IN THE MATTER OF AN ARBITRATION

BETWEEN:

Canadian Union of Public Employees Local 79

-and-

City of Toronto

Re: Various Policy and Individual Grievances Regarding Mandatory Vaccination

Before: Arbitrator Brian McLean

Date of Hearing: February 17, 2022

Date of Award: March 20, 2022

Appearances:

For the Union: Jim Nyman, Erin Carr et al.

For the City: Zoya Torfimenko, Sharon Duffy et al.

This award concerns a preliminary motion brought by the Union that the terminations of more than two hundred employees by the City for their non-compliance with the City's mandatory vaccination policy are "*void ab initio*" or "null and void" because of the failure of the City to hold termination meetings, which in turn led to a lack of Union representation with respect to those terminations.

The parties made argument on the Union's motion on February 17, 2022, based on the following agreed statement of facts:

1. The City of Toronto ("City") and the Canadian Union of Public Employees, Local 79 ("Union") are parties to four Collective Agreements covering approximately twenty-thousand employees in the Full Time, Part Time "B", Part Time Long Term Care Homes and Services, and Part Time Recreation Workers bargaining units, respectively.

2. These employees work in a variety of workplaces, including congregate settings, and perform a wide range of duties, including caring for seniors in Long Term Care Homes.

3. In August 2021, the City determined that its obligations under the Occupational Health and Safety Act (OHSA) required employees to disclose their COVID vaccination status and to be fully vaccinated by an identified timeline.

4. The City of Toronto provided notice of its Vaccination Policy ("Policy") on August 19, 2021, by a City Manager Message sent by email to all employees of the City of Toronto, which notified employees of three requirements:

    a. To disclose and provide proof of their vaccination status by September 13, 2021.

    b. To attend mandatory education if they did not comply with the first requirement or were not vaccinated, and then provide proof of their first dose of vaccine by September 30, 2021.

    c. To be fully vaccinated by October 30, 2021. This requirement was identified as mandatory, subject to legally entitled accommodation.

[Tab 1 – City Manager Message August 19, 2021.]

5. The full Policy, effective September 7, 2021, repeated these requirements, provided additional detail, and, in the section entitled "Consequences of Non-Compliance with Policy", set

out that employees who do not comply with the Policy may be subject to discipline, up to and including dismissal.

[Tab 2 – COVID-19 Vaccination Policy.]

6. The City Manager's update on October 6, 2021 elaborated that, starting the week of November 1, 2021, employees who did not provide proof of receiving two doses of vaccine would be suspended for six weeks without pay. If they did not provide proof of full vaccination by December 13, 2021, they would be terminated for cause for failure to comply with the Policy.

[Tab 3 – City Manager Update October 6, 2021.]

7. As part of the implementation of the Policy, managers met with employees who did not appear to meet Policy requirements to review their vaccination status. These meetings commenced during the week of November 1, 2021.

8. The City and the Union worked to ensure Union representatives were in attendance at the vaccination status review meetings scheduled with employees, in accordance with the relevant Collective Agreement. At these meetings, employees, aided by their Union representatives, were able to provide information related to their vaccine status and compliance with the requirements of the Policy.

[Tab 4 – Sample Email Thread regarding Union Representation.]

9. If no additional information was provided by the employee at this meeting regarding their vaccine status or to indicate compliance with the Policy, the employee was given a letter of discipline, providing by way of penalty:

> As a consequence of your very serious misconduct described above the City is imposing the following disciplinary penalty: You are hereby suspended without pay, beginning <date>, and you will remain suspended without pay until you achieve compliance with the Policy by uploading proof of full vaccination through the Staff Vaccination Disclosure Form by no later than 11:59 p.m. on December 12, 2021, failing which you will be terminated for cause effective December 13, 2021.

[Tab 5 – Sample Discipline Letter.]

10. Subsequent City Manager updates on October 28 and November 29, 2021 extended the date for the vaccination status review meeting to the week of November 28, 2021 for employees with a first dose by October 31, 2021. A further extension to January 2, 2022 was

provided to this "one dose" group to receive their second dose, failing which they would be terminated for cause.

[Tabs 6 and 7 – City Manager Updates October 28, 2021 and November 29, 2021.]

11. Employees who did not provide proof of compliance with the Policy by the deadline of January 2, 2022, and who had already received a discipline letter resulting in their suspension pending termination, had their termination confirmed by letter in January 2022. No additional meeting was held prior to the confirmation letter being sent.

[Tab 8 – Sample Confirmation of Termination Letter.]

Applicable to Long Term Care Homes only – Ministry Directives

12. On May 31, 2021 the Ministry of Long Term Care issued a Minister's Directive: LONG-TERM CARE HOME COVID-19 IMMUNIZATION POLICY, to be effective July 1, 2021. The Directive required all Long Term Care Homes to have a COVID-19 policy which included a requirement for all staff, student placements and volunteers to:

1. Provide proof of vaccination against COVID-19; or

2. Provide a documented medical reason for not being vaccinated against COVID-19; or

3. Participate in an educational program approved by the licensee.

[Tab 9 – Ministry of Long-Term Care Directive effective July 1, 2021]

13. On August 31, 2021 the Ministry of Long Term Care updated the Minister's Directive: LONG-TERM CARE HOME COVID-19 IMMUNIZATION POLICY, to be effective September 2, 2021. The Directive required all Long Term Care Homes to have a COVID-19 policy which included a requirement for all staff, student placements and volunteers to:

1. Provide proof of vaccination against COVID-19; or

2. Provide a documented medical reason for not being vaccinated against COVID-19; or

3. Participate in an educational program approved by the licensee.

Furthermore, Section 2.5 of the Directive stated:

> 2.5. Every licensee of a long-term care home shall ensure that the policy clearly sets out the consequences for individuals who do not provide proof per either subsection 2.2(a), 2.2(b), or 2.2(c), if applicable, and such consequences shall be in accordance with the licensee's human resources policies, collective agreements, and any applicable legislation, directives, and policies.

