In an arbitration pursuant to The Labour Relations Act 1995

B E T W E E N:

Bruyere Continuing Care

("the Employer")

and

The Canadian Union of Public Employees, Local 4540

("the Union")

Individual grievance 21-i-29 and Policy grievance 21I - 24

Hearing held by video conference on September 7, 2022, March 29, 2023, April 25, 2023, October 20, 2023, September 10 and 11, 2023, January 18, 2024, Sept 10, 2024, Sept 11, 2024, Oct 17, 2024, February 4, 2025, April 22, 2025, April 29, 2025, May 27, 2025, August 19, 2025,

Motion on mootness addressed by written submissions, completed October 24, 2025.

Argument on merits was made on November 12, 2025.

Elaine Newman, Arbitrator

Appearances:

Union: Nadine Blum, Goldblatt Partners
Karin Galldin, Goldblatt Partners
Kevin Cook, First Vice-President, OCHU
Douglas Currier, President, CUPE Local 4540
Frank Lamothe, Vice President, CUPE 4540
Dave Verch, Chief Steward, CUPE Local 4540
Keri-Lyn Denny, Secretary Treasurer, Local 4540

Employer: Porter Heffernan, Emond Harnden LLP
Noel Platte, Emond Harnden LLP
Mark Crichton, Labour Relations and Compensation
Sonia Girouard, Labour Relations Manager
Melissa Kong Kam Wa, Consultant, Labour Relations

AWARD ON THE MERITS

[1] The grievor will remain anonymous throughout this award.

[2] The grievor was a senior electrician who worked for a full-service public health care facility since 2007, in a job that took him throughout the hospital, in common areas and patient rooms as well as unoccupied spaces. He refused vaccination and objected to the Employer's COVID-19 vaccination policy on many grounds. He does not believe that COVID-19 vaccines are safe and was clear that he would never accept any vaccine that had not been proven safe and effective through ten to thirty years of experience. He objected to mandatory vaccination on a number of other grounds which he called legislative, legal and scientific.

[3] The grievor first expressed these objections to vaccination (which will be referred to as "personal concerns") in August of 2021 and made request for exemption from the mandatory vaccination policy. He did not initially make a request based on religious freedom. He first made a creed-based request on September 8, 2021, and continued to pursue his personal concerns. He then provided a fulsome creed-based request on September 27, 2021, after about one month following his first request.

[4] The grievor believes that to accept a vaccine that has "any connection" to aborted fetal stem cell lines would be to condone abortion and murder.

[5] The Employer refused the request for exemption. It refused the request based on the personal concerns and challenged the sincerity of the claim for creed-based exemption. It also claimed that accommodating creed-based protection, if found to exist, would cause undue hardship.

[6] The Employer put the grievor on unpaid leave of absence on October 15, 2021. He remained out of the workplace until he chose to resign, became employed elsewhere, and accessed his pension three years later.

[7] The aspect of this case that makes it unusual is that, following several days of hearing, the Employer unconditionally conceded that it violated both the procedural and substantive requirements of the Ontario *Human Rights Code* by refusing the creed-based request for exemption. It conceded that it failed to accommodate the grievor's claim for exemption from vaccination on the grounds of creed.

[8] Why then, does the case continue?

[9] The Employer argued that the merits portion of the hearing was moot. It took the position that the Arbitrator might make any factual findings necessary to ground the forthcoming hearing on remedy. It did not accept the particulars of the violations as set out by the Union.

[10] The Union brought a motion for a determination that the hearing on the merits must continue to permit argument resulting in a comprehensive award, detailing the nature and severity of the violations. My Award allowing that motion was released on October 29, 2025.

[11] In brief, I found that the issues pertaining to the merits of the matter were not moot, and that specific factual findings were required in order to ground the remedy portion of the process.

[12] This Award provides the factual findings on the merits of the grievance.

Positions of the Parties

[13] There is no dispute that the grievor triggered a freedom of religion claim. He asserted that his religion, that of the Romanian Orthodox church, espoused the dogma that abortion is a sin (the objective element). In his personal belief system the grievor asserted that taking a vaccine that had any connection to fetal cells would be a sin of the soul that would condemn him to eternal spiritual death. (the subjective element).

[14] The Union argues that after fourteen years of service, the Employer summarily rejected the request for creed-based exemption from the mandatory vaccination policy. The Employer kept the grievor out of the workplace, and deprived the grievor of the ability to earn a living at the end of his career.

[15] The Union argues that the procedural and substantive breaches of the Ontario *Human Rights Code* ("the Code") were numerous and repeated. Having established a reasonable mandatory vaccination policy that provided for exemptions based on the Code, the Employer failed to honour it. In particular, the Employer failed to conduct an individualized assessment of the grievor's request, relying on assumptions that were not founded. The Union argues that the evidence supports a finding of *prima facie* discrimination, as well as a failure to accommodate the grievor.

[16] The Union seeks findings on several aspect of the evidence that will form the foundation of the remedy stage of these proceedings.

[17] The Union relies on the following authorities in advancing its position, some of which are of particular influence, and are reviewed in this award:

Adga Group Consultants Inc. v. Lane, 2008 CanLII 39605 (ON SCDC)

Longueépée v. University of Waterloo, 2020 ONCA 830 (CanLII)

Syndicat Northcrest v. Amselem, 2004 SCC 47 (CanLII), [2004] 2 SCR 551 ("*Amselem*")

Public Health Sudbury& Districts v Ontario Nurses' Association, 2022 CanLII

48440 (ON LA) (Herman) ("*Public Health Sudbury")*

Wilfrid Laurier University v United Food and Commercial Workers Union,
2022 CanLII 120371 (ON LA)(Wright) ("*Wilfred Laurier")*

Harrison and others v. National Research Council of Canada, 2025 FPSLREB
57 (CanLII) ("*Harrison*")

Caressant Care Nursing Home v Ontario Nurses' Association, 2025 CanLII

61591 (ON LA)(McNamee)

Canadian National Railway v Teamsters Canada Rail Conference Rail Traffic Controllers, 2024 CanLII 87100 (Cameron)

CUPE Local 129 v. The City of Pickering (Posteraro Grievance), unreported decision of Arbitrator McLean, issued June 6, 2023 ("*City of Pickering")*

Excerpts *Human Rights Code*, RSO 1990, c H.19

Excerpts OHRC Policy on Creed

Hamilton-Wentworth District School Board v. Fair, 2016 ONCA 421 (CanLII) ("*Hamilton-Wentworth District School Board")*

