

**IN THE MATTER OF AN ARBITRATION PURSUANT TO THE LABOUR
RELATIONS ACT, 1995**

BETWEEN:

Trillium Health Partners

(the “Hospital”)

-and-

Canadian Union of Public Employees, and its Local 5180

(the “Union”)

**Re: Grievances of S. Vu (Written Warning #Q-22-005, Suspension #Q-22-080,
Discharge #Q-22-091)**

DECISION

ARBITRATOR: Daniel P. Randazzo, Arbitrator

APPEARANCES:

UNION:

Ryan Newell, Counsel
Jane Zhang, Counsel
Dave Verch, OCHU First Vice-President
Joe Ricci, Local President
Laura Murchison, Chief Steward
Jackson Bajulaiye, CUPE, 5180 Treasurer
Amanda Allan, CUPE, 5180 Vice President
Nancy McBain, CUPE, National Representatives
Charlotte Karli, CUPE, National Representatives
Sarah Vu, Grievor

HOSPITAL:

Amanda Hunter, Counsel
Rebecka Arraial, Counsel
Cheryl Barnet, Manager – People Health
Brian Blakeley, Senior Advisor, Labour and Employee Relations
Rejan Mehta, Coordinator, Labour and Employee Relations
Nazneen Mehta, Senior Advisor, Labour and Employee Relations
Suzanne Owens, Manager Human Resources
Jennifer Smith, Human Resources Business Partner

DATE OF HEARING:

September 14, 2023
February 8, 2024
March 19, 2024
April 3, 2024
(All dates via videoconference)

1. These matters come to me by way of consensual appointment. The grievances concern the discipline and eventual discharge of Ms. Sarah Vu (the “Grievor”). The discipline and discharge flow from the alleged non-compliance with the Hospital’s COVID-19 Vaccination Policy. On December 20, 2021, the Grievor was issued a written warning on the basis that the Grievor had not received her first dose of the COVID-19 vaccination; on March 15, 2022, the Grievor was issued a fourteen (14) day suspension on the basis that the Grievor had not received her second dose of the COVID-19 vaccination; and, on March 30, 2022, the Grievor was terminated on the basis that she was not in compliance with the Hospital’s COVID-19 Vaccination Policy. The Union grieved each discipline, the written warning, the suspension, and the termination. The three grievances were consolidated and referred to me for determination.
2. It is the Union’s claim that the Hospital violated the *Human Rights Code* (“*Code*”) by failing to accommodate the Grievor’s medical request for an exemption to the Hospital’s COVID-19 Immunization Policy, specifically, a request for an extension in the time to receive the second dose of the COVID-19 vaccine. Further, the Union claimed that the Hospital violated its own COVID-19 Immunization Policy (“the Policy”) by applying the Policy’s exemption guidelines in an overly mechanical and strict manner; and the Union claimed that the Hospital violated the Collective Agreement by disciplining and ultimately terminating the Grievor without just cause. The Hospital denied violating the *Code* and the duty to accommodate under the *Code*. The Hospital takes the position that the Policy was applied fairly and consistency vis a vis all employees, including the Grievor and ultimately the Grievor was disciplined and terminated for non-compliance with the Policy.
3. Prior to the commencement of the hearing, the parties entered an Agreed Statement of Facts (“ASF”), which is attached as Appendix “A” to my decision. The parties also entered a Joint Book of Documents. I heard from two witnesses, both called by the Hospital. I heard from Dr. Vincent Spilchuk a physician who practices occupational medicine and who was a paid occupational health consultant to the Hospital. Dr. Spilchuk was a member of the Hospital’s COVID-19 Immunization Policy Exemptions & Accommodations Committee (“the Committee”). I also heard from Ms. Cheryl Barnet, who during the relevant time period, was the Manager of People Health. Ms. Barnet was not a member of the Committee, however in her role as the Manager of People Health, Ms. Barnet facilitated the medical and other *Code* based exemption requests submitted by those seeking an exemption from the Policy. The Union chose not to call any witnesses, relying on the ASF and their cross-examination of the Hospital’s witnesses.
4. Further, the parties agreed to file written submissions and authorities with regards to their closing arguments. The Hospital delivered and filed their final argument, including case law, with the Union filing their argument and authorities shortly thereafter. Lastly, the Hospital filed and delivered their reply to the Union’s argument.
5. The grievances, and the parties’ respective arguments, did not focus on the reasonableness of the Policy. In fact, the Policy was the subject of a separate arbitration

before Arbitrator Steinberg,¹ where the Policy was found to have been consistently applied. The matter focused on the Union's claim that the Grievor was entitled to an accommodation under the *Code* that would provide relief from the application of the Policy, and more specifically, relief from the Policy's immunization schedule.

Timeline and Background Facts

6. The facts are pulled primarily from the parties' ASF. I have included those facts most relevant to this matter while also including excerpts from the communications between the Grievor and the Hospital. The testimony of Dr. Spilchuk and Ms. Barnet is reviewed and incorporated into my analysis and decision where necessary and appropriate. I note at this juncture, that I found both witnesses to be credible and reliable giving their evidence in chief and in cross-examination in a respectful and helpful manner.
7. The Grievor was hired on September 18, 2018 as a regular part-time Porter at the Hospital's Queensway Health Centre location. The Grievor worked in this position until her termination on March 30, 2022. In 2014 the Grievor was diagnosed with Ventricular Tachycardia (VT), an abnormal cardiac condition characterized by episodes of irregular heart rhythm.
8. As a result of the COVID-19 pandemic and pursuant to the direction Ontario Chief Medical Officer of Health², the Hospital implemented the Policy on September 7, 2021 which required all employees to be *fully* vaccinated for COVID-19 by October 21, 2021. "Fully vaccinated" was defined by the Policy as:

Fully Vaccinated means having received the full series of a COVID-19 vaccine or combination of COVID-19 vaccines authorized by Health Canada (e.g., two doses of a two-dose vaccine series, or one dose of a single-dose vaccine series; and having received the final dose of the COVID-19 vaccine at least 14 days prior). This Policy and definition may change as national vaccination/provincial recommendations and definitions change and could include subsequent doses of the COVID-19 vaccines.

9. The Policy allows for medical exemptions and accommodations under the *Code*. The Policy states:

An Individual who cannot be vaccinated based on medical or other grounds recognized by the *Human Rights Code* can submit a COVID-19 Vaccination Medical Exemption/Accommodation Request Form or a COVID-19 Vaccination Human Rights Accommodation Request Form with supporting documentation to EHSW. These forms will be reviewed on a case-by-case basis by the COVID-19 Immunization Policy Exemptions & Accommodations Committee. All decisions will be made

¹ *Trillium Health Partners v CUPE Local 5180*, 2023 CanLII 2826 (ON LA) (Arbitrator Steinberg).

² Directive #6, issued under, Section 77.7 of the Health Protection and Promotion Act, R.S.O. 1990, c.H.7.

in accordance with current scientific evidence and the *Human Rights Code*.

10. With respect to compliance and enforcement of the Policy, employees were advised that failure to comply will result in progressive action up to and including termination. The Policy states:

An Individual's failure to comply with THP's COVID-19 Immunization Program will result in progressive action up to and including termination of employment or placement and/or restriction, suspension, revocation or non-renewal of privileges. For learner placement termination, appropriate Individuals from the University/College will be consulted prior to the decision to end a placement which is in progress. This will be done in consultation with the Education Office, Hospital Program (depending on the learner's discipline) and the University/College delegate.
11. On October 10, 2021, the Grievor sought a religious based accommodation seeking to be exempt from the Policy. To facilitate the processing of accommodation requests, the Hospital created different "pathways" with respect to implementation of the Policy and potential consequences for non-compliance. Those who were seeking accommodations were placed in Pathway #3. Under Pathway #3, the consequences for non-compliance were not implemented while an employee's accommodation request was being considered. If the accommodation request was eventually denied, the employee was given fourteen (14) days to obtain their first vaccination dose or be subject to discipline.
12. The Grievor's religious accommodation request was denied on December 6, 2021 at which time she was advised that she was required to get her first COVID-19 vaccination dose by December 20, 2021.
13. The Grievor received her first dose on December 19, 2021, however due to difficulties using the Hospital's self-reporting portal, the Grievor was not able to advise the Hospital of her vaccination status (first dose) until January 13, 2022. However, the Grievor did contact her manager on December 22, 2021 and verbally advised that she received her first dose. The Grievor confirmed her vaccination status in a follow-up email to her manager.
14. On December 20, 2021, the Hospital, presumably not knowing that the Grievor had received her first dose on December 19, 2021, issued a written warning due to the Grievor's apparent non-compliance.
15. On December 31, 2021, due to the impact of the omicron variant on both the Hospital's projected patient intake and reduced staffing levels, the Hospital paused the application of the Policy. By February 10, 2022 the projected hospitalizations reduced to a level which permitted the resumption of the Policy.
16. As stated, the Grievor received her first dose on December 19, 2021. On or about January 8, 2022 the Grievor was infected with the COVID-19 virus. The Grievor's infection was

confirmed with a positive COVID-19 test on January 13, 2021. On January 14, 2021 the Grievor was hospitalized with “exacerbation of her Right Ventricular Outflow Tract tachycardia.” The Grievor remained in the hospital from January 14, 2021 to January 23, 2021. While hospitalized, the Grievor was referred to Dr. Christopher Graham, an internal medicine and infectious disease specialist. Although hospitalized for nine (9) days, she was under the care of Dr. Graham on January 15, 2021 and under the care of other physicians and/or other medical practitioners for the remaining days of her stay. On January 15, 2021, Dr. Graham wrote the following discharge note:

This 39-year-old woman presents with exacerbation of her RVOT VT in the setting of recent COVID-19. She does appear to have recovered from her acute viral infection, but there may have been some myocardial injury. At this point the indication for further treatments for COVID-19 would be the need for supplemental oxygen. She will need to complete 10 days of isolation given that she has only had a single COVID-19 vaccine. Regarding her 2nd vaccine I would suggest deferring this 3 months until she is fully recovered, as well as receiving clearance from Cardiology. She should be exempt from any vaccine mandates during this time. Please let ID on call know if she does progressed to requiring oxygen. Thank you for involving me in her care.

17. Following her hospital stay, the Grievor returned to work and advised her Team Leader that she had medical documentation supporting a medical exemption. On February 7, 2022 she was advised by Human Resources that she was not in compliance with the Policy and that she was required to submit her request for an exemption on the appropriate form with supporting documentation by February 11, 2022. She was further advised that if she did not provide the necessary information by February 11, 2022 and continued to be in non-compliance with the Policy her employment would be terminated.
18. The Grievor responded to the February 7 communication disputing the characterization of her request as an “exemption”, while stating that she was seeking an “extension” for receiving the second dose and not an exemption. The Hospital provided the Grievor with a COVID-19 Vaccination Medical Exemption/Accommodation Request Form and advised that the exemption request form and supporting documentation had to be submitted by February 11, 2022.
19. On February 10, 2022 the Grievor submitted the exemption request form and documentation. The Grievor attached the January 15, 2022 discharge note (reproduced in paragraph 16 of my decision) issued by Dr. Graham. Upon review of the exemption request form and Dr. Graham’s note, the Hospital, noting that the exemption request form and Dr. Graham’s discharge note referenced a referral to a cardiologist, requested the Grievor to provide the cardiologist’s documentation in regard to the second dose. The Grievor had earlier advised the Hospital that had attended a follow-up appointment with her cardiologist.

20. On February 17, 2022 the Grievor advised the Hospital that she would not provide the documentation from her cardiologist. I have reproduced the full text from the Grievor's February 17, 2022 email to the Hospital below:

Cheryl

I have already received my first vaccine dose on December 19, 2021 and have provided your office with a copy for your records. I then became infected with covid after working with several infected workers at Trillium and known to be infected by Trillium, before it was time to receive my second dose. I was advised by Dr. Graham that because of my heart condition I will need to wait until 3 months until I can receive my second dose as it could again exasperate my heart condition that I informed your office that I was recently in the CCU for. I provided you with the hospital note from Dr. Graham and you advised I also will need for him to complete the accommodation request form, which I had completed and submitted directly to you on February 10, 2022. You are now again asking me for further medical records after I advised you that I spoke not only with my family physician but also my cardiologist and they both advised that the hospital note (which I already provided to your office) is more than sufficient along with the accommodation request form which I already provided. A physician or specialist cannot comment on my health while at the hospital as they were not my treating physicians, and they both made this very clear to me. This is why I not only provided the discharge note from Dr. Graham but also the accommodation request form.

In all fairness, I still brought your below request to my family physician's attention to see if there was anything further I could do to appease this process and I was advised that (under PHIPA) a workplace is not to request my personal health information in this way and your office should be well aware of this, as this is documented clearly under the law.

I have been more than flexible and willing to provide all the requested documents by your office, but I will not be unnecessarily disclosing my personal medical records to my workplace, as I have provided all completed documentation that your office has requested and requires to date. It is my understanding that under the law, I have provided my due diligence to provide all documents necessary to prove without a reasonable doubt that my health condition requires a very brief period before I can receive my second dose in a way that will not jeopardize my health. I am not willing to put my life on the line to appease this seemingly impossible process and the difficulty and discriminal I now feel I am facing because of my health condition. ***I have remained transparent and I have all intention to have my second dose immediately after the 3 month period, as advised was safe by Dr. Graham.***

Thank you,

Sarah
[emphasis added]

21. The Grievor's exemption request was submitted to the Committee on February 22, 2022. In rejecting the Grievor's exemption request the Committee's Minutes reference the following comments:

- i. This individual sent email communication to advise that she had seen cardiologist but has refused to submit cardiology information. Stating that it is personal health information which the committee doesn't have the right to.
- ii. There is no documentation of illness post vaccine.
- iii. The documentation submitted does not meet MOH guidelines.
- iv. Currently, the committee has Dr. Graham's statement and MOH guidelines. The committee does not know what the specialist has said.
- v. The committee does not have sufficient information to make a determination.
- vi. Consideration to include in letter, may still submit further medical documentation during given timeline, otherwise to be vaccinated.

22. On March 1, 2022, the Hospital advised the Grievor that her request for an exemption was denied and she was instructed to obtain her second dose of the vaccine within fourteen (14) days. The Grievor was given the following explanation for the denial:

This decision has been made after careful consideration of the information you have provided to us in support of your request. Based on the documentation provided, the Committee does not have sufficient information to make a determination in alignment with Ministry of Health Standards. ***We do understand that you were referred to, and met with, a Cardiologist regarding your situation however no subsequent medical documentation was provided.*** Based on guidance from the National Advisory Committee on Immunization and the Ontario Ministry of Health, the information you provided to date does not medically exempt you from receiving the COVID-19 vaccine.

[emphasis added]

23. The Grievor did not obtain her second dose within the fourteen (14) day window, consequently the Hospital, on March 15, 2022, suspended the Grievor without pay for fourteen (14) days and advised the Grievor that if she did not receive her second dose of

the vaccine by March 28, 2022 her employment would be terminated. The Union grieved the fourteen (14) suspension.

24. On March 18, 2022 the Grievor emailed the Hospital enclosing a note from her family doctor, Dr. Geetha Rao. The Grievor's email communication is reproduced below:

Hi,

I would like to make it clear that I have advised my situation and I am not asking for an exemption but an extension to the covid-19 mandate. Dr. Graham from Trillium Health Partners who filled out the exemption form also clarified in the documents that I needed to wait 3 months after my discharge from the hospital to get the ***second shot which I have scheduled it for April 19, 2022. If you require proof of this scheduled appointment please let me know as I can provide that to you.*** I have also attached a doctors note from my family physician to support Dr. Graham's decision. ***I have done everything possible by providing all requested documents by your office.*** If there is anything else I can provide to avoid termination as of March 28, 2022 please let me know.

[emphasis added]

Thank you,

Sarah Vu

25. The note from Dr. Rao is reproduced below:

To whom it may concern,

This is to confirm that Sarah was diagnosed with COVID-19 infection after developing symptoms from January 8, 2022 and testing psotive [sic] on January 13, 2022. She is advised to wait three months from the time of this infection before getting a second dose of COVID-19 vaccination.

Regards

Dr. Geetha Rao, MD, CCFP, FCFP

26. The Hospital responded to the Grievor's March 18, 2022 email advising that her medical information did not meet the criteria for an exemption/extension based on the National Advisory Committee On Immunization and Ontario Ministry of Health guidelines and that she was expected to receive her second dose in accordance with the Policy.
27. By letter dated March 30, 2022, the Hospital informed that Grievor that her employment was terminated for failure to comply with the Policy. The Union grieved the Grievor's termination.
28. On October 4, 2023, approximately nineteen (19) months after visiting the cardiologist, the Grievor produced a note from Dr. Catherine Le Feuvre, the Grievor's cardiologist, which confirmed that there was no evidence of COVID myocarditis. The report states that following her COVID infection her ECG was unchanged and her Cardiac MRI

showed no evidence of mild myocarditis. Dr. Le Feuvre agreed with Dr. Graham's recommendation that the Grievor should wait three months to get her second dose of the COVID vaccine.