[Tab 10 – Ministry of Long-Term Care Directive effective September 2, 2021]

14. On October 1, 2021 the Ministry of Long Term Care updated the Minister's Directive: LONG-TERM CARE HOME COVID-19 IMMUNIZATION POLICY, to be effective October 1, 2021. The Directive repeated the COVID-19 policy requirements for Long Term Care Homes and, in addition, stated that all staff, support workers, student placements, and volunteers who did not meet the requirements of the policy by November 15, 2021 would not be able to attend a long-term care home to work, undertake a student placement, or volunteer. The Directive further stated in Section 2.4 that any additional consequences would be in accordance with the home's human resources policies, collective agreements, and any applicable legislation.

[Tab 11 – Ministry of Long-Term Care Directive effective October 1, 2021]

15. On November 4, 2021 the Ministry of Long Term Care updated the Minister's Directive: LONG-TERM CARE HOME COVID-19 IMMUNIZATION POLICY, to be effective November 4, 2021. The Directive repeated the COVID-19 policy requirements for Long Term Care Homes and extended the date following which all staff, support workers, student placements, and volunteers who did not meet the requirements of the policy would not be able to attend a long-term care home to work, undertake a student placement, or volunteer, to December 13, 2021. The updated Directive reiterated in Section 2.4 that any additional consequences would be in accordance with the home's human resources policies, collective agreements, and any applicable legislation.

[Tab 12 – Ministry of Long-Term Care Directive effective November 4, 2021]

Employees in Long Term Care Homes who did not comply with the Policy or the Directives were called to vaccination status review meetings with management and provided Union representation, and disciplinary letters were issued where employees were not compliant. The disciplinary process for Long Term Care Homes was consistent with the process outlined in paragraphs 7 through 11 above, as modified by the Directives, including the provision of Union representation at the vaccination status review meeting. Termination of Long Term Care employees who were not compliant was not finalized until January 2, 2022, the same deadline applicable to all not-fully-vaccinated City employees.

[Tab 13 – Sample Email Thread regarding Union Representation (LTCH).]

[Tab 14 a, b, c – Sample Discipline, Extension, and Confirmation of Termination Letters (LTCH).]

16. On December 16, 2021, David Mitchell, President of Local 79 wrote to Mr. Milloy advising him that Local 79 expected the termination of non-compliant members to take place in person with Union representation. (See Tab 15.)

17. On December 22, 2021, Local 79 and City Representatives met to discuss issues in respect of the Omicron variant, and the issue of termination meetings was raised by Local 79.

Local 79 impressed upon the City its view of the need to hold meetings for a variety of reasons including but not limited to employee mental health, timely grievance filing, possible extension of vaccination deadlines, eliminating delays between date of termination and date of notification of termination and avoiding claims from employees that they had not received notice of termination. Local 79 requested a written response to their December 16, 2021 correspondence.

18. On December 23, 2021, Mr. Milloy wrote to Mr. Mitchell advising him that the City would not hold termination meetings. (See Tab 16.)

19. The termination letters were sent to employees by both regular mail and email. Local 79 was copied on the letters confirming termination and provided with a list of terminated employees. In December, the parties agreed to engage the Arbitrator in case management for the policy and individual grievances on the first day of hearing. At that time no termination grievances had yet been filed. On January 6, 2022, the Union asked, without prejudice, for the City's agreement that the individual grievances filed in October, November and December, 2021 and January, 2022 would cover the recent terminations. In response, the City by letter dated January 13, 2022, agreed, without prejudice, that any employee who had already filed an individual grievance, and who had subsequently been terminated as a result of non-compliance with the mandatory vaccination policy, need not file another grievance in respect of their termination. (see Tabs 17, 18, and 19)

20. To date the City has received in excess of 290 individual grievances from Local 79 in relation to employees being disciplined for non-compliance with the Policy. The first such grievance was filed on or about November 2, 2021.

Collective Agreement Provisions

21. The Collective Agreements between the parties contain the following provisions:

> Disciplinary Discussions and Notations
>
> Whenever an employee is requested to report for a disciplinary discussion with a supervisor, prior to any disciplinary action being taken, such employee shall be advised of his/her right to a Steward or Local 79 representative, as appointed/selected by Local 79 under clause 16.05 to be present at such meeting. Local 79 shall ensure that such representative is available within forty-eight (48) hours excluding weekends of receiving such request. Where such representation is not provided within the forty-eight (48) hours the employee shall be advised of his/her right to the presence of an employee of

his/her choice who is on duty at his/her place of work at the time the discussion takes place.

Investigation Protocol

Where the City conducts an investigation which may result in the discipline of a Local 79 employee(s), the employee(s) who is the subject of the investigation will be informed of the nature of the meeting and their right to Local 79 representation. The City shall inform Local 79 about the pending investigation meeting and the nature of the meeting. The following information will be provided to a Local 79 designated email:

- Name and contact information of the supervisor/manager;
- Name and contact information of the employee;
- Date, time and location of the meeting.

