**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 5167**

**and**

**THE CITY OF HAMILTON**

**Vaccination Policy Grievance (Policy Grievance No. I-2022-006)**

**Before**: Jesse M. Nyman
Sole Arbitrator

**Appearances:**

For the Union: Tracey Henry (Counsel), Danielle Stampley (Counsel), Jay Hunter, Tracey Provo, Leigh Ann Sutherland, Deann Smith, April Settimi, Greg Dawson, Bobby Barnett, Ann Jenkins, Jodi Coville, Greg Melville-Cryer, Steve Perusello and Darcie McEathron (CUPE National).

For the Employer: Daina Search (Counsel), Kennedy Simpson (Counsel), Gillian Mastrandrea, Julie Shott and Kyra Marunchak.

This grievance proceeded to a hearing by videoconference on May 24, 2022.

1. The employer, City of Hamilton ("Hamilton") and the union, Canadian Union of Public Employees, Local 5167 ("CUPE") are bound to a Collective Agreement covering the inside and outside employees of Hamilton save and except a number of exclusions that are irrelevant to the issue presently before me (the "Collective Agreement").

2. In 2021 Hamilton introduced a vaccination policy in response to the COVID-19 pandemic that requires all employees to disclose whether they are vaccinated against COVID-19 and to submit to regular testing for COVID-19 if they are not (the "Policy"). In January 2022, Hamilton amended the Policy to provide that all employees had to be fully vaccinated by May 31, 2022 or their employment with Hamilton would be terminated. Specifically, the policy provides as follows:

> All City of Hamilton employees are required to be fully vaccinated against COVID-19 to access a City facility for the purpose of conducting work, unless subject to an approved exemption by May 31, 2022.

> …
>
> Subject to any valid exemptions, employees failing to provide proof of being fully vaccinated against COVID-19 by May 31, 2022 will be terminated from their employment with the City as of that date

3. CUPE filed a policy grievance in response to the Policy (the "Grievance") and the Grievance was referred to me for final and binding arbitration. At this point, in broad terms, the issue raised by the Grievance is whether the provision of the Policy providing for termination of employment if an employee is not fully immunized is reasonable. CUPE raises a number of grounds on which it asserts this provision of the Policy is unreasonable.

4. One of CUPE's grounds of attack is based on Article 10.3(g) of the Collective Agreement. That Article reads:

> g) Where an Employee is required by the Employer to be immunized, the Employer agrees to provide or reimburse Employees for the cost of immunizations not covered by OHIP. Where a prophylactic alternative to immunization is available it may be taken as a substitute to immunization where appropriate based on medical or religious grounds. It is understood that the Employer cannot force an Employee to be immunized or to take the prophylactic alternative without their consent. It is further understood that where such immunization (or the prophylactic alternative to immunization) is required in order for the Employee to attend work and the Employee refuses the immunization or its substitute, they may be placed on unpaid leave with no loss of seniority. In this event the Employer agrees to take reasonable steps to accommodate workers through alternate work arrangements.

5. CUPE argues that a unilaterally imposed policy, such as the Policy, cannot conflict with the Collective Agreement. CUPE argues that pursuant to Article 10.3(g), Hamilton may place an employee who refuses to be vaccinated on an unpaid leave without loss of seniority and must take reasonable steps to accommodate such workers through alternate work arrangements. CUPE argues that provision of the Policy providing for termination of employment violates Article 10.3(g). Hamilton denies that the Policy is unreasonable or that it violates the Collective Agreement in any way, including violating Article 10.3(g).

6. It is important to note that CUPE is not challenging the Policy generally or specifically taking the position that employees who are not vaccinated cannot be put on an unpaid leave, subject to Hamilton's obligation to take "reasonable steps to accommodate [them] through alternate work arrangements." The issue raised by CUPE is whether the Policy can provide for automatic termination of employment.

7. On May 26, 2022, after the hearing, Hamilton advised that it had unilaterally extended the deadline for and employee to be fully vaccinated or face termination of employment under the Policy until September 30, 2022.

8. At the time of the hearing there were approximately 154 bargaining unit members facing termination of employment under the Policy. Ten of those employees have refused to declare their vaccination status and/or undergo Rapid Antigen Testing and had been placed on an unpaid leave back in 2021 as a result. The parties estimated that slightly less than 20 of the 154 employees are part-time employees (at the hearing Hamilton raised an argument that Article 10.3(g) only applies to full-time employees).