British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), 1999 CanLII 646 (SCC), [1999] 3 SCR 868 (SCC)["*Grismer*"]

Ornge Air and OPEIU (DeGeit), 2021 334 LAC 4th 333 (Misra) ("Ornge *Air*")

Canadian National Railway v Teamsters Canada Rail Conference Rail Traffic Controllers, 2024 CanLII 110252 (CA LA)(Anderson) ("*CNR v Teamsters*")

Christoforou v. John Grant Haulage Ltd., 2020 CHRT 33 (CanLII)(Khurana)

Air Canada v International Association of Machinists and Aerospace Workers, 1998 CanLII 27718 (ON LA)(Stanley) ("*Air Canada v IAMAW*")

Loder v. Huron Perth Health Care Alliance, 2025 HRTO 1995 (CanLII)(Inbar) ("*Loder*")

Air Canada v International Association of Machinists and Aerospace Workers, Lodge (Duty to Accommodate re COVID-19 Vaccination Policy Grievance), November 13, 2024 (Ready) ("*Air Canada v IAMAW (November 13, 2024)")*

[18] The Employer did not dispute the evidence as summarised by the Union. The policy itself was considered a reasonable policy, and that is not here in dispute. It repeats its position that the determination of the merits in this matter is moot.

[19] The Employer asserts that the Employer acted in good faith, doing its best in the throes of a life-threatening global pandemic. With appropriately high regard for the safety of its patients, staff and the public, it implemented a policy that is recognized as reasonable, and that is intended to protect its patients, its staff and the public. There was no malice in

refusing the creed-based request for exemption. The Employer did its best with the information available to it – and that information included the grievor's personal concerns, which were intertwined with and which clouded consideration of his creed-based request.

[20] In applying the policy to this grievor, the Employer asserts that the manner in which the grievor asserted his request - asserting personal concerns for a full month before focussing on his religious objection, then intertwining political, pseudo-scientific and personal concerns with the creed-based request - provided grounds upon which the Employer could, under the circumstances, reasonably conclude that the creed-based request was not sincere. The Employer did its best at the time, working in extraordinary circumstances, in the best interests and in view of its responsibilities to its patients, its staff, and the public.

[21] The Employer seeks inclusion of these facts, for consideration in the remedy stage of these proceedings.

[22] The Employer relied upon these authorities, which have been considered in this analysis:

Lakeridge Health v CUPE, Local 6364, 2023 CanLII 33942 (ONLA) ("*Lakeridge*")
Empower Simcoe v JL, 2022 ONSC, 5371 (On Div Ct) ("*Empower Simcoe*")
UFCW Local 41 v Canada Safeway Ltd., 2013 ABQB 687
Smith v Network Technical Services Inc., 2013 HRTO 1880

The Ontario Human Rights Code, R.S.O. 1990, Chapter H.19

[23] The relevant provisions of the Code are these:

5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

11 (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or

(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right. R.S.O. 1990, c. H.19, s. 11 (1).

Idem

(2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. R.S.O. 1990, c. H.19, s. 11 (2); 1994, c. 27, s. 65 (1); 2002, c. 18, Sched. C, s. 2 (1); 2009, c. 33, Sched. 2, s. 35 (1).

Policy of the Ontario Human Rights Commission

[24] Policy of the Ontario Human Rights Commission is not considered to be binding on this Board of Arbitration, but offers useful guidance on the interpretation and application of the Code. Relevant portions of those guidelines are these:

The Ontario Human Rights Commission Policy on Preventing discrimination based on Creed, (2015) provides in part:

9.2 Procedural and substantive duty to accommodate

The duty to accommodate has a procedural component (the process) and a substantive component (the accommodation provided). Both are very important.

The procedural duty involves the considerations, assessments and steps taken to respond to an accommodation need. A failure to give any thought or consideration to an accommodation issue or request, including what steps if any could be taken, may represent a failure to satisfy the "procedural" duty to accommodate…
The substantive duty is about the appropriateness or reasonableness of the chosen accommodation as well as the reasons for not providing an accommodation, including proof of undue hardship.

9.5.3 Sincerely held creed belief
Sincerity of belief means honesty of belief.
Sincerity of belief should generally be accepted in good faith unless there are evident reasons for believing otherwise. Where warranted, inquiry into a person's sincerity of belief should be as limited as possible. An inquiry only needs to establish that an asserted creed belief "is in good faith, neither fictitious nor capricious, and that it is not an artifice". In many cases, this will be unnecessary or relatively easy to show. However, in other cases, evidence may be required, usually from the person asserting the right, to establish that a person's claim is sincere.

Where there is reason to question someone's sincerity, the credibility of a person's accommodation request is an important factor in establishing sincerity of belief. The consistency of a person's current practices with their asserted creed accommodation may need to be examined to establish sincerity of belief. This may require evidence from the accommodation-seeker about their current belief and practice at the time of the accommodation request.

9.6 Information to be provided
In rare cases there may be a reasonable basis to question the adequacy of the information provided or the sincerity of a person's request for accommodation. In the context of creed, questions usually relate to the need to clearly establish, where there is a reasonable basis to potentially believe otherwise, that a person's belief or practice requiring accommodation is in fact (1) sincerely held; (2) connected to a creed; and (3) adversely affected by a requirement or rule, including more precisely how.

Sincerity of belief should generally be accepted in good faith unless there are legitimate reasons for believing otherwise. Where warranted, inquiry into a person's sincerity of belief should be as limited

as possible. It need only establish that an asserted creed belief "is in good faith, neither fictitious nor capricious, and that it is not an artifice." In many cases, this will be unnecessary or relatively easy to show. However, in other cases evidence may be required, usually from the person asserting the right, to establish that his or her claim is sincere.

9.9.3 Health and safety If an accommodation is likely to cause significant health and safety risks, this could be considered "undue hardship." Employers, housing providers and service organizations have an obligation to protect the health and safety of all their employees, clients and tenants, including people who observe a creed, as part of doing business safely, and as part of fulfilling their legal requirements of the Occupational Health and Safety Act. The Code recognizes that the right to be free from discrimination must be balanced with health and safety considerations. An employer, housing or service provider can determine whether modifying or waiving a health or safety requirement or otherwise providing an accommodation will create a significant risk by considering:

♣ Is the person seeking accommodation willing to assume the risk in circumstances where the risk is solely to their own health or safety?

♣ Is changing or waiving a requirement or providing any other type of accommodation reasonably likely to result in a serious risk to the health or safety of other employees, tenants, staff or other service users?

♣ What other types of risks are assumed within the organization, and what types of risks are tolerated within society as a whole?