Where practical, the employee will receive twenty-four (24) hours notice of the investigation meeting.

At the meeting, the City will disclose the nature of the investigation including the nature of any complaints received.

At the meeting, the employee and the Local 79 steward or representative will be informed if the City has contacted or intends to contact the police, children's aid societies or a professional regulatory body regarding the matters under investigation.

Once the investigation is completed, the employee will be informed of the outcome of the investigation in a timely manner.

[Tabs 20 to 23 – Article 16.26 (Full Time), 16.24 (Part Time B), 19.25 (Part Time Homes), 14.26 (Recreation Workers) and Investigation Protocol in each Collective Agreement]

It is useful to set out some of the documents described in the agreed facts. The body of the warning letter, which is excerpted at paragraph nine of the agreed facts, states in whole:

> On August 19, 2021 the City of Toronto introduced its COVID-19 Vaccination Policy requiring that all staff be fully vaccinated and received both doses of a COVID-19 vaccine no later than October 30, 2021. Staff were required to disclose and provide proof of their vaccination status by September 17, 2021. You have failed to comply with this Policy.
>
> An investigation meeting was conducted with you on November 02, 0221 in the presence of Manager Employment & Social Services Fiona McNeil, Union Steward Lisa Jaipaulsingh and Supervisor Direct Programs Catherine Lori. Further to this investigation meeting with you, the City has determined that you have engaged in the following misconduct:

- you are insubordinate and have willfully disobeyed an important workplace health and safety rule by refusing to comply with the direction given to you in the COVID-19 Vaccination Policy (the "Policy") to be fully vaccinated with a COVID-19 vaccination series, and;
- by failing to get fully vaccinated, you have undermined a critical workplace health and safety measure, implemented by the City in the Policy, designed to maximize vaccination rates in order to protect employees from the serious hazards of COVID-19.

As a consequence of your very serious misconduct described above the City is imposing the following disciplinary penalty: You are hereby suspended without pay, beginning November 03, 2021 and you will remain suspended without pay until you achieve compliance with the Policy by uploading proof of full vaccination through the Staff Vaccination Disclosure Form by no later than 11:59 p.m. on December 12, 2021, failing which you will be terminated for cause effective December 13, 2021.

We are requesting that you consider the seriousness of your actions. I am available to provide you with support and additional resources you may need to comply with this Policy.

The body of the letter referred to in paragraph 11 of the agreed facts states in full:

CONFIRMATION OF TERMINATION

On November 02, 2021 you were provided with a letter advising that you were insubordinate and willfully refusing to comply with the City's COVID-19 Vaccination Policy and that your employment with the City of Toronto would be terminated for cause unless you achieved compliance with the Policy by uploading proof of full vaccination. In the intervening time, you were suspended without pay to provide you with an opportunity to comply with the Policy.

As of January 3, 2022, you were still not in compliance with the City's COVID-19 Vaccination Policy and, as such, you have not remedied your insubordination and willful disobedience. Therefore, this letter confirms your termination for just cause effective January 3, 2022.

If you have not already done so, please return all City property including keys, access cards, cell phones and City issued equipment to your manager/supervisor immediately. We will arrange for all personal belongings, if any, to be returned to you via courier.

Any outstanding wages or documents will be sent to you at the above address. At the time of your suspension pending termination, the City submitted your Record of Employment (ROE) to Service Canada through an on-line service on or before the pay date for your final pay. Information regarding employment insurance is available at:

http://www.servicecanada.gc.ca/eng/ei/application/employmentinsurance.shtml. As a reminder, if you require a hard copy of your ROE, please contact, TEAM Central, the divisional payroll representative, at [phone #].

The City has made arrangements for continued EFAP support to you. If you are an existing EFAP client you can receive two additional sessions post-dismissal. If you are not an existing client, you can receive one additional session. You can reach EFAP at [phone #].

Arguments

The Union

The Union's argument is that the City was required to hold individual termination meetings with each discharged employee. Had that been done then the discharged employees would have had union representation during the meetings. The Union argues that the City's failure to hold the meetings means that the discharges are null and void and/or *void ab initio* and that the employees should be returned to employment in the status of an employee on a leave of absence. The issue of whether the City could then re-terminate the employees at a meeting and with Union representation could then be determined.

The Union argues that the union representation clauses in the collective agreement should be interpreted in light of the Union's role which is established by the *Labour Relations Act*. Under the *Act,* the Union is the exclusive bargaining agent for the employees in the bargaining unit, including the grievors. In addition, the Union owes a duty of fair representation to the grievors which could only have been fulfilled if the Union was permitted to assist the grievors at an in-person or virtual termination meeting.

One of the purposes of meetings on the termination of the employment of an employee is to allow the Union to fulfill its legal representational obligations. In this case, this representational

obligation could have included, at a meeting, exploring whether the employee was in fact unvaccinated, and, if so, the reasons for their failure to get vaccinated (which may not have been previously conveyed to the Employer), and whether there were circumstances which might justify that the penalty of discharge be ameliorated. In this regard, the Union suggested, for example, that it might not be fair to terminate an employee who was just about to go off on a parental leave. Since the City chose to discharge the grievors for disciplinary reasons, there could be a multitude of factors such as these, which might suggest that the penalty was too harsh in individual circumstances, and the Union could point these out to the Employer at the termination meetings, had they been held.