29. The Hospital relied upon and followed the recommendations and guidelines established by National Advisory Committee on Immunization ("NACI") and the Ontario Ministry of Health with respect to vaccinations and employees' requests for a medical exemption from the Policy. I accept Dr. Spilchuk's testimony that the NACI set the national standards regarding the administration of vaccines, and in particular the administration of COVID-19 vaccines. I also accept Dr. Spilchuk's testimony with respect to the importance of vaccine immunity, and while he recognized that both natural immunity, immunity achieved by an unvaccinated person following a COVID-19 infection, and hybrid immunity, immunity achieved through both vaccine immunity and natural immunity, were effective tools against the spread of the COVID-19 virus, this did not change his opinion, that vaccine immunity, with a full course of vaccinations, was NACI recommended and the preferred path to effective immunization.
30. I accept Ms. Barnet's testimony that the Hospital followed the recommendations from the NACI with respect to the timing of the doses for the COVID-19 and that given the urgency for healthcare workers, the Hospital implemented the NACI's minimum time frame of 21-28 days between the first and second dose. I also accept Ms. Barnet's evidence that the Hospital applied the guidelines established by the Ministry of Health (MOH Guidelines) with respect to requests for medical exemptions. The MOH Guidelines established a set of narrow criteria or circumstances that would warrant or justify a medical exemption to receiving the COVID-19 vaccine.
31. The MOH Guidelines³ are intended to assist physicians/specialists and nurse practitioners in evaluating contraindications or precautions to the COVID-19 vaccination that may warrant a medical exemption. The MOH Guidelines state, "*In general, there are few actual contraindications to Health Canada authorized COVID-19 vaccines that would qualify as medical exemptions and most individuals can receive COVID-19 vaccines. Only individuals with contraindications to mRNA and viral vector vaccines qualify for medical exemptions.*"⁴ Further, with respect to *true* medical exemptions the MOH Guidelines states, "*True medical exemptions are expected to be infrequent and should be supported by expert consultation.*"⁵
32. As described below, the MOH Guidelines provides for four categories of exemptions:
 1. **Pre-existing Condition(s)**
 - a. Myocarditis prior to initiating mRNA COVID-19 vaccine series
 - b. Severe allergic reaction (including anaphylaxis) to a component of a COVID-19 vaccine.

³ Ministry of Health, *Medical Exemptions to COVID-19 Vaccination*, Version 3.0, January 12, 2022.

⁴ Ministry of Health, *Medical Exemptions to COVID-19 Vaccination*, Version 3.0, January 12, 2022, page 2.

⁵ Ministry of Health, *Medical Exemptions to COVID-19 Vaccination*, Version 3.0, January 12, 2022, page 3.

2. Contraindications to Initiating an AstraZeneca or Janssen COVID-19 Vaccine Series

- a. History of capillary leak syndrome (CLS)
- b. History of cerebral venous sinus thrombosis (CVST) with thrombocytopenia.
- c. History of heparin-induced thrombocytopenia (HIT).
- d. History of major venous and/or arterial thrombosis with thrombocytopenia.

3. Adverse Events Following COVID-19 Immunization

- a. Thrombosis with thrombocytopenia syndrome (TTS/VTT) following the AstraZeneca or Janssen COVID-19 vaccine.
- b. Myocarditis or pericarditis following mRNA COVID-19 vaccine.
- c. Severe allergic reaction (including anaphylaxis) following COVID-19 vaccine
- d. Serious adverse event following COVID-19 immunization (e.g. results in hospitalization, persistent or significant disability/incapacity).

4. Other

- a. Actively receiving monoclonal antibody therapy Or convalescent plasma therapy for the treatment or prevention of COVID-19.
- b. Actively receiving or recently completed immunosuppressing therapy anticipated to significantly blunt vaccine response.

33. I accept the evidence of Dr. Spilchuk and Ms. Barnet that the Grievor, pursuant to the MOH Guidelines, did not meet the narrow standards necessary to qualify for a medical exemption.

ANALYSIS AND DECISION

34. I will address the parties' arguments throughout my analysis. I note that the Union has claimed that the Hospital violated the *Code* by failing to accommodate the Grievor's medical request for an exemption to the Policy. With respect to this claim, an alleged violation of the *Code* and the duty to accommodate, the Union carries the onus to establish the violation of the *Code* and the breach of the duty to accommodate. The Union also claims that the Hospital violated its own Policy and the Collective Agreement by disciplining and discharging the Grievor without just cause. With respect to the Union's second claim, the Hospital carries the onus to establish that they had just cause to discipline and eventually terminate the Grievor's employment. Although there is an overlap between the claims, I will deal with each claim separately below.
35. The parties relied on the following case law in support of their respective positions:

Union:

ATCO Electric Ltd. v. Canadian Energy Workers Association, 2023 CanLII 120961(AB GAA) (Casey); *Di Biase v. 1004904 Ontario O/A Canada Pure Water co. Ltd.*, 2019 HRTO 1005 CanLII (Vice Chair Cook); *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employes de employés de l'Hôpital general de Montréal*,

2007 SCC 4 (CanLII), [2007] 1 SCR 161; *Western Health Care Corp v. CUPE Local 488*, 1999 CarswellNfld 417, (Oakley); *Re: Meadow Park Nursing Home and Service Employees International Union, Local 220*, 1983 CanLII 4910 (ON LA) (Swan); *Chartwell 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) (Misra); *Canadian Labour Arbitration, 5th Edition*, Chapter 7:71:Warnings; *Humber River Hospital v. Teamsters Local Union No. 419*, 2024 CanLII 19827 (Parmar); *Quinte Health and Ontario Nurses Association*, 2024 CanLII 14991 (ON LA) (Hayes); *Toronto Professional Fire Fighters' Association, I.A.A.F. Local 3888 v. Toronto (City)*, 2022 CanLII 78809 (ON LA) (Rogers); *BC Hydro and Power Authority v. International Brotherhood of Electrical Workers, Local 258*, 2022 CanLII 25764 (BC LA) (Somjen); *Power Workers' Union v. Elexicon Energy Inc.*, 2022 CanLII 7228 (ON LA) (Mitchell); *Complex Services Inc. v. Ontario Public Service Employees Union, Local 278*, 2012 CanLII 8645 (ON LA) (Surdykowski; and *Amalgamated Transit Union, Local 1587 (Policy) v. Ontario (Metrolinx-Go Transit)*, 2021 CanLII 77471 (ON GSB) (Wacyk).

Hospital

Lakeridge Health v CUPE, Local 6364, 2023 CanLII 33942 (ON LA)(Arbitrator Robert Herman); *Central West Local Health Integration Network v Canadian Union of Public Employees, Local 966*, 2023 CanLII 58388 (ON LA)(Arbitrator Russell Goodfellow); *Trillium Health Partners v CUPE Local 5180*, 2023 CanLII 2826 (ON LA) (Arbitrator Steinberg); *Lumber & Sawmill Workers' Union, Local 2537 v KVP Co 1965*, CanLII 1009 (ON LA); 2023 CanLII 127020 (SK LA) (Wallace, Janzen Brown, 2023); *Bunge Hamilton Canada, Hamilton, Ontario v United Food and Commercial Workers Canada, Local 175*, 2022 CanLII 43 (ONLA) (Arbitrator Herman); *Ontario Power Generation and the Power Workers Union (OPG-P-185)*, [2021] CarswellOnt 18220 (Arbitrator Murray); *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal* 2007 SCC 4 (CanLII), [2007] 1 SCR 161; *Yeats v. Commissionaires Great Lakes* 2010 HRTO 906.

36. The parties spent considerable time attempting to distinguish between an *exemption* from the Policy vs. an *extension* to the Policy's vaccination timetable. The Grievor, in her communication with the Hospital, disputed that she was seeking an exemption, characterizing her request as only an extension. The Hospital maintained that an "extension" was equivalent to an exemption and, like an exemption request, was subject to the same MOH Guidelines. During cross-examination, Dr. Spilchuk acknowledged that the Grievor was not seeking a "full-blown" exemption in that she was only seeking additional time to get her second dose.

37. Ultimately, the Grievor was seeking a medical accommodation which, if accepted or approved, would result in the Policy having a different application to her than how it was applied to other employees. I am not persuaded that the Grievor's request falls outside of what is understood to be an "exemption", albeit a 'temporary exemption'. The Grievor is claiming a medical accommodation seeking to be exempt from the strict application of the Policy's COVID-19 vaccination schedule. Although she was not seeking to be exempt from the vaccination mandate in its entirety, she is seeking to be exempt from the Policy's vaccination schedule, while looking to have a vaccination schedule customized to her current medical needs.
38. In this regard, I agree with the Hospital that the Grievor's request for a temporary exemption from the Policy is properly assessed using the NACI/MOH Guidelines.