Assessing whether an accommodation would cause undue hardship based on health and safety must reflect an accurate understanding of risk based on objective evidence rather than stereotypical views. Undue hardship cannot be established by relying on impressionistic or anecdotal evidence, or after-the-fact justifications. Organizations should not claim undue hardship based on anticipated hardships caused by proposed accommodations, if these are based only on speculative or unsubstantiated concerns that certain negative consequences "might" or "could" result if the person is accommodated.

In evaluating the seriousness or significance of risk, organizations should consider:

♣ The nature of the risk: what could happen that would be harmful?

♣ The severity of the risk: how serious would the harm be if it occurred?

♣ The probability of the risk: how likely is it that the potential harm will actually occur?

♣ Is it a real risk, or merely hypothetical or speculative? Could it happen often?

♣ The scope of the risk: who will be affected if it occurs?

If the potential harm is minor and not very likely to happen, the risk should not be considered serious. If there is a risk to public safety, consideration will be given to the increased numbers of people potentially affected and the likelihood that a harmful event may happen…

A person with a creed may wish to assume a risk. Where possible, persons with a creed should be allowed to assume risk with dignity, subject to the undue hardship standard. The risk created by modifying or waiving a health and safety requirement must be weighed against the right to equality of the person with a creed.

Where the risk is so significant it outweighs the benefits of equality, it will be considered an undue hardship. Organizations have an obligation under health and safety legislation not to place people in a situation of direct threat of harm. High probability of substantial harm to anyone may constitute an undue hardship.

Organizations must try to mitigate risks where they exist. The amount of risk that exists after accommodations have been made and precautions have been taken to reduce the risk (short of undue hardship based on cost) will determine whether there is undue hardship. In some cases, it may be undue hardship to attempt to mitigate risk, such as where the risk is imminent and severe.

Analysis

[25] In the Award dated October 29, 2025, I rejected the Employer's position that the determination of the merits of the grievance was moot, in light of its unequivocal concession of both the procedural and substantive violations of the Code. I held that in a human rights case, an award of damages ought to be based on clear findings of fact that reflect the nature and severity of the violation. As opposed to being academic or hypothetical, these findings of fact will have practical impact on the parties, as they influence the award of damages. In reaching this conclusion I relied on *Borowski v. Canada (Attorney General),* 1989 Carswell Sask 241, [1989] 1 SCR 342 and *Ontario Provincial Police v Mosher*, 2015 ONCA 722).

[26] Consistent with that Award, I reject the Employer's continued assertion that factual findings on the merits are irrelevant because they are moot.

Assessing Sincerity

[27] There is no dispute with the fundamental principles that guide this analysis. I consider these to be as follows.

[28] In assessing an individual's claim for creed-based accommodation, an Employer is entitled to assess the sincerity of the belief. I have taken into consideration and have adopted as useful, the guidelines provided by the Ontario Human Rights Commission in consideration of this issue.

[29] The starting point for consideration of the jurisprudence is the instruction of the majority of the Supreme Court of Canada in *Amselem*, at page 583(CanLII):

> Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice of belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religions be triggered.

[30] This guidance has been followed throughout the jurisprudence on religious freedom, including the arbitral jurisprudence relied upon by the Union (for example, the awards in *Public Health Sudbury*, *Wilfred Laurier, City of Pickering, Ornge Air, Air Canada (2024)*).

[31] In assessing the sincerity of an employee's claim to accommodation based on the ground of creed, an employer must examine the sincerity of the claim. OHC Policy 9.5.3. requires that the approach to that assessment be to take the claim in good faith. It is in the

rare case – in the exceptional case – that an employer may have grounds to suspect sincerity.

[32] Guidance on the approach is found, for example, in the awards in *Public Health Sudbury* and in *Wilfred Laurier*, where, as in this case, the employee asserted a combination of reasons for the exemption request, ranging from the personal (such as concern for the safety and efficacy of vaccine) to the political (requiring mandatory vaccination infringes on individual rights).

[33] In *Public Health Sudbury*, at para 44, the following is said:

> The impact of this decision [*Amselem*] is that the grievor must demonstrate that she has a practice or belief, that has a nexus with her creed, that calls for a particular line of conduct, here the decision not to get vaccinated, "either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials." To meet the requirement that an applicant must establish a link between the conduct in question and his or her creed, the court has therefore determined that a "subjectively engendered" personal connection with the divine or one's spiritual faith is sufficient.

[34] Once that nexus is established, the question of sincerity arises. A critical point arises about the assessment of sincerity. The mere fact that a creed-based claim is asserted along with secular personal or political claims ought not automatically lead to the conclusion that the creed-based claim is insincere. An employee can have personal and political beliefs as well as a valid religious belief. Arbitrator Herman, in *Public Health Sudbury*, said the following at para 50:

> There can be multiple reasons for objecting to getting vaccinated, but as long as one of the reasons is sincerely and legitimately based upon one's creed, as subjectively interpreted and applied, an applicant would be entitled to an exception under the *Code* and the vaccination policy itself. Once the grievor learned about the fetal cell line connection with the vaccines, even if that connection is

> factually and objectively quite remote, if the griever sincerely believes that her faith does not allow her to get vaccinated, that would be sufficient grounds for granting her request for an exemption.

[35] Similarly, in *Wilfred Laurier*, at para 88, the following is said:

> That each of the grievers has also voiced secular reasons for not getting vaccinated, does not, by itself, undermine their claim for a religious exemption based on creed. The authorities are clear that so long as one of the reasons for declining to get vaccinated is sincerely based on one's creed, as subjectively interpreted, an applicant is entitled to a code-based exemption to the Policy.

[36] The point, I think, is easily made in an academic discussion. But, as the instant facts demonstrate, there is nothing easy about applying this "clear" point. This Employer, as others in the health care sector, faced an extraordinary challenge in the throes of the COVID-19 pandemic. Hospitals and care centres faced the task of balancing the safety of vulnerable patients who were entrusted to their care, the safety of staff and the safety of the public against the rights of their employees. It was necessary to work through a number of claims for exemption from vaccination policies, some of which lacked sincerity, some of which were sincere but did not fall within the protections afforded by the Code. The retrospective view ought not minimize the challenges involved. My conclusions in this award are informed by the context in which the dispute arose.