Here, the Union argues, termination meetings were specifically requested by the Union on December 16 and 22. Yet on December 23 the City advised that it would not hold termination meetings and therefore there was no way for the Union to exercise its representational responsibilities. To the suggestion that the Union was present at the meetings held in November with respect to the warning letters and therefore it had the opportunity to exercise any representational function it needed to, the Union asserts that there was initially supposed to be 6 weeks for the grievors to get vaccinated and that period was extended to nine weeks. During that time the Omicron variant took hold and the landscape of the virus and measures to confront it had changed. In these circumstances, another meeting was required. Moreover, the termination decision was a fresh disciplinary step which required a meeting.

The Union asserts that the personalized nature of the City's decision to terminate an employee for just cause, which supports the requirement for individual termination meetings, is demonstrated in a recent case involving a vaccine mandate, Ch*artwell Housing Reit (The Westmount, the Wynfield, the Woodhaven and the Waterford) v Healthcare, Office and Professional Employees Union, Local 2220,* 2022 CanLII 6832 (ON LA). In that case, Arbitrator Misra held that the decision to discharge employees for just cause without consideration of individual factors was problematic:

> 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.

The Union argues that Arbitrator Misra's analysis in *Chartwell* points to the necessity of providing union representation on termination (which can only be done at a meeting) so that the Union may raise potentially mitigating factors in advance of the termination.

The Union acknowledges that the representation clauses in the collective agreements (Article 16.26 in the full-time collective agreement, for example) are not models of clarity. However, it argues that, read as a whole, these Articles obligate the employer to hold a meeting when the employer is disciplining an employee. In this regard, meetings are the norm around which the Articles are built.

The Union relies on a series of cases involving these parties where arbitrators have found that union representation (in the form of an "observer" under predecessor collective agreements) at disciplinary meetings is mandatory and that the failure to allow such representation means that the discipline imposed was *void ab initio*. These include *Re Corporation of City of Toronto and Canadian Union of Public Employees, Local 79* [1986] O.L.A.A. No. 34 (Joliffe); *Toronto (City) v. Canadian Union of Public Employees, Local 79 (Nzeakor Grievance)* (Charney) (Upheld by the Divisional Court; *Toronto (City) v. Canadian Union of Public Employees, Local 79 (Kourtsidis Grievance)* 8 C.L.A.S. 315 and *Toronto (City) v. Canadian Union of Public Employees, Local 79 (Bedi Grievance).*

These decisions all deal with circumstances where the City held a meeting without a union representative present and then disciplined the employee. The decisions each determine that the remedy for a failure to provide union representation or observation under the City of Toronto collective agreements is that the discipline is null and void. It is acknowledged that none of the cases directly answer the question of whether the City was required to hold the meeting in the first place. However, the Union argues that it would be absurd if the Employer could avoid the requirement to have union representation by sending the employee an email or letter rather than holding an in- person (or currently, virtual) meeting.

The Union also relies on *The Board of Governors of the Riverdale Hospital, (the "Hospital") and Canadian Union of Public Employees and Its Local 79,* (the "Union") (Surdykowski) 62 C.L.A.S. 186, 93 L.A.C. (4th) 195. That case involved a union representation issue under the following article of the collective agreement:

> ARTICLE 9 - GRIEVANCE AND ARBITRATION PROCEDURE
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> . . . . .
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> 9.02 At the time that formal discipline is imposed, or at any stage of the complaint stage, an employee shall have the right upon request to the presence of her/his steward. In the case of suspension or discharge, the Hospital shall notify the employee of this right in advance.

Arbitrator Surdykowski stated:

> 25. It is useful to start by reviewing the basis for and purpose of union representation provisions. As time goes by, there are fewer and fewer collective agreements that do not contain some sort of union representation provision. I am not sure which is more surprising: that such provisions have not been included in all collective agreements, or that they are necessary at all. Union representation clauses are fundamental to collective agreements. Indeed, they reflect the basis of the collective bargaining scheme in this province. All private sector and much of public sector collective bargaining in Ontario springs from and is governed by the Labour Relations Act, 1995. Under that statute, or any other collective bargaining legislation for that matter, once a trade union obtains bargaining rights for a bargaining unit of employees of an employer it becomes the exclusive bargaining agent and representative for those employees in all employment related dealings with their employer. This means that trade

> unions have not only the right but also the obligation to represent bargaining unit employees in any matter relating to the terms and conditions of their employment. Concomitantly, unionized employers cannot deal directly with bargaining unit employees in matters relating to employment except as permitted under the collective agreement, as agreed by all concerned in a particular instance, or for purposes in directing the workforce in the normal performance of their work. The rights, obligations and duties of a union and an employer are imposed generally by statute, and more specifically by the collective agreement they have bargained.
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> 26. A union representation clause serves to remind the parties of their respective rights, duties and obligations. Its purpose is to ensure that employees have the support and advice and of their collective bargaining agent as advocate, in situations of conflict or potential conflict with their employer, particularly where their employment rights and even continued employment may be in jeopardy. That is what unions are for, and that is what they do. They represent employees in their dealings with their employer.

The Union relies on Arbitrator's Surdykowski's general comments on the importance and role of Union representation in unionized workplaces. These comments are likely obiter since there was a union representation clause in place and the central issue was whether the meeting was captured in the circumstances before him, and the arbitrator found that it was. His comments about union representation in general were not necessary to decide that issue. Nevertheless, I agree with the sentiment expressed in that award regarding the importance of a Union's representational rights.