Duty to Accommodate

39. As referenced earlier, the Grievor was seeking a medical accommodation to the strict application of the Policy's COVID-19 vaccination timetable/schedule. The Hospital's duty to accommodate is acknowledged within the terms of the Policy while also an obligation under the *Human Rights Code* ("Code").
40. The Union correctly directs my attention to *McGill University Health Centre, supra*, in which the Supreme Court of Canada endorsed an individualized accommodation process. The Supreme Court of Canada states,⁶

[22] *The importance of the individualized nature of the accommodation process cannot be minimized. The scope of the duty to accommodate varies according to the characteristics of each enterprise, the specific needs of each employee and the specific circumstances in which the decision is to be made.* Throughout the employment relationship, the employer must make an effort to accommodate the employee. However, this does not mean that accommodation is necessarily a one-way street. In *O'Malley* (at p. 555), [1992] 2 S.C.R. 970 (S.C.C.), the Court recognized that, when an employer makes a proposal that is reasonable, it is incumbent on the employee to facilitate its implementation. If the accommodation process fails because the employee does not co-operate, his or her complaint may be dismissed.

41. The accommodation process will vary depending on the characteristics of the employer, the specific needs of the employee and the specific circumstances in which the accommodation decision is made. The specific needs of the Grievor clearly drives the process, however the Hospital's characteristics and the specific circumstances within which the accommodation decision is made must be considered. The accommodation

⁶ *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employes de employés de l'Hôpital general de Montréal*, 2007 SCC 4 (CanLII), [2007] 1 SCR 161, para. 22

process is not conducted in a vacuum, the context within which the decision is made is relevant. The COVID-19 pandemic and its impact on the Hospital and workplace, as well as the Ministry of Health's directives, the NACI and MOH Guidelines can influence or effect the outcome.

42. Arbitrator Steinberg, in *Trillium Health Partners v CUPE Local 5180*, *supra*, describes the context within which the Grievor's request for accommodation was made,

[93] With respect to the second issue, the employer was facing the closest to an existential threat as one could imagine. OMICRON resulted in a huge increase in the patient population at the very same time that the number of staff available to care for them was being decimated by the virus. Patients were also much sicker requiring intensive care in order to save lives.

...

[113] The pandemic was a once in a 100-year event. It created enormous challenges for society at large but more so in the health care sector. How to respond to those challenges in such a novel environment placed enormous strain on all those involved in health care.

43. The context within which a decision is made is relevant. This is not to suggest that the Hospital is, due to the enormous challenges and threats encountered during the COVID-19 pandemic, free to be wrong with respect to an accommodation request. However, the context, and in particular the context within which these events occurred, influence the outcome and will have an impact on the accommodation assessment, including the assessment of undue hardship.
44. Before we get to the stage in the process of assessing undue hardship, the Union must establish that the Grievor was entitled to a medical accommodation seeking an exemption to the Policy's vaccination schedule. In this regard, the Union relies on the discharge note of Dr. Graham, in which he references a possible myocardial injury, recommends a three month delay in receiving the second dose of the COVID vaccine, and recommends that the Grievor receive "clearance from Cardiology". The Grievor's family doctor also provided a note repeating Dr. Graham's recommendation with respect to the three month delay in the second dose.
45. The Hospital did not dispute the contents of Dr. Graham's discharge note, it was the Hospital's position that the Grievor's accommodation claim and allegation of a breach of the *Code* should be dismissed on the basis that the Grievor failed to cooperate in the accommodation process. The Hospital points to the Grievor's refusal to provide the cardiologist's February 1, 2022 report as evidence of the Grievor's failure to cooperate.
46. I did not have the benefit of hearing from the Grievor and therefore make no assessment with respect to the Grievor's reliability and credibility. I accept the Grievor's email communications and exchanges with the Hospital and Ms. Barnet as her reasons or

justification for refusing to produce/provide the cardiologist's February 1, 2022 report. I understand from her communications with the Hospital and Ms. Barnet, that she believed that she had provided all the necessary documents, she was burdened by the process and requests for further information (the cardiologist's report), and she believed that the cardiologist's report was *private medical information* and did not have to be produced/provided to the Hospital. The Grievor was wrong in her beliefs with respect to the production of the February 1, 2022 cardiologist report.

47. The Hospital's request for the cardiologist report was reasonable and relevant to the accommodation assessment. Dr. Graham references a possible myocardial injury and the need for "clearance from Cardiology". This, in and of itself, renders the cardiologist's report relevant and necessary. Furthermore, in her communications with Ms. Barnet, the Grievor states that she, presumably in accordance with Dr. Graham's recommendation, attended with her cardiologist, which reinforces the importance and relevance of the cardiologist's report.
48. The Grievor considered the cardiologist's report as private medical information that did not have to be produced. The Grievor correctly assessed the report as private medical information but failed (or refused) to appreciate that, when making a medical accommodation request, private medical information, and often in great detail, must be produced to substantiate the accommodation request.
49. I am at a loss to understand how the Grievor was willing to produce the discharge note from Dr. Graham and a medical note from her family physician, both of which fall under the rubric of private medical information, but not a similar note from her cardiologist. A note which she had in her possession at the time and which was clearly relevant to her medical exemption request. Perhaps the Grievor's frustration with the process influenced her better judgement. I have reviewed the Grievor's communications with Ms. Barnet and draw from those communications that she was frustrated with the process. I note Ms. Barnet's comment on February 17, 2022 that she understood the Grievor to be frustrated with the process. The Grievor's February 17, 2022 email communication is reproduced above. On the same date, in response to the Grievor, Ms. Barnet wrote,⁷

Hi Sarah,
Thank you for your email. *I understand that this process can be difficult.*
I will forward that documents you have submitted thus far to the Review Committee and you will receive a reply directly back from the Committee once reviewed.

50. Frustration is not grounds for refusing to produce a relevant and necessary medical document. I find that the cardiologist's February 1, 2022 report was a relevant document to the Grievor's request for a medical accommodation and the Hospital's request to have the Grievor produce the cardiologist's report was reasonable in the circumstances. Further, I find that the Grievor was uncooperative by refusing to produce the cardiologist's report.

⁷ Email exchange between Cheryl Barnet and Grievor, February 17, 2022 1:28 pm.

51. Both parties have a role in the accommodation process. I note parenthetically that it in the unionized sector, all three parties, the employer, the employee and the bargaining agent have a role in the accommodation process. The Supreme Court of Canada, in *McGill University Health Centre, supra*, commented on the important role an employee plays in the accommodation process,⁸

[22] The importance of the individualized nature of the accommodation process cannot be minimized. The scope of the duty to accommodate varies according to the characteristics of each enterprise, the specific needs of each employee and the specific circumstances in which the decision is to be made. Throughout the employment relationship, the employer must make an effort to accommodate the employee. ***However, this does not mean that accommodation is necessarily a one-way street.*** In *O'Malley* (at p. 555), [1992] 2 S.C.R. 970 (S.C.C.), ***the Court recognized that, when an employer makes a proposal that is reasonable, it is incumbent on the employee to facilitate its implementation. If the accommodation process fails because the employee does not co-operate, his or her complaint may be dismissed.***

52. The Ontario Human Rights Tribunal also recognizes the important role an employee plays in the accommodation process,⁹

[48] Employers and employees with disabilities have a shared responsibility for making the accommodation process a success. Employers' duties in the accommodation process include accepting requests for accommodation in good faith, requesting only the information required to consider possible methods of accommodation and taking an active role in ensuring that possible solutions are examined. ***Employees must cooperate in obtaining the necessary medical information,*** make their needs known, preferably in writing, in order that the person responsible for accommodation can consider possible accommodations, participate in discussions about solutions and work with the employer on an ongoing basis to manage the accommodation process.

53. It is incumbent on the employee seeking a medical accommodation, at the very least, to cooperate in obtaining and providing the necessary medical information. In this matter, the Grievor was required to provide the cardiologist's report, which was in her possession at the time, to the Hospital to allow the Committee to make an informed decision on her accommodation request. I note that this is not a case where the Grievor could not meet with her physician/cardiologist and obtain the necessary medical information or report.

⁸ *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employes de employés de l'Hôpital general de Montréal*, 2007 SCC 4 (CanLII), [2007] 1 SCR 161, para. 22.

⁹ *Yeats v. Commissionaires Great Lakes* 2010 HRTO 906, para. 48.

The Grievor was in possession of the cardiologist's report. Her refusal to provide the report frustrated the process to the point where the Hospital was not able to properly adjudicate her claim. I note that the Committee, in the February 22, 2022 minutes, identified the Grievor's refusal to submit the cardiologist's report and expressed a need or importance with respect to the report.