[37] This Employer, in the unique situation it found itself, introduced a reasonable mandatory vaccination policy in the interests of safety. It faced some claims for exemption that were without medical or legal merit and was tasked with the responsibility of assessing the sincerity of this claim in the context of the exigencies of the pandemic. The task in this case was rendered more complicated by the fact that this grievor had, for a full month before submitting his creed-based claim in any format, oral or written, vociferously advanced a series of diverse grounds for his request for exemption, including pseudo-scientific, legal and political theories.

[38] To be specific, this grievor, on September 1, 2021, without mentioning any creed-based concern for vaccination, provided the Employer with a "Vaccine Notice of Liability

Employer" (dated August 27, 2021), that he adapted from a document he found online, claiming, among other allegations, that the Employer was "unlawfully practicing medicine" by requiring its employees to submit to "experimental medical treatment" and "experimental gene therapies". He questioned the evidence that substantiated a "public health emergency", and asserted that the rate of infection was consistent with a normal influenza season. He asserted that the purported increase in COVID-19 cases resulted from increased testing, asserted that "PCR testing" produced 97% false positive results. He cited a Portuguese court that found PCR tests unreliable. He referred to PCR testing as "fraudulent". He accused the Employer of violating "The Nuremberg Code" by supporting experimentation on human beings, and he asserted the experimental nature of all COVID-19 vaccines. He denied that any vaccine treatment had been fully approved, rendering informed consent impossible, and asserted that vaccines cause death, blood clots, infertility, miscarriage, cancer, and other disorders. He asserted that minors are at little risk of infection from COVID-19. He asserted that the Employer was in violation of the *Criminal Code* of Canada by undertaking acts dangerous to life.

[39] The grievor did submit a creed-based objection on September 8, 2021, and submitted several additional documents that did not include reference to a creed-based objection such as:

- An email dated September 9, 2021, including a "An act to prohibit and prevent genetic discrimination", Statute of Canada, 2017;

- An email dated September 10, 2021, including concerns and documents regarding the questionable efficacy of vaccines, violation of "provincial rights' and of unparticularized human rights.

[40] The Employer had designated the grievor's manager, John Martin, as the individual in best position to discuss with the grievor his refusal to accept vaccination. The grievor and Martin had a good relationship and trusted each other. This was a good choice on the

part of the Employer, demonstrating sound judgement in selecting the individual with the greatest likelihood of being able to meet with the grievor, converse with him at length, understand his concerns and ensure that the grievor had access to good information about available vaccines. Martin met with the grievor several times. However, he was not successful in persuading the grievor to accept vaccination.

[41] The grievor's mention of a religious ground for his objection was not, in September, the focus of his communications. As stated, he had, in his email of September 8, 2021, alleged violation of a religious belief and made a request for religious accommodation as part of his request for exemption. His conversations with Martin were not initially focussed on the religious objection, but were centred on the grievor's other objections. Martin, on September 20, 2021, offered to provide the grievor with the appropriate form with which he could pursue his creed-based objection to vaccination.

[42] The grievor responded to this offer by saying that "he and John Martin had never discussed his faith", and that "religion could not be discussed or negotiated".

[43] It was only on September 27, 2021 that the grievor provided his particularized creed-based request for exemption from COVID-19 vaccination in the required form– days after the exemption request based on personal concerns had been rejected. In response, the Employer required an attestation from the grievor's religious leader – a request to which the grievor initially objected. However, he provided the attestation, which was received by the Employer. The attestation supported the creed-based exemption request.

[44] Martin testified that eventually he did identify that the grievor was asserting a creed-based exemption request. Martin and the grievor discussed this further, and Martin became satisfied that the grievor was sincere in his belief that accepting vaccination would cause him dire spiritual consequences. Unfortunately, Martin, who was in the best position to assess the grievor's sincerity, was not involved in the decision to deny the grievor's request. Nor was he asked to share his opinion of the grievor's sincerity.

[45] Christopher Soucy, Manager of Documentation, Compensation and Benefits was responsible for making the decision to deny the creed-based request for exemption. He formed the opinion that the creed-based claim was not sincere. His will-say explains:

> In coming to this conclusion, I considered in particular that the griever had raised multiple objections to the policy, which were prior to his September 8 2021 correspondence, primarily based on his belief that the vaccine was not sufficiently researched, not necessary, and not safe, as well as his belief that he had a legal right to refuse to be vaccinated and Bruyere could not compel him to become vaccinated. These non-religious objections were reiterated in his correspondence after September 8, 2021.
>
> While I did not doubt that the grievor may be religious and may have strong religious beliefs his identification of his creed as a reason for refusing the vaccine came only after his previous objections on the basis of his understanding of the science and the law.
>
> It appeared to me that his religious objection to the vaccination arose from his searching for various reasons which he could point to as justifying his refusal of the vaccine.
>
> I also believe that the grievor's objection was specific to the available COVID-19 vaccines. It was my understanding that many conventional vaccines and commonly available over the counter medications have a similar connection to abortion, in that they were similarly tested using fetal stem cells. I was not aware of the grievor previously refusing to be vaccinated, or seeking an exemption from vaccination on religious grounds I doubted whether the griever had refused to use over the counter medications on the same basis. In consideration of all of these factors, I concluded that while the grievor maybe [sic] religious, his reliance on his religion to refuse to become vaccinated was not bona fide but rather was a veneer or pretense for what was in essence a secular objection to being vaccinated on the basis of his understanding of the science, the safety of the available vaccines, and the law.

[46] In cross examination, Mr. Soucy said that he never met with the grievor personally to discuss the creed-based request, did not reach out to the Spiritual Health team for consultation or advice, did not ask John Martin for his opinion on the sincerity of the grievor's religious beliefs and creed-based request. He was influenced in his decision to refuse by the plethora of personal concerns asserted by the grievor before he focused on

the creed-based request, and on the fact that the assertion of personal concerns continued after the creed-based request was made.

[47] Mr. Soucy agreed that he made several assumptions about the grievor, including the assumption that he took over-the-counter medications that had some connection to fetal stems cells. He did not speak with the grievor about these matters and made no inquiries about the facts upon which he based these assumptions.

[48] Mr. Soucy received the attestation from the grievor's priest, which he understood was required in order to "validate" the request for religious exemption. He did not question the validity of the attestation.

[49] Mr. Soucy agreed that he might have met with the grievor, and that through that meeting might have obtained relevant facts about the grievor's religious beliefs. Mr. Soucy agrees that at the time, it would have been helpful to him to have had John Martin's opinion about the sincerity of the grievor's request. These pieces of information might have changed the outcome.