City Argument

The Employer noted that during its argument the Union made reference to assertion of facts that are not in the agreed statement of facts about the practice of the parties regarding the use of meetings as a way to terminate employees (as opposed to some other form of communication like a letter or email) and that the Union would be "surprised" or "shocked" to learn that the City was not required to hold a meeting to terminate an employee's

employment. The City argues that I should have no regard to assertions of fact that are not in the agreed statement of facts.

The City also notes that the collective agreements before me provide that an arbitrator may not amend or add to the language of the collective agreement and that the management rights clause provides that management has all its rights except those that are specifically limited by the terms of the collective agreement. Accordingly, this dispute must be resolved having regard to the agreed statement of facts and the relevant collective agreement language.

The City agrees that the collective agreements are clear that Union representation is required when there is a meeting with an employee regarding discipline. However, there is nothing in the collective agreement articles in question which require that a meeting be held in any specific case. The City notes the comments of Arbitrator Starkman in *Toronto (City) and Canadian Union of Public Employee, Local 79 (Spencer), (unreported)* 2001 about the predecessor union representation provisions of the collective agreement where he said: "**While there is no obligation in the collective agreement to which I was directed that imposes on the Employer an obligation to meet with an employee prior to imposing discipline**, should the Employer choose to meet with such an employee to consider their explanation prior to the imposition of discipline, this would clearly be a disciplinary meeting within the meaning of article 16.23 of the collective agreement." (emphasis added). The City notes that in the rounds of collective bargaining following Arbitrator Starkman's award the parties agreed to a provision to provide union representation during investigation meetings, but they did not address Arbitrator Starkman's comments by specifically negotiating a new provision which would obligate the employer to meet with an employee to impose discipline.

Moreover, the City asserts that in this case a meeting was held with Union representation present when the employees were told of the consequence of their failure to get vaccinated.

No Union representation was required when the City later sent letters to each of the employees confirming the termination of their employment in accordance with the letter warning of the consequences of non-vaccination/notice of termination sent earlier because the terminations were part of the same disciplinary transaction as the notices of termination/warning.

The City relies on *MacMillan Bathurst Inc. v. C.P.U. Local 1497*, 1992 CarswellOnt 1256, 28 C.L.A.S. 497, 29 L.A.C. (4th) 415 where the arbitrator stated in relation to a similar collective agreement provision:

> Article 15 says that, "[w]hen an employee is called into the office for the purpose of receiving a formal discipline, he will be accompanied by the appropriate union steward". We are bound to enforce what the provision directs. Had [management] chosen to call the grievor into the office without giving him the opportunity for the assistance of a steward, the discharge would be invalid. But the grievor was at home, and MacNeil chose to discharge him by having the letter delivered to him there. Under that circumstance, Article 15 does not apply, and the objection fails.

The City argues that the circumstances here are the same as in *Macmillan Bathurst.* Had the City chosen to hold a meeting to advise the grievors that their employment was terminated then union representation was required. However, since no such meetings were held, like in *Macmillan Bathurst*, the union's objections must fail.

The City also argues that the true disciplinary action which required union representation was the meetings of the employer, the employee and the union representative in or about November 2021. At those meetings the employee was invited to provide any information to the employer "related to their vaccine status and compliance with the requirements of the Policy." At those meetings the employee and the Union were free to raise any of the issues now identified by the Union as individual circumstances which might mitigate the penalty of discharge such as, for example, that the employee was close to retirement. The City argues that the confirmation of termination letters which were initially to be provided in December, but which were ultimately provided in January, were not additional discipline but were confirmation of the discipline which was set out in the November letters. As such, no further

meeting or union representation at this stage was required. The terminations were the natural consequence of the employees' failure to become vaccinated.

On this point, the City relies on *Natrel (Ontario) Inc. v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters* (Albertyne) 2000 CanLII 28098 (ON LA) where the collective agreement contained a right to union representation when an employee was "summarily dismissed". After the employee engaged in serious and embarrassing misconduct, the Employer gave the employee 24 hours to resign his employment, following which, if that opportunity was not accepted, the employee's employment would be terminated. The employee did not resign, and the Employer terminated the employee's employment. The Arbitrator upheld the discharge despite the lack of union representation at the termination meeting because the employee had not been "summarily dismissed" but had effectively been given notice of termination. The Employer argues that this is exactly what occurred here: the City effectively gave notice of termination and at the time the notice was given the employee had the benefit of union representation.

The City argues that, in the alternative, if it was required to have a meeting with Union representation prior to dismissing the grievors, then the appropriate remedy in this case is not to declare the terminations null and void but is instead to recognize that the grievors each had the benefit of union representation at the time the warning letters were given. In addition, there was an approximately two-month period during which the Union could have advanced any arguments it wanted on behalf of the grievors in order to attempt to stave off termination. In these circumstances, returning the grievors to the status of an unpaid leave only to have them terminated again, as would likely happen unless grievors were vaccinated in the interim, is to put form over substance for no actual benefit whatsoever.