54. Further, the Committee, through the Hospital/Ms. Barnet, communicated to the Grievor that she may submit further medical information, thereby giving the Grievor a final opportunity to provide the cardiologist's report. An opportunity she again refused to accept. In refusing to provide the medical information requested, the Grievor breached her cooperative obligation within the duty to accommodate and in doing so she deprived the Committee, and thereby the Hospital, of the opportunity to review and consider all of the relevant medical information.
55. I have considered the evidence of Ms. Barnet and Dr. Spilchuk regarding their views on the effect of the cardiologist's report. Both Ms. Barnet and Dr. Spilchuk expressed the opinion that the cardiologist's report would not change their view that the Grievor's circumstances did not warrant the medical accommodation requested. Although I considered this evidence, I have found that it is not relevant nor helpful to the determination of whether the Grievor breached her duty to cooperate within the accommodation process. Had the Grievor provided the cardiologist's report it would have been considered by the whole Committee and this outcome may have been different. For the above reasons, the Union's claim that the Hospital breached the *Code* by failing to accommodate the Grievor's medical condition is dismissed.

Violations of the Collective Agreement

56. Having found that the Grievor was uncooperative in the accommodation process and dismissing the Union's claim that the Hospital breached the *Code* by failing to accommodate the Grievor with respect to the application of the Policy, and in particular the Policy's vaccination schedule, it is now necessary to address the claim that the Hospital breached the Collective Agreement by disciplining and ultimately terminating the Grievor's employment.
57. The Grievor received a written warning, a fourteen (14) day suspension, and a termination. I will address each disciplinary action and grievance below.
58. The Grievor was employed as a part-time Porter at the Queensway Health Centre location. The Grievor was hired on September 19, 2018 and at the time of her discharge she had been employed for approximately 4 years. Other than the discipline arising from the COVID-19 pandemic and the Policy, the Grievor's personnel file is not marred with disciplinary actions. There are no complaints or concerns, written or otherwise, with respect to the Grievor's attendance, or work performance.
59. The Policy is clear with respect to the vaccination requirements and the potential consequences with respect to non-compliance. The Policy provides as follows,

An Individual's failure to comply with THP's COVID-19 Immunization Program will result in progressive action up to and including termination of employment or placement and/or restriction, suspension, revocation or non-renewal of privileges. For learner placement termination, appropriate Individuals from the University/College will be consulted prior to the decision to end a placement which is in progress. This will be done in consultation with the Education Office, Hospital Program (depending on the learner's discipline) and the University/College delegate.

60. I find that the Policy, in clear terms, informs the employees, including the Grievor, that non-compliance with the Policy will result in disciplinary action up to and including termination. My view is strengthened by the findings of Arbitrator Steinberg, who had the opportunity to review and evaluate the same Policy.¹⁰

82. Among the requirements set out in *KVP* for an employer-promulgated policy to be upheld "Such rule should have been consistently enforced by the company from the time it was introduced." (at p. 85)

83. The purpose of the rule is to ensure that employees are aware of what is expected of them and are not lulled into a false sense of security that a violation will not have consequences. This is captured in *Ottawa Civic Hospital* as follows (at p. 38):

...Consistency of enforcement has been insisted on by boards of arbitration when employers have sought to impose sanctions for breach of a company rule. The rationale for this insistence has been that consistent enforcement demonstrates to employees what is expected of them while inconsistent enforcement may lull them into a false sense of security.

84. It should be noted that while the union criticized the omission from the written Policy of important matters such as the Pathways, ***all of the correspondence in evidence clearly shows that employees were aware of what was expected of them, and no one could have been led into a false sense of security by such omission, or any of the other inconsistencies alleged by the union, of the consequences of non-compliance with the Policy. In fact, no employee testified that they were in any way misled.***

[emphasis added]

61. I consider it important to establish or confirm that the Policy was clear and, as found in *Trillium Health Partners v CUPE Local 5180*, *supra*, met the standards set out in *Lumber & Sawmill Workers' Union, Local 2537 v KVP Co 1965*, *supra* ("KVP"). I note that the Union has not argued that the Policy is unclear or that it does not meet the *KVP* requirements. The Union's argument focused on the view that there was discretion within

¹⁰ *Trillium Health Partners v CUPE Local 5180*, 2023 CanLII 2826 (ON LA), paras. 82-84.

the Policy that would allow, and under the circumstances of this case, direct the Hospital to take a more measured approach to the Grievor's non-compliance.

Written Warning

62. The Grievor sought a religious exemption with respect to the Policy. While her request for a religious exemption was being processed and assessed, the Grievor was not required to obtain the first dose of the vaccine. On December 6, 2021 she was informed that her request for a religious exemption was denied and advised that she was required to obtain her first dose of the COVID-19 vaccine within fourteen (14) days.
63. On December 19, 2021, less than fourteen (14) days after receiving the December 6, 2021 communication from the Hospital, the Grievor obtained her first COVID-19 vaccination dose. On the same day that she received her first dose, the Grievor attempted to self-report her vaccination status however she was unable to do so. On December 20, 2021 she contacted her manager and advised that she was vaccinated (first dose) and followed up on this communication with an email on December 22, 2021. On January 14, 2022, the Grievor successfully uploaded proof of her first dose.
64. On December 20, 2021 the Hospital issued the Grievor a written warning for the alleged failure to obtain her first dose. The letter also informed the Grievor that should she remain non-compliant, she would be subject to an unpaid fourteen (14) day suspension and eventual termination.
65. Evidently, the written warning was issued on the mistaken assumption that the Grievor was non-compliant on December 20, 2021. Had the Grievor successfully uploaded her vaccination status on December 19, 2021, I am confident that the Hospital would not have issued a written warning. In these circumstances, it is clear that the written warning should be rescinded. The Grievor was compliant with the vaccination time limit set out in the December 6, 2021 communication, she had informed her manager (twice) and eventually successfully uploaded her vaccination status on January 14, 2022. The written warning should have been rescinded no later than January 14, 2022 once the Grievor's vaccination status had been successfully uploaded.
66. For the foregoing reasons, I uphold the Union's grievance with respect to the written warning and rescind the December 20, 2021 written warning.

Unpaid Fourteen Day Suspension

67. From December 31, 2021 to February 10, 2022, the Hospital paused the application of the Policy. On February 7, 2022, after her return following her hospitalization, the Grievor was informed that she was required to obtain her second dose and advised that she would need to submit a request for a temporary medical exemption by February 11, 2022. On February 10, 2021 the Hospital resumed the application of the Policy.

68. The Grievor submitted her request for a medical exemption on February 10, 2022 and after several communication exchanges regarding the cardiologist's report, the Grievor chose not to include the cardiologist's report with her exemption request. On February 22, 2022, based on the limited information submitted by the Grievor, the Committee denied the Grievor's medical exemption request.
69. On March 1, 2022, the Grievor was informed of the Committee's decision denying her medical exemption and the Grievor was advised that she had fourteen (14) days to obtain her second dose. The Grievor did not receive her second dose within the fourteen (14) days, and the Hospital, on March 15, 2022, suspended the Grievor without pay for fourteen (14) days. The Union grieved the fourteen (14) day suspension.
70. I have found that the Policy is clear with respect to the vaccination requirements and the potential consequences with respect to non-compliance. This finding is supported by Arbitrator Steinberg's decision in *Trillium Health Partners v CUPE Local 5180, supra*.¹¹ The Union and the Grievor were fully aware of the potential consequences with respect to non-compliance.
71. Arguably, in light of the rescinding of the December 20, 2021 written warning, a fourteen (14) day suspension may seem out of step with respect to progressive discipline. However, given the clarity with which the Policy had been communicated to the Union and the Grievor, the Grievor's clear intentions to delay her second dose beyond the Policy's vaccination schedule, the importance of a consistent enforcement of the Policy, particularly during a period in time when the pandemic presented enormous challenges for society and in particular, those in the health care sector, I find that a fourteen (14) day suspension was appropriate. Accordingly, I dismiss the Union's grievance with respect to the fourteen (14) day suspension.

Termination

72. On March 18, 2022, during her fourteen (14) day suspension, the Grievor advised the Hospital that she intended to follow the recommendations of Dr. Graham and delay the second dose for the full thirty (30) days. The Grievor also provided a secondary medical note from her family doctor, which confirmed Dr. Graham's recommendation with respect to waiting thirty (30) days before her second dose, however, the Grievor still did not provide the cardiologist's report. Finally, in her March 18, 2022 communication, the Grievor confirmed that she had made an appointment on April 19, 2022 to get the second dose of the vaccine. The Grievor concluded her March 18, 2022 communication with "*If there is anything else I can provide to avoid termination as of March 28, 2022 please let me know.*"
73. On March 22, 2022, the Hospital responded to the Grievor advising that she, based on the NACI and MOH Guidelines, was not entitled to an exemption and the expectation was that she would be fully vaccinated as per the Policy. On March 30, 2022, the Hospital

¹¹ *Trillium Health Partners v CUPE Local 5180*, 2023 CanLII 2826 (ON LA), paras. 82-84.

confirmed that the Grievor had not submitted any further information (since her March 18, 2022 communication) and subsequently, by letter dated March 30, 2022, terminated the Grievor's employment. The Union grieved the termination.