[50] At the end of the day, Mr. Soucy explained that he made his decision to deny based on both the volume and the timing of the grievor's requests for exemption based on personal grounds, and in the context of these, considered the creed-based request a pretense for the grievor's personal preference to avoid vaccination. The written denial provides no explanation of why the creed-based request was denied, does not refer to the conclusion that the request was not based on a sincere belief, and provides no foundation for the reasoning. Nor does it refer to the employer's ability to accommodate the grievor's religious objection.

[51] Between September 1, 2021 and September 27, 2021 the grievor provided his completed creed-based exemption request, and repeated his personal concerns about COVID-19 vaccination both in his email communications and in his numerous meetings with Martin.

[52] The grievor was placed on leave of absence on October 15, 2021, after being permitted to take an accumulated vacation for two weeks.

[53] As the Employer argues here, the intermingling of personal and creed-based objections to vaccination complicated the Employer's process of assessing the sincerity of the latter.

[54] The Employer admits that it erred. It failed in a number of respects, which I detail below. But as I recount the errors this Employer made, I note that the Employer's task was challenging. There is no evidence of malice toward this grievor in a complex context of mixed messages. The significance of this finding, if any, will be addressed in the remedy stage of this proceeding.

[55] The Employer erred in its assessment of the grievor's sincerity in asserting the creed-based claim in a number of ways.

[56] First, the Employer failed to give due consideration to the creed-based request. It failed to meet with and engage the grievor in direct discussion and ask him question about his faith and impact that accepting vaccination might have on his belief system. It's failure to provide reasons for the refusal of his request for exemption supports the conclusion that its refusal was arbitrary, and not based on a meaningful assessment of the claim.

[57] Second, the Employer assumed that the grievor's intermingling of secular and creed-based beliefs and arguments rendered the creed-based claim insincere. The Employer began and ended its consideration of the creed-based claim by assuming that it was insincere. It assumed that it was a cover for his secular objections to vaccination.

[58] On this point, I must add that the grievor did not make this assessment easy. The volume and tone of the personal concerns were dramatic. Had this Board been tasked with making a factual finding of the grievor's sincerity, it would have found the task challenging.

But at the end of the day, had the Employer talked to the grievor, heard him on the subject of his religious beliefs, listened to his heartfelt expression of faith and absolute determination of the need to reject any connection with fetal cells, it was likely to have been convinced of his sincerity.

[59] Third, while the Employer appropriately designated the grievor's manager, John Martin, to meet with the grievor to discuss his vaccination objection, to ensure that the grievor had good information to inform his decision, and to discuss and explain the Employer's policy, ultimately it failed to consider Martin's views concerning his assessment of the grievor's religious objection. As I have indicated earlier, the Employer was right to designate Martin to this task. He approached the matter with genuine interest, with genuine concern for the grievor's security in the workplace, and with respect for the grievor's views – both secular and religious. The evidence is that once the grievor raised the issue of his creed-based beliefs, Martin found him to be genuine and sincere. The Employer's error occurred, however, because Martin's views were never sought or communicated to the Human Resources department.

[60] John Soucy testified that had he known Martin's views, he would have considered them helpful to his assessment of the sincerity of the creed-based claim. Martin's opinion of the grievor's sincerity may well have changed the outcome of the eventual assessment.

[61] Fourth, the Employer had resources at its disposal to assess the grievor's sincerity that it did not use. It has a department of Spiritual Health. It might have accessed the expertise in that department to facilitate discussions with the grievor.

[62] Fifth, the Employer erred when it required the attestation of the grievor's priest. Although individuals may choose to provide such attestations, neither the OHRC guidelines nor the jurisprudence requires the statement of a religious leader to authenticate or validate such a claim. There are many circumstances, such as the present one, in which dogma of an organized religion might be interpreted differently by faith leaders and members of the faith. The Patriarch of the Romanian Orthodox church, for example, may

choose to accept vaccination. But that fact does not detract from the individual's belief that to do so, for him, would result in the condemnation of eternal sin.

[63] The Supreme Court of Canada has clearly stated in *Amselem* that although a claimant may choose to produce a letter from their religious leader to support a creed-based accommodation, such evidence is not necessary to prove the sincerity of the claim. The Court said:

> …a claimant may choose to adduce expert evidence to demonstrate that his or her belief is consistent with the practices and beliefs of other adherents of the faith. While such evidence may be relevant to a demonstration of sincerity, it is not necessary. Since the focus of the inquiry is not on what others view the claimant's religious obligations as being, but rather what the claimant views these personal religious "obligations" to be, it is inappropriate to require expert opinions to show sincerity of belief. An "expert" or an authority on religious law is not the surrogate for the individual's affirmation of what his or her religious beliefs are. Religious belief is intensely personal and can easily vary from one individual to another. Requiring proof of the established practices of a religion to gauge the sincerity of belief diminishes the very freedom we seek to protect.

[64] Arbitrators have consistently adopted this approach, as exemplified in the award in *Wilfred Laurier.* Because the emphasis is on personal choice, involving subjective interpretation and application of religious teaching, the protection does not only apply to those who follow the proscribed dogma of an organized faith. The protection of religious freedom applies equally to those who sincerely hold beliefs that reflect their own interpretation of what conduct is consistent with the theory and teaching of their faith. Claimants of religious freedom protection need not provide objective validation of their beliefs, or validation that their practices are consistent with that of others who hold the same belief. As Arbitrator McLean concluded, at para 47:

> I find that what the City was trying to do through its request for information was to have the Grievor established the validity of his belief. This was wrong. It also chose to do that by requiring the Grievor to provide a letter from a senior member of his creed. This was also wrong.

[65] There will be cases in which claimants choose to provide letters of validation from religious leaders. Claimants might choose to have those more familiar with the articulation of dogma to communicate that on their behalf. It can prove an aid to the illustration of religious belief and to the issue of sincerity. For example in *Harrison*, the Board (at para 57 – 58) received such a letter and remarked that it was a personal, intimate and helpful piece of communication:

> [57] Evidence from religious leaders or experts is not necessary to determine the sincerity of a belief. Once, again, I refer to the words of the Supreme Court of Canada in *Amselem* at paragraph 54 on assessing the sincerity of belief:
>
> > *… An "expert" or an authority on religious law is not the surrogate for an individual's affirmation of what his or her religious beliefs are. Religious belief is intensely personal and can easily vary from one individual to another. Requiring proof of the established practices of a religion to gauge the sincerity of belief diminishes the very freedom we seek to protect.*
>
> [58] Nevertheless, although the letter from Mr. Stewart's pastor is not necessary to establish the sincerity of his belief, in this case, it is relevant. I find it helpful. It is personal wise and intimate. There is no doubt that Mr. Stewart is no stranger to the pastor, as a devoted member of his flock. I attribute some weight to it when assessing the sincerity of Mr. Stewart's belief. At minimum, it establishes that his sincerely held religious belief is consistent with other religious practices - how he lives his life with religion, including ministering to people experiencing poverty, attending church regularly, and treating his body as a sacred temple.