The City acknowledges that many of the cases relied on by the Union (and indeed some relied on by the City) treat the failure to provide union representation as essentially automatically causing the discharge to be null and void. However, the City argues that this automatic consequence of the failure to provide union representation at a disciplinary meeting is no longer the law in Ontario. The City relies on the Ontario Court of Appeal decision in *Limestone District School Board v. Ontario Secondary School Teachers' Federation*, 2008 CanLII 63992 (ON SCDC) where the arbitrator, relying on caselaw, held that "discipline imposed in breach of a union representation provision cannot be allowed to stand". The Court of Appeal found that the arbitrator was wrong to treat the breach of representation clause as automatically voiding the discipline:

> Failure to Treat Remedy as Discretionary
>
> [49] In any event, even if it was reasonable to approach this case as one continuum in which the breach of the union representation clause is taken to be integral to the conduct that followed, the Arbitrator's rigidity in her application of those principles in this case was unreasonable. Clearly, there is ample jurisprudence justifying the revocation of all discipline as an appropriate remedy for an employer's breach of a union representation clause: Brinks Canada; London (King St.) Purchaseco Inc; Ontario (Liquor Control Board) v. O.P.S.E.U., Liquor Board Employees Division, [2007] O.J. No. 952 at paras. 22-23 (Div.Ct.); Medis Health and Pharmaceutical Services v. Teamsters, Chemical and Allied Workers, Local 424, [2002] O.J. No. 571 at para 14 (Div.Ct.); Toronto (City) v. C.U.P.E., Local 79 (1997), 1997 CanLII 17809 (ON SCDC), 147 D.L.R. (4th)548 (Div.Ct.). **However, that does not mean that every time there is a breach of a union representation clause, that is the remedy that must be applied, or even that there must always be a remedy for every breach.** (Emphasis added)
>
> [50] Reasonable decision-making, particularly in the consideration of remedy, requires the application of legal principles to the particular facts of a case. There is no absolute rule that a breach of a union representation clause renders all discipline void. That determination must be made on a case by case basis by the Arbitrator; it cannot be a formulaic response.
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> [51] A five-member panel of the British Columbia Labour Relations Board examined this issue in British Columbia (Public Service Employee Commission) and B.C.G.E.U., [1995] C.C.L.R.B.D.

No. 233, 27 C.L.R.B.R. (2d) 161. The central issue in that case was whether an employer can "re-dismiss" an employee where an earlier termination has been declared void because of a breach of a union representation clause in a collective agreement. However, the Board also considered the inter-connected issue of whether the remedy of void ab initio is mandatory upon finding a breach of representational rights. Because of the importance of the issue, the Board extended invitations of intervenor status to a number of interested business and labour organizations and engaged in its decision in an extensive analysis of the principles involved. In the result, the Board concluded that once a dismissal has been set aside by an arbitrator for breach of representation rights, an employer cannot re-dismiss the employee for the same cause. In the course of coming to that conclusion the Board disapproved of a "presumptive" or "usual" remedy which does not account for the merits of a particular dispute, stating at para 47:

> We observe in passing our discomfort over describing something as a "usual remedy". Such a presumptive approach borders on an a priori remedy which is inconsistent with an arbitrator's statutory duty under the Code. Further, we do not find the terminology "void ab initio" to be particularly helpful or appropriate in this labour relations context. As we have stated above, where arbitrators set aside a discharge based on a breach of representational rights, they are really finding that the employer has lost authority to impose discipline, and cannot proceed to prove just and reasonable cause.

[52] A similar conclusion was reached by the British Columbia Supreme Court in Purolator Courier Ltd. v. Public Service Alliance of Canada, 1998 CanLII 1283 (BC SC), [1998] B.C.J. No. 336, 156 D.L.R. (4th) 357 (B.C.S.C.). In that case an employee was suspended, then later dismissed, for having contravened the employer's cash management policies. Prior to the imposition of the initial discipline, the employer failed to provide notice to the employee and union that discipline might be imposed. Both the union and the employee filed grievances. The Arbitrator concluded that a breach of representational rights "must result in a determination that any action taken against the affected employee is void ab initio": Purolator Courier, para. 13. This arbitrary approach was found to be patently unreasonable by the British Columbia Supreme Court on judicial review. Pitfield J, held, at paras. 25 and 29:

> 25. While the arbitrator construed the notice provision as conferring a substantive right on the employee and requiring a mandatory course of conduct on the part of the petitioner, it is evidently unreasonable to conclude that any departure from the notice requirement will render all disciplinary proceedings a nullity. Non-compliance with the notice provision must be considered in conjunction with the merits of the petitioner's claim that the employee's conduct provided cause justifying the

employer's actions. The arbitrator must weigh the factors against one another and decide whether, in all of the relevant circumstances, the dismissal was justified.

29. To conclude otherwise could lead to absurd results. For example, if the arbitrator's approach to jurisdiction were to prevail when an employer failed to give the Article 13.11 notice to an employee whom it dismissed when the employee had been convicted of fraud practiced upon the employer over a period of time, the employee would be reinstated because the disciplinary proceeding was a nullity. The employer would be precluded from renewed disciplinary action or "re-dismissal". The employer would be deprived of a suitable remedy and would be compelled to continue to employ an individual in untenable circumstances.

[53] Likewise, in BPB Canada v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge D274, [2005] M.G.A.D. No. 47 (Graham) the Arbitrator adopted a balancing approach in a situation where there had been breach of a union representation clause, rather than merely voiding the discipline once the breach had been proven. The Arbitrator observed (at para 78) that declaring discipline causally connected to a breach of an employee's representation rights to be void ab initio was "problematic" and "in some cases will lead to unfair and unreasonable results." He held, at paras 80 and 81:

80. Accordingly, I cannot accept that in all cases, any discipline imposed after a breach of an employee's representation rights, which is causally connected to the breach, will be null and void. Such a result will be appropriate in some cases, but not in all.