74. I note that the Grievor did not obtain her second dose of the vaccine on April 19, 2022 and, at the time of the hearing, had not become fully vaccinated having only received her first dose on December 19, 2021.
75. As previously found, the Policy is clear with respect to the vaccination requirements and the potential consequences with respect to non-compliance. Furthermore, it is clear from the Grievor's March 18, 2022 communication that she was fully aware that her continued non-compliance, without an acceptable or approved exemption, would likely result in her termination. The March 18, 2022 communication was the Grievor's final attempt to avoid termination for non-compliance.
76. In *Lakeridge Health v CUPE, Local 6364, supra*, Arbitrator Herman was called upon to determine the reasonableness of the hospital's decision to place unvaccinated employees on unpaid leave and then terminating those employees who remained unvaccinated. In dismissing the grievances and, for the most part, upholding the hospital's decision to place unvaccinated employees on an unpaid leave of absence and then terminating those who remained unvaccinated, Arbitrator Herman held that disciplinary action imposed on those who were non-compliant with a mandatory vaccination policy was reasonable.

173. The importance of the subject matter of the Policy and its purposes justified requiring employees to comply with the terms of the Policy, and justified the Hospital's treatment of non-compliance as disciplinable misconduct. As noted, the Policy did not serve to protect only the employees who got vaccinated, but also vaccinated employees and patients and their families who might be exposed to unvaccinated employees. Cases that stand for the principle that employees who refuse or decline to take medicine do not engage in disciplinable conduct have limited application in this context. This is particularly so where the Act requires that employers take reasonable steps to protect the health and safety of employees and where the Local Agreement stipulates that employees have the right to a safe and healthy work environment and directs the Hospital not to wait until there is scientific certainty before taking reasonable actions to reduce the risks to employees.

174. It is a legitimate response to a breach of the Policy to discipline employees who refused to comply with the reasonable requirement that they be vaccinated in order to protect other employees, patients and Hospital visitors. Employees were not forced to get vaccinated, they were required to get vaccinated only if they wished to continue to work for the Hospital.

77. Arbitrator Herman, in *Lakeridge Health v CUPE, Local 6364, supra*, faced with similar circumstances, including an employer's decision to terminate employees who remained

unvaccinated, upheld terminations and found that the subject matter of the policy and its purposes justified the mandatory nature of the policy and the consequences of non-compliance. I am in agreement with Arbitrator Herman's reasoning and approach and add that, the context within which these difficult decisions were made is also a relevant consideration when assessing the reasonableness of the employer's decision.

78. There are of course differing opinions. For example, Arbitrator Parmar in *Humber River Hospital v. Teamsters Local Union No. 419*, *supra*, found that it was not appropriate to impose disciplinary action against employees who refused to comply with a COVID-19 vaccination policy and mandate.¹² Although Arbitrator Parmar disagrees with the approach taken in *Lakeridge Health v CUPE, Local 6364*, *supra*, she suggests that an examination of the balance between an employer's operational interests and an employee's interests in retaining her employment while also examining if, at the time of termination, there was any change in circumstances in the foreseeable future. This examination recognizes that there is a point where the employer is able to end the employment relationship.¹³

[70] A review of those cases indicates two key elements to the arbitral approach applied in all of these various situations. One is that there is an examination of whether the employer's actions appropriately balance the employer's operational interests with that of the employee's interests in retaining his or her employment. The other is that there is an examination of whether, at the time of the termination, there was any reasonable likelihood of change to the situation in the foreseeable future warranting the continuation of the balancing of these interests. The combination of these elements permits consideration of the specific facts in the specific workplace, giving regard to both the extent of any operational impact on the employer from continuing the employment relationship and the importance to the employee of maintaining their employment, along with their service/seniority rights. It also limits any burdens to the employer, which may result from this balancing of interests, to the point where it is clear it no longer makes sense to continue it. In other words, it recognizes that there must be a point where the employer, unable to obtain the basic benefit expected from an employment relationship – that is, having an employee perform work - is able to end the employment relationship.

[71] These, in my view, are appropriate considerations to the apply in the present case.

79. Arbitrator Herman in *Lakeridge Health v CUPE, Local 6364*, *supra*, notwithstanding that imposition of discipline, including disciplinary terminations, contrasted with non-culpable administrative decisions described in *Humber River Hospital v. Teamsters Local*

¹² *Humber River Hospital v. Teamsters Local Union No. 419*, 2024 CanLII 19827 (Parmar), para. 56.

¹³ *Humber River Hospital v. Teamsters Local Union No. 419*, 2024 CanLII 19827 (Parmar), paras. 70-71.

Union No. 419, supra, also conducted a balancing of interests. Arbitrator Herman comments at paragraph 184,¹⁴

184. The need to protect the health of its employees and patients, and to act in a way that enabled the Hospital to continue to provide its services in a relatively safe manner, outweighed the rights of individual employees to preserve their employment status when they declined to get vaccinated.

80. The common thread in *Humber River Hospital v. Teamsters Local Union No. 419, supra*, and *Lakeridge Health v CUPE, Local 6364, supra*, is the examination of a balance between competing interest. In *Lakeridge Health v CUPE, Local 6364, supra*, Arbitrator Herman found that the hospital's interests in protecting the health of its patients and employees outweighed the interests of the individual employees who declined to get vaccinated. I find this to be a useful examination and am in agreement this approach. However, in *Lakeridge Health v CUPE, Local 6364, supra*, the balance was between the hospital's interests of protecting its employees and patients and the interests of employees who refused to get vaccinated, while in the matter before me, the Grievor did not refuse to get vaccinated, but was seeking a doctor recommended delay in obtaining the second dose of the vaccine. The balance, in these circumstances, shifted.
81. The Hospital's need for a consistent expeditious application of the Policy, a factor I considered to be relevant, as well the need to protect its employees and patients, must be weighed against the Grievor's need to follow Dr. Graham's recommendation. The Grievor had to choose between her job and following the recommendations of Dr. Graham, an internal medicine and infectious disease specialist. Undoubtedly, a difficult decision. I am not suggesting that the Grievor was entitled to a medical accommodation. I have found, given her uncooperative actions during the accommodation process, that she was not so entitled. However, in the meting out of discipline, particularly when the discipline imposed is termination, the Hospital was required to consider all factors, which include Dr. Graham's recommendation. In these circumstances, the Hospital's need for consistent application of the Policy and the protection of its employees and patients, when balanced against Dr. Graham's recommendation and the fact that the Grievor was prepared to obtain the second dose and was, ostensibly, prepared to receive the second dose on April 19, 2022, less than three weeks from the date of termination, suggests that a disciplinary measure less than termination would have achieved a better or more fitting balance.
82. Discharge may be an appropriate response to an employee's non-compliance of a COVID-19 mandatory vaccination policy, particularly when the employee is refusing to get vaccinated and when there is no reasonable possibility or potential outcome in which the employee chooses to change course and becomes compliant with the policy. In this matter, the Grievor was not refusing to get the second dose and there was a reasonable possibility that she would obtain the second dose on April 19, 2022. I find that this matter is distinguishable from the multitude of cases where employees refused to comply with a

¹⁴ *Trillium Health Partners v CUPE Local 5180*, 2023 CanLII 2826 (ON LA), para. 184.

COVID-19 mandatory vaccination policy and were clearly intending to remain non-compliant. In the circumstances of the case before me, I find that the termination was without just cause.

SUMMARY AND REMEDY

83. I find that the Grievor, by not producing the cardiologist's report, did not cooperate in the accommodation process. The Grievor's failure to cooperate deprived the Hospital of the opportunity to conduct a complete review of the necessary and relevant information with respect to the Grievor's accommodation request. Consequently, I find that the Hospital did not violate the *Human Rights Code* and did not breach the duty to accommodate by failing to grant the Grievor a medical exemption from the application of the Policy's vaccination mandate.
84. The Grievor obtained her first dose of the vaccine on December 19, 2021, within the fourteen (14) day timeframe stipulated by the Hospital and its Policy. I find that the Hospital violated the Collective Agreement by imposing a written warning on December 20, 2021 on the mistaken belief that the Grievor did not obtain her first dose within the stipulated period. I uphold the grievance and rescind the written warning.
85. The Grievor failed to obtain her second dose by March 15, 2022 as required by the Hospital and its Policy. The Grievor did not have an approved medical exemption from the application of the Policy. The Grievor was not in compliance with the Policy as of March 15, 2022 and it was apparent that the Grievor did not intend to obtain her second dose of the vaccine within the Policy's prescribed timeframe. Consequently, I find that discipline was warranted and find that the fourteen (14) day suspension from March 15, 2022 to March 29, 2022 was appropriate in the circumstances. I dismiss the Union's grievance with respect to the Grievor's fourteen (14) day suspension.
86. The Grievor failed to obtain her second dose by March 30, 2022 as required by the Hospital and its Policy. The Grievor did not have an approved medical exemption from the application of the Policy. The Grievor was not in compliance with the Policy as of March 30, 2022. However, the Grievor was following the recommendation of an internal medicine and infectious disease specialist and there was a reasonable possibility that the Grievor would receive her second dose on April 19, 2022, approximately three weeks from her date of discharge. In these circumstances, I find that termination was not warranted. I uphold the Union's grievance, in part, and substitute an unpaid suspension in place of the discharge. The length of the suspension shall be no shorter than from March 30, 2022 to April 19, 2022.
87. The Union, as a remedy, requested that I reinstate the Grievor on condition that she provide proof of having obtained a second dose of the COVID-19 vaccine within a reasonable period of time after my decision. I decline to do so. The Hospital's COVID-19 vaccination policy remains in place, more than two years have passed since the Grievor's termination, the Grievor did not get her second dose of the vaccine on April 19, 2022 and

is not currently fully vaccinated. In these circumstances, a conditional reinstatement is not appropriate.