[66] In the instant case, the Employer requested a certificate of legitimacy from his priest, in order to verify the sincerity of the creed-based claim. The grievor objected to that request, asserting that there was no one else who could testify to how he interpreted and applied his own belief.

]67] The grievor ultimately provided the letter. The grievor's priest supported his faith-based objection to vaccination. The Employer then disregarded the letter. This was another component of the Employer's violation of the duty to accommodate.

[68] Sixth, the Employer erred in this case when it relied upon the grievor's refusal of the Novavax vaccine as evidence of his insincerity. The reasons I come to this conclusion are based on the following evidence.

[69] The grievor was placed on leave of absence on October 15, 2021. A new vaccine, the Novavax vaccine (Nuvaxovid, NVX-CoV2372) was authorized for use in Canada on February 17, 2022. The Employer called as a witness Dr. Gale Smith, Senior Vice President of Discovery and Pre-Clinical Research, and Chief Scientist at Novavax Inc., who led the development of Novavax's core vaccine technology for use with respect to respiratory syncytial virus, influenza, Ebola and coronaviruses, including SARS, MERS, and SARS-CpV-2 (COVID-19). He was the inventor of the Novavax vaccine. According to his will-say statement of October 19, 2023, no human fetal-derived cell lines or tissue are contained in Nuvaxovid or used in its development, manufacture or release testing.

[70] At hearing, the matter was demonstrated to be less clear than the Employer had understood. Dr. Smith clarified that the "development" of the vaccine refers to the actual birth of the drug molecule itself. "Manufacture" means the industrial process used to produce the drug for market. "Release testing" refers to the quality control tests used to test batches of the mass produced vaccine.

[71] Dr. Smith further testified that Novavax was tested at various non-clinical stages and during the clinical trial process using pseudovirus assays. These are tests that are dependant on fetal cells in two ways. Pseudovirus replication assays use fetal cells to make pseudoviruses that mimic the actual COVID-19 virus. Pseudovirus cells are used in an immune viral correlate which can test a vaccine's effectiveness. These tests are used to determine how well a vaccine produces antibodies that can block infection by the COVID virus.

[72] The pseudovirus was used in several scientific papers in which Novavax scientists were involved, by performing testing and in designing the studies. Novavax relied on the test results that used the pseudovirus results in its submissions to regulators.

[73] The Novavax vaccine was available in Ottawa on April 14, 2022. On that date Employer's Counsel contacted Union Counsel to discuss the availability of this vaccine and to inquire into whether the grievor would be comfortable taking it. The grievor refused. The Union argued that Novavax did use fetal-derived cells in testing the vaccine. Based on the understanding that, as Dr. Smith's evidence confirmed, no human derived cell lines or tissue was used in the development, manufacture or release testing of the vaccine, the Employer concluded that the grievor's refusal to consider taking Novavax confirmed his insincerity in asserting the creed-based claim. If, the Employer reasoned, a vaccine was available that had no connection to fetal cells, then the grievor's refusal was unfounded in any nexus to his religion.

[74] The grievor has stated in evidence that "any connection to fetal cells is too much". That is his sincere belief. It is a belief for which he is entitled to the protection of religious freedom, and protection from discrimination. The question of whether or not the vaccine contains elements of fetal cells, or whether or not fetal cells were used in the research and testing that led to the remarkable and life-saving discovery of the Novavax vaccine, is not the issue. For this grievor, any connection to fetal cells was too much connection. He was entitled to stand on that ground as a sincerely held aspect of his belief system.

[75] It is my impression of the evidence that the Employer acted in good faith when it approached the Union to inquire into the grievor's comfort with the Novavax vaccine. it was maintaining contact, ensuring that the grievor had good information based on mainstream scientific foundation, and that he was making an informed choice in continuing to maintain his refusal to become vaccinated. The evidence supports the conclusion, however, that it erred when it decided that the grievor's refusal to accept the Novavax vaccine was evidence of insincerity.

[76] The essential point is that once an employee communicates a creed-based request for exemption from a policy, or requests an accommodation based on their religions belief, the Employer is required to begin with an acceptance of that claim. It is required to assume that the claim is valid and sincere. There are circumstances under which such claims will be questionable, and there will be reason to perform a thorough examination of the claim. This does not include conducting an inquisition into one's personal belief system or attacking one's dignity with ill-informed cross examination. It does mean inviting a conversation that provides the claimant with the opportunity to explain and describe their belief system, and the way in which the employer's requirement conflicts with the belief system.

[77] As was stated in the *Harrison* award at para 61:

> The majority of the Supreme Court of Canada has said that an inquiry into the sincerity of a belief must be minimal. In *Amselem,* it insisted that a court's inquiry must be limited to assessing whether the religious belief is sincerely held and not delve in to the interpretation of religious precepts. I find that there is sufficient evidence on a balance of probabilities to establish that [the Grievor] meets the low threshold of establishing that his religious belief is sincerely held.

[78] As the facts reveal in this case, claims for creed-based accommodation may arise in circumstances that are complex, and may be intertwined with other reasons for refusing to comply with a policy. Some, indeed, may be outright falsifications. But an employer's responsibility under the Code is to start with the premise that the claim is valid. If there are reasons to suspect it is not, the guidelines issued by the Ontario Human Rights Commission suggest the body of questions that may be asked, in a genuine fact-finding exercise, to ensure complete understanding.

[79] As stated in Ontario Human Rights Commission Policy 9.5.3 on Sincerely held Creed Belief:

> The Code protects individuals from discrimination based on their personal religious beliefs practices or observances, providing they are sincerely held and connected to a religion or creed…
> Sincerity of belief should generally be accepted in good faith unless there are evident reasons for believing otherwise. Where warranted, inquiry into a person's sincerity of belief should be as limited as possible. An inquiry only needs to establish that an asserted creed belief "is in good faith, neither fictitious nor capricious, and that it is not an artifice". In many cases, this will be unnecessary or relatively easy to show. However, in other cases, evidence may be required, usually from the person asserting the right, to establish that a person's claim is sincere.