81. An arbitrator should have the discretion to consider the circumstances of the case, including the nature of the statements or information given by the employee, and the impact of such statements or information on the employer's disciplinary decision, and the other information on which the disciplinary decision was made, before determining the consequences of an employer's breach of an employee's representation rights.

[54] The same underlying principle is implicit in the Alberta Court of Appeal's decision in White v. Canada Safeway Ltd., [1994] A.J. No. 725. 1994 ABCA 319 (CanLII), 157 A.R. 195 (C.A.). At issue was the admissibility of evidence concerning the acts of an employee at a meeting held in breach of a representation clause in a collective agreement. The Court stated (at para 15), "We have great difficulty seeing why a breach of the collective agreement should automatically lead to exclusion of evidence as the union suggests."

…

[56] Accordingly, in my view, it was open to the Arbitrator in this case to consider the Board's conduct in reprimanding Huddleston at a meeting conducted in breach of the union representation clause in the collective agreement and whether that breach by the Board caused or provoked Huddleston's subsequent misconduct. It was also appropriate to consider the fundamental importance of union representation clauses in collective agreements generally. However, it was not reasonable for the Arbitrator to automatically impose the drastic remedy she did merely upon finding the breach and without considering that breach within the context of all the surrounding circumstances. In doing so she acted arbitrarily, not reasonably.

Unreasonableness of the Result

[57] Finally, in determining whether a decision is reasonable, it is relevant to consider the reasonableness of the outcome: Dunsmuir at para 47. No remedy can be considered to be automatic, no matter how unreasonable.

Along the same lines, the City also relies on *Labatt Breweries Ontario Canada and SEIU, Local 2* (Lewis), Re, 2020 CarswellOnt 2564, 143 C.L.A.S. 45, 313 L.A.C. (4th) 325 where Arbitrator Levinson, relying on *Limestone*, found that in circumstances where an employee had attended a number of investigatory meetings with union representation, the failure to provide union representation at the termination meeting, which lasted three minutes and was only held to give the employer's decision to the employee, did not void the discharge.

The Employer points out that Arbitrator Surdykowski later revisited his decision in *Riverdale* in *Hamilton Health Sciences and Ontario Nurses' Association,* 194 L.A.C. (4th) 393 where he stated:

42. Second, arbitrators should never be averse to reconsidering the jurisprudence or their own analyses in previous cases. Consistency and certainty are legitimate and laudable objectives, but the first look isn't necessarily the best and the jurisprudence must evolve with the labour relations world. Although I stand by my decisions in Re Riverdale Hospital, supra, and Delta Chelsea Hotel, supra, as reflecting the labour relations approach to the issues at the time, I am

> not sure I would decide them the same way if they were litigated today. I would in any case alter the analysis somewhat.

The Arbitrator's comments in paragraph 42 are somewhat cryptic; it is unclear which aspects of *Riverdale* he would not necessarily decide in the same way. It is clear from paragraphs 45 and 48 of the decision that he no likely longer believes that violations of such union representation clauses mean that the discipline is automatically void. Instead, they are voidable. This is at least one way in which he no longer would decide the *Delta Chelsea* case the same way. It is less clear what issue he has with his *Riverdale* award. In *Riverdale* he determined in a very perfunctory way that the consequence of a failure to provide union representation was that the discipline was null and void ("It is well established that the effect of noncompliance with a union representation clause is that any discipline imposed will be declared void ab initio."). It would appear that at minimum, Arbitrator Surdykowski would today not come to that same conclusion.

Decision

As a starting point, I agree with the City that, given the absence of certain assertions of fact regarding the parties' practice with respect to termination meetings from the agreed facts, I cannot have regard to them. In deciding this issue, I must only have regard to the agreed facts.

Nevertheless, I can take notice of my experience, which is that it is the norm in labour relations for an employer to terminate the employment of employees in person (or lately over online video meetings) and that for the Union to be present at such meetings. Of course, there are also often exceptions to that norm which, is, any event subject to the wording of the collective agreement in any case. In fact, in many cases, such a meeting and such representation will be specifically provided for in the collective agreement.

Accordingly, the starting point for a determination of the issues before me must be the language in the collective agreement. On inspection, that language does not obviously create a requirement that the City hold a meeting when it is notifying an employee that their employment is being terminated.

The Article is titled "Disciplinary Discussions and Notations" and provides that "Whenever an employee is requested to report for a disciplinary discussion with a supervisor, prior to any disciplinary action being taken, such employee shall be advised of his/her right to a Steward or Local 79 representative, as appointed/selected by Local 79 under clause 16.05 to be present at such meeting." I see little in this language that requires the City to hold a meeting. The use of the word "Whenever" suggests that a disciplinary meeting does not happen each time an employee is disciplined. Moreover, I see no basis to conclude that a "disciplinary discussion" could include a written termination letter, particularly since the Article describes the discussion as "such meeting". Finally, had a meeting been required it would have been easy for the parties to clearly set that agreement out. The language, therefore, appears to apply when the City requests a meeting with an employee but does not mandate that such a meeting take place.