88. In the event that I did not reinstate the Grievor, the Union requested that I order the Hospital to pay the Grievor her notice and severance entitlements under the *Employment Standards Act*. The Hospital advised that the issue of whether non-compliance with the hospital's policy amounts to wilful misconduct is currently before Arbitrator Goodfellow. In these circumstances, I consider it appropriate to remit the issue of the Grievor's entitlement to notice and severance pay under the *Employment Standards Act* to the parties.
89. I remain seized with respect to this matter.

Dated at Ancaster, Ontario this 25th day of November 2024.


Daniel P. Randazzo

APPENDIX “A”

Trillium Health Partners and CUPE Local 5180 (S.Vu)

November 25, 2024

TRILLIUM HEALTH PARTNERS

-and-

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 5180

Re: Individual Grievances of Sarah Vu

AGREED STATEMENT OF FACTS

The parties agree to the following facts without prejudice to their respective positions regarding their relevance.

Background

1. The Canadian Union of Public Employees, Local 5180 (the “Union”) represents a bargaining unit of full-time and part-time service employees at Trillium Health Partners.
2. Trillium Health Partners (the “Hospital”) is a three-site hospital in Mississauga and west-end Toronto. The three primary sites are as follows: Q-Site located on the Queensway near the 427 in Etobicoke, M-Site located on the Queensway at Hurontario in Mississauga, and the Credit Valley Hospital Site located at Erin Mills Parkway and Eglinton Avenue in Mississauga. In addition, the Hospital has “off-sites” at Humber River Hospital (Church Site), Watline (Renal Dialysis), and at Speakman Drive (Renal Dialysis).
3. The Collective Agreement consists of central provisions and an appendix of local issues (**Tab 1**).
4. The Union filed three individual grievances on behalf of the Grievor, Sarah Vu (Grievance Nos. Q-22-005, Q-22-080, and Q-22-091 (the “Grievances”). The Grievances were referred to arbitration and consolidated for hearing before

Arbitrator Daniel Randazzo. There is no dispute between the Parties regarding Arbitrator Randazzo's jurisdiction to determine the Grievances.

The Grievor

5. The Hospital hired Sarah Vu (the "Grievor") into the position of Regular-Part-Time Porter at the Queensway Health Centre on September 19, 2018 2018. She worked in this position until her termination effective March 30, 2022.

THP COVID-19 Immunization Policy

6. On September 7, 2021, the Employer implemented the "THP COVID-19 Immunization Policy" (the "Policy") (**Tab 2**).
7. The Policy required employees to be fully vaccinated for COVID-19 and declare their vaccination status by October 20, 2021. Fully vaccinated was defined as:

Fully Vaccinated means having received the full series of a COVID- 19 vaccine or combination of COVID-19 vaccines authorized by Health Canada (e.g., two doses of a two-dose vaccine series, or one dose of a single-dose vaccine series; and having received the final dose of the COVID-19 vaccine at least 14 days prior). This Policy and definition may change as national vaccination/provincial recommendations and definitions change and could include subsequent doses of the COVID-19 vaccines.
8. The Policy stated that employees who could not be vaccinated based on medical reasons could submit a "COVID-19 Vaccination Medical Exemption/Accommodation Request Form" and the form would be reviewed on a case-by-case basis by the COVID-19 Immunization Policy Exemptions & Accommodations Committee.
9. The Policy also stated that an individual's failure to comply with the Hospital's Policy would result in "progressive action up to and including termination of employment and/or restriction, suspension, revocation or non-renewal of privileges."
10. The Grievor was made aware of the Policy and the deadlines for compliance. She did not obtain any doses of the vaccine but did submit an accommodation request based on religious grounds on October 10, 2021.
11. The hospital denied her accommodation request on December 6, 2021 (**Tab 3**).

Written warning

12. In the December 6, 2021 letter, the Hospital provided written notice to the Grievor that she needed to obtain the first dose of the COVID-19 vaccine within 14 days to become compliant with the Policy (**Tab 3**).
13. The Grievor received her first dose of the COVID-19 vaccine on December 19, 2021 (**Tab 4**). The Grievor attempted to self-attest regarding her vaccination status on the Hospital's Portal on December 19, 2021. On December 20, 2021, she contacted her Manager Sandy Balappa to explain that she had done so. She followed up by email to Ms. Balappa on December 22, 2021 (**Tab 31**). The Grievor submitted a copy of the proof of first dose on January 14, 2022 (**Tab 5**).
14. On December 20, 2021, the Employer issued a letter of written warning for the Grievor's alleged failure to receive the first dose of the COVID-19 vaccine (**Tab 6**). The letter provided that if the Grievor failed to receive the first dose of the COVID-19 vaccine by January 3, 2022, she would be put on an unpaid suspension from January 4 to January 17, 2022 and that continued non-compliance would result in termination.
15. On December 31, 2021, the Hospital paused the application of the Policy hospital-wide to ensure that it had sufficient staffing to continue its operations.¹⁵
16. The Union filed a grievance on the Grievor's behalf challenging the written warning on January 2, 2022 (**Tab 7**).

Request for Extension for Medical Reasons

17. The Grievor was diagnosed with Ventricular Tachycardia in 2014. [THP has no knowledge of the date she was diagnosed but can't dispute it either]
18. The Grievor tested positive for COVID-19 on January 13, 2022.
19. On January 14, 2022, she was hospitalized at THP with exacerbation of her Right Ventricular Outflow Tract tachycardia. The Grievor was referred for an Inpatient consultation with Dr. Christopher Graham, an internal medicine and infectious disease specialist. In a discharge note dated January 15, 2022, Dr. Graham stated:

This 39-year-old woman presents with exacerbation of her RVOT VT in the setting of recent COVID-19. She does appear to have recovered from her acute viral infection, but there may have been some myocardial injury. At this point the indication for further treatments for COVID-19 would be the need for supplemental oxygen. She will need to complete 10 days of isolation given that she has only had a single COVID-19 vaccine. Regarding her 2nd vaccine I would suggest deferring this 3 months until she is fully recovered, as well as receiving clearance from Cardiology. She should be exempt from any vaccine mandates during this time. Please let ID on call

¹⁵ [*Trillium Health Partners v Canadian Union of Public Employees, Local 5180*](#), 2023 CanLII 2826 (ON LA), para 25 [Steinberg].

know if she does progressed to requiring oxygen. Thank you for involving me in her care. **(Tab 8)**

20. The Grievor was hospitalized from approximately January 14 to January 23, 2022. While she was discharged from Dr. Graham's care on January 15, 2022, she remained in hospital under the care of other THP physicians until January 23, 2022.
21. In an email dated February 7, 2022, Human Resources Business Partner Jennifer Smith stated as follows:

Hi Sarah

Your Team Leader, Michael has let us know that you have not yet received your 2nd dose of the Covid-19 Vaccine. (You received your first dose on December 19th, 2021)

You have informed him that you have medical documentation supporting that you should not receive your 2nd dose within the 28 day deadline.

In order to have this reviewed you will need to submit a temporary medical exemption for review by the committee in alignment with MOH medical exemption guidelines.

You will need to complete this form and submit it as well as any documentation you have with regards to this to the email address on the attached form by February 11th 2022.

If the information is not received by this date, please note that your continued non-compliance with the COVID-10 Immunization policy will result in the termination of your employment.

