25 the arbitrator added "Any privacy rights in this context are considerably outweighed by the minimal intrusion on such rights and the enormous public health and safety interests at issue."
18. In reply counsel for the Union reiterated that not only must any employer rules be reasonable but they cannot be inconsistent with the collective agreement. Counsel asserted that this point is supported by comments made at paragraph 14 of the *Bunge Hamilton* decision.

ANALYSIS AND DECISION

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

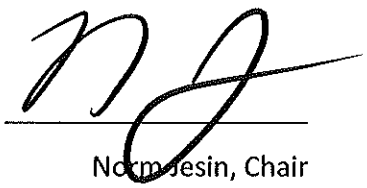
the protection of workers as set out in OHSA. Indeed, the Union has emphasised that it is not challenging the Employer's vaccine mandate in this case but is only seeking to protect the employee's right to keep personal medical information private.

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.

22. For all these reasons it is my determination that the Employer has not violated the collective agreement or any relevant legislation by requiring the grievor to disclose his vaccine status and by placing him on an unpaid leave of absence for refusing to disclose his vaccine status. Accordingly, the grievance is dismissed.

Dated at Toronto this 12th day of January, 2022.



Norm Jesin, Chair