9. At the outset of the hearing CUPE brought a motion to bifurcate the hearing and hear all evidence and argument related to its allegation that the termination of employment provision of the Policy violates Article 10.3(g) and that once a determination of that issue is made, to hear all evidence and argument related to any remaining issues. CUPE is prepared to argue this issue on the basis of the Policy, the Collective Agreement and the Minutes of certain meetings of Hamilton City Council. Hamilton opposes bifurcating the proceeding. It also asserts that it has additional evidence it may wish to call in relation to this issue including bargaining history, past practice and context evidence. This decision determines this procedural issue. The parties did not make any submissions concerning the change of the date for compliance from May 31, 2022 to September 30, 2022 under the Policy regarding the bifurcation issue before me.

10. CUPE argues that the issue of whether to bifurcate a proceeding is a procedural determination that is within the discretion of an arbitrator to make, and that the decision should be guided by the goals of efficiency and fairness. CUPE argues that the decision as to whether to bifurcate is a balancing of interests and that the balance weighs in favour of bifurcation in this case. CUPE argues that the parties would benefit from a determination of this narrow issue at the earliest opportunity and ideally prior to any employee being terminated.

11. CUPE argues that the Article 10.3(g) issue is a distinct issue that is easily severable from the other issues in dispute. CUPE argues that there is no need for extensive evidence to determine this issue and that any evidence that is before me will be equally applicable at later stages of the litigation.

12. CUPE argues that there are 154 bargaining unit members facing termination and that this militates in favour of hearing what it characterizes as the most critical issue first. CUPE acknowledges that resolution of the Article 10.3(g) issue will not be dispositive of the entire proceeding but argues that it would be sufficiently dispositive that it warrants adjudication on a preliminary basis. CUPE argues there is no prejudice to Hamilton by bifurcating the issues.

13. CUPE refers to and relies upon the following cases in support of its positions: *Cherubini Metal Works Ltd. v. U.S.W.A., Local 4122*, 2008 CarswellNS 432 (Christie); *Ontario Nurses' Association, Local 003 v Peterborough Regional Health Centre*, 2021 CanLII 27718 (Wacyk); *Health Sciences North v Ontario Nurses' Association*, 2021 CanLII 35430 (C. Johnston); *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1965), 16 L.A.C. 73 (Robinson); *Vancouver (City) Fire & Rescue Services v. Vancouver Professional Fire Fighters' Assn., Local 18*, 2005 CarswellBC 3396 (Sullivan); *Ontario Finnish Resthome Assn. v. S.E.I.U., Local 268*, 2004 CarswellOnt 4541, (Luborsky); Brown & Beatty, *Canadian Labour Arbitration*, 5th ed. (Aurora, Ont.: Canada Law Book) para §2:6); *Global Calgary and Communication, Energy and Paperworkers Union of Canada, L88-M*, 2007 CarswellNat 3970 (Sims); and, *Chartwell Housing Reit (The Westmount, the Wynfield, the Woodhaven and the Waterford) v Healthcare, Office and Professional Employees Union, Local 2220*, 2022 CanLII 6832 (Misra).

14. In response Hamilton argues that the cases relied upon by CUPE are distinguishable and the decision to bifurcate is a case-by-case analysis depending on the unique facts and circumstances of each case. Hamilton argues that as the Article 10.3(g) issue is not dispositive it is not more efficient to bifurcate that issue from the remainder of the case in this proceeding. For example, Hamilton argues the Article 10.3(g) issue will not fully determine the status of the 10 employees who refused to provide their vaccination status or potentially the status of part-time employees.

15. Hamilton argues that it will rely on evidence of bargaining history (from the time Article 10.3(g) was negotiated), past practice regarding the application of Article 10.3(g) and context evidence. Hamilton advised that it was not in a position to call that evidence or particularize it at the hearing. Finally, Hamilton argues that the determination of the Article 10.3(g) issue should only be made in the context of a grievance challenging the termination of an employee under the Policy and that as no one has yet been terminated, any such determination is premature. Hamilton refers to and relies upon *Bunge Hamilton Canada, Hamilton, Ontario v United Food and Commercial Workers Canada, Local 175*, 2022 CanLII 43 (Herman) and *Unifor Local 973 v Coca-Cola Canada Bottling Limited*, 2022 CanLII 25769 (Wright).