Thank you,
Jennifer **(Tab 9)**

22. On February 9, 2022, the Grievor replied to explain that she had been hospitalized, and she has a medical note for an extension, not exemption, for receiving the second dose of the COVID-19 vaccine. The Hospital responded that the nature of the Grievor's request constituted an "exemption" and provided a COVID-19 Vaccination Medical Exemption/Accommodation Request Form for completion by February 11, 2022 **(Tab 10)**.
23. The Hospital referred to the Ontario Government Guidelines for Medical Exemptions when individually assessing any medical exemption or extension requests **(Tab 11)**

24. On February 10, 2022, the Grievor submitted a copy of the Hospital's COVID-19 Vaccination Medical Exemption / Accommodation Request Form completed by Dr. Graham (**Tab 12**). The Request Form included the following information:

Patient admitted with ventricular tachycardia in setting of COVID-19. Given possible myocardial injury, and immunity following infection with previous vaccine dose. I have recommended waiting 3 months following her COVID-19 before proceeding with second dose.

The Form also included a copy of Dr. Graham's discharge note dated January 15, 2022 (**Tab 8**).

25. The Hospital confirmed receipt of the Accommodation Request Form and asked the Grievor to confirm "if a referral to cardiology has been made and when the appointment is scheduled". The Grievor responded "Yes I already saw my cardiologist last week and she said she would have the receptionist book a follow up in about 3-4 months." (**Tab 13**)
26. On February 10, 2024, the Hospital resumed the application of the Policy.¹⁶
27. In an email dated February 11, 2022, Cheryl Barnett stated as follows:

Hi Sarah,

Thanks for the email. The note you submitted by Dr Graham references getting an opinion from cardiology regarding 2nd dose. As you mentioned below you saw your cardiologist last week, we require updated documentation from your cardiologist in regards to 2nd dose. Submitting a copy of the consultation note that your cardiologist should have sent back to your family physician after the appointment last week would be sufficient.

Thanks

Cheryl (**Tab 14**).

28. On February 16, 2022, the Grievor made an appointment to receive the second dose of the COVID-19 vaccine on April 19, 2022 at the Peel Vaccine Centre (**Tab 16**). In an email to the Hospital dated March 18, 2022, reproduced below, she offered to provide proof of this appointment.

29. On February 17, 2022, the Grievor sent an email to Ms. Barnet in which she stated,

Cheryl

I have already received my first vaccine dose on December 19, 2021 and have provided your office with a copy for your records. I then became

¹⁶ *Ibid*, at para 27.

infected with covid after working with several infected workers at Trillium and known to be infected by Trillium, before it was time to receive my second dose. I was advised by Dr. Graham that because of my heart condition I will need to wait until 3 months until I can receive my second dose as it could again exasperate my heart condition that I informed your office that I was recently in the CCU for. I provided you with the hospital note from Dr. Graham and you advised I also will need for him to complete the accommodation request form, which I had completed and submitted directly to you on February 10, 2022. You are now again asking me for further medical records after I advised you that I spoke not only with my family physician but also my cardiologist and they both advised that the hospital note (which I already provided to your office) is more than sufficient along with the accommodation request form which I already provided. A physician or specialist cannot comment on my health while at the hospital as they were not my treating physicians, and they both made this very clear to me. This is why I not only provided the discharge note from Dr. Graham but also the accommodation request form.

In all fairness, I still brought your below request to my family physician's attention to see if there was anything further I could do to appease this process and I was advised that (under PHIPA) a workplace is not to request my personal health information in this way and your office should be well aware of this, as this is documented clearly under the law.

I have been more than flexible and willing to provide all the requested documents by your office, but I will not be unnecessarily disclosing my personal medical records to my workplace, as I have provided all completed documentation that your office has requested and requires to date. It is my understanding that under the law, I have provided my due diligence to provide all documents necessary to prove without a reasonable doubt that my health condition requires a very brief period before I can receive my second dose in a way that will not jeopardize my health. I am not willing to put my life on the line to appease this seemingly impossible process and the difficulty and discriminal I now feel I am facing because of my health condition. I have remained transparent and I have all intention to have my second dose immediately after the 3 month period, as advised was safe by Dr. Graham.

Thank you,

Sarah

(Tab 14).

30. On February 22, 2022, the Hospital's "COVID-19 Immunization Policy Exemptions & Accommodations" Committee held a meeting. The Minutes show that the Grievor's request for an extension due to medical reasons was presented by Ms.

Barnet (**Tab 17**). The Grievor's completed exemption request and the attachments were before the committee (**Tab 19 and 20**). The Minutes state, *inter alia*:

New case. This individual had their 1st dose in December.

Covid infection, onset Jan 9th. Ended up in hospital.

Note from Dr. Chris Graham, recommended defer 2nd dose (3 months) until she sees cardiology and symptoms resolve.

This individual sent email communication to advise that she had seen cardiologist but has refused to submit cardiology information. Stating that it is personal health information which the committee doesn't have the right to.

There is no documentation of illness post vaccine.

The documentation submitted does not meet MOH guidelines.

Currently, the committee has Dr. Graham's statement and MOH guidelines. The committee does not know what the specialist has said.

The committee does not have sufficient information to make a determination.

Consideration to include in letter, may still submit further medical documentation during given timeline, otherwise to be vaccinated."

Unpaid 14-day suspension

31. On March 1, 2022, the Hospital denied the Grievor's request for an extension and advised that she needed to obtain the second dose of the vaccine within 14 days of the letter (**Tab 21**). The letter included an explanation for the denial:

This decision has been made after careful consideration of the information you have provided to us in support of your request. Based on the documentation provided, the Committee does not have sufficient information to make a determination in alignment with Ministry of Health

Standards. We do understand that you were referred to, and met with, a Cardiologist regarding your situation however no subsequent medical documentation was provided. Based on guidance from the National Advisory Committee on Immunization and the Ontario Ministry of Health, the information you provided to date does not medically exempt you from receiving the COVID-19 vaccine.

32. On March 15, 2022, the Hospital suspended the Grievor for 14 days without pay (**Tab 22**). The Hospital further advised that if she did not receive the second dose of the COVID-19 vaccine by March 28, 2022, she would be terminated for cause.
33. The Union filed an grievance on the Grievor's behalf challenging the 14-day suspension on March 16, 2022 (**Tab 23**).

Termination

34. On March 18, 2022, the Grievor sent the Hospital an email, attaching a letter dated March 16, 2022 from her family physician Dr. Geetha Rao, that read as follows:

Hi,

I would like to make it clear that I have advised my situation and I am not asking for an exemption but an extension to the covid-19 mandate. Dr. Graham from Trillium Health Partners who filled out the exemption form also clarified in the documents that I needed to wait 3 months after my discharge from the hospital to get the second shot which I have scheduled it for April 19, 2022. If you require proof of this scheduled appointment please let me know as I can provide that to you. I have also attached a doctors note from my family physician to support Dr. Graham's decision. I have done everything possible by providing all requested documents by your office. If there is anything else I can provide to avoid termination as of March 28, 2022 please let me know.

Thank you,

Sarah Vu

(**Tab 24**)

35. Dr. Geetha Rao's letter dated March 16, 2022 email reads as follows:

To whom it may concern,

This is to confirm that Sarah was diagnosed with COVID-19 infection after developing symptoms from January 8, 2022 and testing psotive on January 13, 2022. She is advised to wait three months from the time of this infection before getting a second dose of COVID-19 vaccination.

Regards

Dr. Geetha Rao, MD, CCFP, FCFP (**Tab 25**)

36. On March 21, 2022, the Hospital responded as follows:

Good Afternoon,

Thank you for your email. Unfortunately we are unable to accommodate an extension as you have requested. We have reviewed the criteria and your medical information and it does not meet the criteria for an exemption and/or extension based on guidance from the National Advisory Committee on Immunization and the Ontario Ministry of Health. As per our mandatory COVID-19 Immunization Policy that was rolled out on September 7, 2021, it is the expectation that you get vaccinated.

Thank you,

Staff COVID Vaccine Team (**Tab 26**)

37. On March 30, 2022, Human Resources Business Partner Jennifer Smith advised Ms. Barnet that she intended to issue a letter of termination and asked Ms. Barnet to confirm if the Grievor had submitted any further information. Ms. Barnet responded as follows:

Sorry for the delay. I have no further communication or documentation submitted since the Feb 17 email I forwarded.

C (**Tab 27**)

38. In a letter dated March 30, 2022, the Hospital terminated the Grievor for failure to comply with the Policy (**Tab 28**) A copy of the letter of termination dated March 30, 2022 is at Tab 22.
39. The Union filed a grievance alleging that the Grievor was terminated without cause (**Tab 29**).

Further medical evidence

In a report dated February 1, 2022, cardiologist Dr. Catherine Le Feuvre concurred with Dr. Graham's opinion that the Grievor should wait three months to receive her second dose and wrote: "[the grievor] should receive her second COVID vaccine in three months" (**Tab 30**). This note was not disclosed to the Hospital until October 4, 2023.