> Where there is reason to question someone's sincerity, the credibility of a person's accommodation request is an important factor in establishing sincerity of belief. The consistency of a person's current practices with their asserted creed accommodation may need to be examined to establish sincerity of belief. This may require evidence from the accommodation seeker about their current belief and practice at the time of the accommodation request.

[80] In this case, the Employer failed to conduct an appropriate assessment of the claim. Had it convened a meeting with the grievor, as he had requested, had it asked his Manager if he thought the claim was sincere, had it given any weight to the certification from the priest, it would likely have been satisfied, as I was, that this grievor was asserting a genuinely held personal belief.

[81] There is no question here that the requirement by the Employer that the grievor vaccinate was a condition that would have interfered in a significant way with the grievor's practice of his faith.

[82] I consider the Employer's summary assessment of the grievor's sincerity to have constituted a *prima facie* act of discrimination and a violation of the duty it owed the grievor under the Code. This is one violation with several components and with several consequences. It was a serious violation.

[83] The Employer has argued that although it erred in its assessment of the grievor's sincerity, the error was not based in malice, and that the error was understandable in the circumstances. In the barrage of reasons for his refusal to accept vaccination, the grievor's legitimate request based on his religious faith became the needle in the haystack. The grievor's approach to asserting his vaccination refusals contributed to the complexity of the assessment of his sincerity. The Employer relies on the *Safeway* decision in asserting that this fact is relevant to the assessment of remedy.

[84] The Union has argued that this position should be considered during the remedy stage of this process, and not in this fact-finding stage. I agree with the Union's point that this issue is for the remedy portion of this process. The impact, if any, of the grievor's approach to the Employer's vaccination requirement will be considered in that analysis.

Undue Hardship

[85] The Union has alleged that the Employer committed several violations of the requirement to accommodate the grievor's religious beliefs, which are both procedural and substantive. It is my view that the failures, taken together, amount to a second violation of the Code. This includes several components.

[86] The evidence is analysed against the following principles reflected in the jurisprudence, about which there is no dispute:

[87] The onus is on an employer to establish undue hardship. This is a high bar, and not an easy burden to discharge;

[88] It is reasonable that an employer accept some hardship in accommodating an employee's religious beliefs;

[89] Assessing whether accommodation would result in undue hardship based on health and safety concerns should not be based on speculation, impressionistic views, or blanket presumptions of risk;

[90] In order to meet the procedural aspect of the obligation to accommodate, each claim must be assessed individually;

[91] In each case, the individual's work must be assessed, along with their working conditions, to assess the ways in which the work raises a safety risk, in what ways the work can be modified to minimize risk, or what other work the individual can productively perform in order to remain in the workplace at minimal risk. A relevant and useful piece of information in this process includes consideration of how the Employer has accommodated others in the workplace, what risks it is able to tolerate, and what risk it does tolerate;

[92] An important part of exploring the accommodation options, the employer should gather information, speak with the individual, speak with those who are in similar positions, and bring a genuine creative curiosity to the process of exploring accommodation potential;

[93] The process of exploring potential for accommodation and for finding the reasonable accommodation that will provide productive and dignified work for the individual is a tripartite process requiring meaningful participation from the employer, the union and the individual;

[94] In accommodation cases, the issue is often one of ensuring that safety concerns are addressed, and balanced against the requirement to provide individuals with accommodation that will enable continuing participation in society. Accommodation may not be refused on the ground only that an employer assumes that the individual cannot be safely accommodated in the workplace. The balance must be struck against the guidelines provided by the jurisprudence – rather than some arbitrary adoption of a blanket rule that ensures the highest level of safety. Put more plainly, a blanket reference to safety is no

excuse for failing to undertake the appropriate procedural and substantive steps of exploring accommodation.

[95] In *Grismer,* the Supreme Court of Canada remarked upon the appropriate balance to be drawn. The Court reviewed the situation of an individual denied a motor vehicle license because he suffered from a visual impairment (homonymous hemianopia, "H.H.") that reduced peripheral vision. The Court rejected the approach that would, as a matter of policy or as a "blanket" approach, refuse license without individualizing the examination of the disability, and exploring methods of achieving accommodation. A standard of achieving a perfect level of safety was rejected by the Court. The test requires "reasonable safety". At para 27:

> The Superintendent thus recognized that removing someone's license may impose significant hardship striking a balance between the need for people to be licensed to drive and the need for safety of the public on the roads, he adopted a standard that tolerated a moderate degree of risk the Superintendent did not aim for perfection, nor for absolute safety. The Superintendent rather accepted that a degree of disability and the associated risk to highway safety is a necessary trade-off for the policy objectives of permitting a wide range of people to drive and not discriminating against the disabled. The goal was not absolute safety but reasonable safety.

[96] Further, a standard that assumes, without evidence, that an individual can not perform a task safely amounts to an unsupportable assumption upon which a denial of accommodation may not be justifiable. Blanket assumptions about individuals with particular conditions or circumstances will be considered "suspect". Their effect is to exclude members of a particular group or class, often without justification. And evidence that one group is being treated differently from the rest - treated more harshly – without fact-based justification may indicate that the standard has not been reasonably applied. The Court stated, at para 31:

> Before discussing the ways in which the Superintendent sought to justify the blanket rejection of licensing people with H.H. [the visual disability in issue] in this case, two common indicia of unreasonableness mentioned in these proceedings may be noted. First, a standard that excludes

members of a particular group on impressionistic assumptions as generally suspect. That is not the case here: the member found that the Superintendent's prohibition was based on current knowledge and was not impressionistic. Second, evidence that a particular group is being treated more harshly than others without apparent justification may indicate that the standard applied to that group is not reasonably necessary. There is some suggestion that the Superintendent's standard for people with H.H. may have been higher than that applied to people with other visual defects. The Superintendent permitted some people with less than a 120 degree field of vision to undergo tests to see if they could compensate for their disability. However, he insisted on a blanket rejection of people with H.H.

[97] The Court then proceeded to assess whether the blanket standard of a refusal of a driver's licence was reasonably necessary to achieve the goal of moderate highway safety. The Court wrote, at para 32:

> … In order to prove that its standard is "reasonably necessary", the defendant always bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost. In this case, there are at least two ways in which the Superintendent could show that a standard that permits no accommodation is reasonably necessary. First, he could show that no one with the particular disability could ever meet the desired objective of reasonable highway safety. For example, using current technology, someone who is totally blind cannot safely operate a motor vehicle on the highway. Since accommodation of such a person is impossible, it need not be further considered. Alternatively, if the Superintendent could not show that accommodation is totally inconsistent with his goal, he could show that accommodation is unreasonable because testing for exceptional individuals who can drive safely despite their disability is impossible short of undue hardship.