16. In reply, CUPE argues this is a policy grievance challenging the Policy and so it need not wait for an employee to be terminated to determine whether the Policy violates the Collective Agreement. CUPE argues it is antithetical to sound labour relations to require it to wait until an employee loses their employment to challenge the Policy's adherence to the Collective Agreement. CUPE argues *Bunge*, *supra* and *Coca-Cola*, *supra*, are distinguishable because in those cases termination of employment was uncertain, whereas in this case a clear date has

been set. Finally, CUPE questions whether there is any relevant evidence that Hamilton can actually call.

17. There is no real issue that I have the jurisdiction to direct that the Article 10.3(g) issue will be determined first and that the determination as to whether to do so is a procedural one. Whether an issue should be bifurcated from the other issues in a proceeding depends upon the circumstances of the case and should largely be driven by considerations of efficiency and fairness. Relevant considerations include whether the issue is discrete, whether resolution of the issue will have a substantial impact on the proceeding, whether bifurcation will lead to duplication of evidence or the calling of witnesses more than once to testify and how quickly the preliminary issue can be disposed of in comparison to the other issues in the case. This is by no means an exhaustive list of considerations and no one consideration trumps the others. I agree with Hamilton that the assessment is made on a case-by-case basis.

18. As a starting proposition, there is no doubt that this hearing will have to be bifurcated in some manner. For example, the evidence and arguments concerning the accommodation of unvaccinated employees pursuant to Article 10.3(g) should only be determined if that obligation actually falls on Hamilton. The issue before me is thus not whether bifurcation should occur, but rather to what extent should this proceeding be bifurcated, and what issue or issues should be heard first.

19. Having considered the arguments of the parties, CUPE's motion to hear and determine the Article 10.3(g) issue on a preliminary basis is granted. While it would not have been possible to hear that argument at the May 24, 2022 hearing as CUPE desired, given Hamilton's desire to potentially call evidence, that evidence can be particularized. As this evidence relates to the bargaining history of and practice around Article 10.3(g), it is sufficiently distinct from the remainder of the evidence that may be called in this case that it may proceed independently. To the extent that either party wishes to situate this Grievance in the larger context of the COVID-19 pandemic, that evidence will be equally applicable to later arguments and can be particularized as well. Much of it may not be in dispute either.

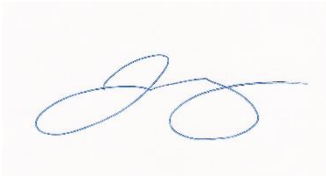
20. While the Article 10.3(g) issue may not be dispositive, it will have a significant impact on the ultimate resolution of this proceeding. It will either narrow the issues for adjudication or assist the parties in resolving the differences that remain.

21. That no employee has yet had their employment terminated pursuant to the Policy is not a reason to refuse to bifurcate the hearing and hear the Article 10.3(g) issue first. The issue of the Policy's adherence to the Collective Agreement is squarely raised by the Grievance. Whether the Grievance is bifurcated or not the

Article 10.3(g) issue will be litigated. While a grievance concerning the termination of employment of a given employee may raise a number of additional issues, CUPE is not seeking a determination in this case as to whether a specific employee's termination for refusing to be vaccinated against COVID-19 satisfies the just cause standard or provides some other basis for upholding the termination of employment of a bargaining unit member. Rather, what CUPE is seeking is an early determination as to the Policy's compliance with the Collective Agreement on its face. In my view, both parties would benefit from a determination of this issue at an early stage. Whether Hamilton or CUPE is correct in its interpretation of Article 10.3(g), an early determination would allow the parties and the affected employees to make decisions as to how to proceed with a greater degree of clarity.

22. For the foregoing reasons CUPE's motion to bifurcate the hearing and determine the Article 10.3(g) issue first is granted. Hamilton is directed to provide particulars of any evidence it intends to call on this issue by June 20, 2022. A conference call with counsel will be scheduled to discuss next steps and the most fair and efficient manner of determining this issue.

DATED at Toronto this 30th day of May, 2022.



Jesse Nyman
Sole Arbitrator