It is tempting to imply the requirement that a meeting be held based on the labour relations norm discussed above. The Article appears to be founded on the idea that meetings will take place and, as noted, it would certainly be normal labour relations practice in Ontario workplaces that management meet with an employee for the purpose of meting out discipline. Some of the reasons for this arise out of the important union representational considerations advanced by the Union in its argument and set out by Arbitrator Surdykowski in his award in *Riverdale (*even though he may have, as it appears, had second thoughts about some aspects of that award). Obviously, in the normal case, the ability of the Union to represent a discharged employee may well be diminished if no meeting is held.

There are at least two difficulties with implying the requirement to hold a meeting. The first is that the collective agreement provides that an arbitrator "shall not have any power to add to, subtract from, alter, modify or amend in any way, any part of this Agreement nor to consider any matter not specifically contained in this Agreement nor otherwise make any decision inconsistent with this Agreement which expresses the full and complete understanding of the parties on remuneration, benefits and working conditions". It may be that implying a right under the collective agreement does not violate these restrictions on an arbitrator's authority, but it suggests that caution should be exercised.

The second difficulty, related to the first, is that if the requirement to hold a meeting is implied it is difficult to establish the parameters of that implied requirement. While it is generally the case that Ontario employers meet with employees to mete out discipline, there are obviously exceptions to that practice. One common exception is when an employee is absent without leave for an extended period. Frequently such employees are first warned by letter that their employment is in jeopardy by their failure to attend work and then discharged by letter if the employee fails to respond to the warning letter. There may also be times when an employee is suspended pending investigation of very serious misconduct and the employer, following investigation and a decision to discharge, does not wish to meet with the employee and so terminates by letter. For these reasons, it is not unusual that a collective agreement does not specifically mandate a termination meeting.

The purpose of setting out these examples of possible exceptions is not to say anything about how this collective agreement operates but to identifying the risks of implying requirements that are not clearly present in the collective agreement. These parties have highly experienced labour relations professionals with a long-standing collective bargaining relationship. Had they intended a requirement that the City was required to meet with an employee to advise that their employment was terminated, that would likely be clearly reflected in the collective agreement. This conclusion is reinforced by the fact that following Arbitrator Starkman's

comments in the Spencer grievance, to the effect that he saw nothing which obligated the employer to hold a disciplinary meeting, no new language was added which clearly addressed Arbitrator Starkman's comment. Implying a mandatory meeting requirement in these circumstances feels uncomfortably like amending the collective agreement.

Finally, I note that in addition to the purposes of meetings with union representation identified by the Union in argument and through its cases, there are also the benefits to the employer of meeting with an employee at the time of discharge. Among those benefits include the fact that such meetings are an opportunity for the employer to learn information from the union and the employee which might affect the decision to terminate which can only benefit the employer. Employers who do not hold these meetings do so at their peril.

I also recognize the importance of union representation at such meetings and that there are two components to that importance. The first is that the importance of union representation to the employee at such meetings. The employee benefits from advice given by the union and from the ability of the union to advocate on the employee's behalf. These are critical labour relations benefits to employees. The second component is the protection of the Union's role as exclusive bargaining agent for employees as is established by the *Labour Relations Act*. In principle, a failure by an employer to meet with an employee to terminate their employment in order to provide union representation, undermines the union's role. However, these important rights and obligations do not by themselves create an automatic right to a termination meeting.

I need not finally decide whether this collective agreement provides for a mandatory meeting on the discharge of these grievors because I am satisfied that in the highly unique circumstances of this case there can be no breach because the purposes of mandatory meetings with union representation have been fulfilled.

There are two bases for that conclusion. The first is that there were meetings in November with union representation when the employees were re-informed of the City's vaccination policy and the consequences of the failure to get vaccinated. There is no suggestion that the Union was, at that meeting, precluded from advancing the employee's interests, seeking information, or providing additional information to the City about the employee's circumstances. There is also no suggestion that the Union was in any way precluded from providing advice to the employees or answering the employees' questions about a decision the City seemed intent and committed to following through on.

The second basis for my conclusion is the amount of time which elapsed between the "Notice" of termination and the termination itself. The facts before me are obviously highly unusual. It is extraordinarily rare that an employer would in effect discharge an employee for just cause with notice. None of the cases referred to by the parties involve circumstances that are even remotely close to the facts before me. Conceptually, the *Natrel* decision is perhaps closest in that it involves a sort of notice. However, the notice in that case was 24 hours, not two months.

Given the amount of time between the warning letter and the termination, the Union had time to engage in whatever representational activities it desired in order to provide further information to the employee, to answer any questions, to advise that a grievance would be filed on the employee's behalf and generally to make it clear that the Union was "going to bat" for the employee. The Union also had a full opportunity to advocate for the Grievors that the new omicron variant of the virus should cause the City to re-think its position. Given the amount of time involved, it is difficult to see that the grievors or the Union have lost anything by the City's decision to terminate employment in writing. Indeed, the amount of time afforded the Union and the grievors likely provided a greater opportunity for representational activities than would have been afforded had a normal termination meeting been held. I

therefore, do not find that the Union or the grievors have suffered any actual prejudice by the City's decision to terminate by letter.

For all of these reasons, the Union's motion that the discharge of these employees is null and void or *void ab intio* is dismissed. I remain seized to determine the merits of the grievances in accordance with the process which has been put in place.

Brian McLean

Arbitrator Brian McLean

Toronto

March 20, 2022