[98] The question is whether accommodation in this case was possible, without causing undue hardship.

[99] In *Hamilton-Wentworth District School Board*, the Ontario Court of Appeal considered a critical aspect of the duty to accommodate. It concluded that the duty must

not only include the question of what can be done to accommodate an individual in their present position, but to go further and explore the degree to which the individual could be accommodated in another position. In that case, the remedy sought was reinstatement to a different position with the employer after fourteen years of absence due to disability. At para 82 the Court said:

> … Section 17 of the *Code* obligated the School Board to accommodate Ms. Fair's needs to the point of undue hardship. This means that the School Board was required to take reasonable steps to accommodate Ms. Fair. Such reasonable steps, as the Tribunal explained, included altering her previous position or looking for alternate positions if the previous one could not be altered in order to accommodate her without undue hardship. As the Tribunal found, the School Board failed to do so.

[100] In cases where safety is the primary Employer concern, as it is in the instant case, care must be taken to avoid reliance on an over-arching assuption to justify a blanket rule or "zero tolerance" approach to accommodation. A clear example is provided in *Ornge Air,* in the award of Arbitrator Misra. The challenging facts of that case involved an employee who required medically prescribed cannabis to treat an anxiety condition. There was no challenge to the *bona fides* of the claim, or to the grievor's compliance with the obligation to report his prescription. The dispute arose from the fact that in cases of prescribed medication generally, the employer's policy contemplated individualized assessment of fitness to work, but it did not adopt the same approach in respect of medically prescribed cannabis. Rather, the employer adopted a zero tolerance approach to employees in safety sensitive positions who took medically prescribed cannabis.

[101] Included in the thorough review of authorities and considerations that influenced her decision to conclude that the policy was discriminatory and unreasonable, the Arbitrator noted:

> 235 In *Irving Pulp and Paper v. CEP Local 30*, (2012) SCC 34, cited above, the Supreme Court was dealing with an employer's policy for random alcohol testing for safety sensitive positions in a dangerous workplace. While that is not the issue in this instance, the Court addressed the balancing of interests

of employees and an employer when considering whether the policy was reasonable. Abella J. writing for the majority quoted with approval from the Alberta Federation of Labour's submission as follows:

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

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

236 At para 31 of the decision, Abella J. went on to note that while "the dangerousness of a workplace – whether described as dangers, inherently dangerous, or highly sensitive – is, while clearly and highly relevant, on the beginning of the inquiry. It has never been found to be an automatic justification for the unilateral imposition of unfettered random testing with disciplinary consequences." As already noted, this is not a random drug testing case, and it is also not one centrally engaging the issue of privacy. However, it is one in which the Employer claims that because of the highly safety sensitive nature of its endeavour, and the safety sensitive nature of the work of AME's [airline maintenance mechanics] that it is reasonable for it to have a zero tolerance standard for the use of any form of cannabis, even if it is medically prescribed. As the Supreme Court of Canada has found, that is only the beginning of the inquiry.

237 Given the position that Ornge is taking, I cannot agree with the Employer's submission that its zero tolerance standard is flexible: It clearly is not as Ornge has stated that it has an absolute prohibition on the use of cannabis by those in safety sensitive positions, even when its expert advises, following an individualized assessment of a particular employee in a safety sensitive position, that there is a way for the employee to take prescribed medical cannabis, but still be fit for duty.

238 The manner in which the Employer has addressed this particular subset of employees stands to deprive them of their livelihoods simply because they were prescribed cannabis to treat their illness. In weighing the interests of a skilled employee who may lose their job because they were prescribed a legal medication to treat their illness, and the Employer's health and safety interests, it is difficult, without a full assessment of each employee's situation, to find that the balance automatically weighs in favour of the Employer. There may well be cases in which the ultimate outcome would be in favour

> of finding that there was a *bona fide* occupational requirement that precluded the accommodation of a particular employee. However, having a blanket edict that if an employee can only use medical cannabis to treat their illness, they cannot do a safety sensitive job, is draconian and inflexible, and is not supported by the CHRA or the jurisprudence.
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> …
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> 247 …However, simply because Ornge is an air ambulance service, with the inherent safety issues involved in operating its aircraft, is not sufficient basis for finding that its blanket rule that no one in a safety sensitive position be accommodated if they are prescribed medicinal cannabis. That belies the Employer's responsibility to turn its mind to the needs of any particular individual who seeks accommodation.

[102] The Employer's honest and critical concern for safety – for safety of the individual, for safety of the rest of the staff, for safety of the public – is not automatic justification for the unilateral imposition of a blanket or inflexible rule. Even where safety is at the crux of the concern, active and curious consideration must turn to the question of what work the individual might perform in a safe and dignified manner. Individual assessment must be made of the individual's circumstances, of their limitations, of their skill and ability, and of the workplace. Risk may not be assumed. It must be assessed. Neither an employer policy nor practice will be upheld that does not account for individualization. (See *British Columbia (Public Service Employee Relations Commission) v. BCGSEU,* 1999 CanLII 652SCC, ("Meiorin");

[103] The point is made in *CNR v. Teamsters*, a case of creed-based objection to vaccination similar to the instant case. The Grievor was found to hold a sincere creed-based objection to vaccination. The work was the safety sensitive job of a rail traffic controller. The employer, with high regard for the risk of unvaccinated employees in the workplace, assumed that the Grievor would pose an undue risk. It relied on that assumption in denying accommodation, and offered no evidence of what that risk was, or why it could not be reasonably or effectively mitigated by other methods to protect others from infection, such as masking and testing. Given that lack of evidence, the employer was held to have failed to

meet the onus of establishing that accommodation short of undue hardship was not feasible.

[104] Not only must the risk be evaluated, but it must also be assessed in the context of, and in comparison to, the degree of risk tolerance an employer assumes in respect of other employees. Tolerance of risk posed by others in the workplace undermines an assertion of undue hardship.

[105] The Union argues that the point is made in *Air Canada v. IAMAW,* in the 1988 award of Arbitrator Stanley. Although I accept the argument that acceptance of risk in other employees may undermine an argument of undue hardship, I do not consider this Award as persuasive authority for that point. The matter addressed the situation of an employee in a safety sensitive position (Station Attendant, Lead Cargo Movement, Coordinator and Supervisor), whose hearing was tested following recall from a layoff exceeding 90 days. The audiogram identified a level of hearing loss beyond the employer's threshold and the grievor was refused recall. The case was decided on the ground that the uneven application of the testing requirement to those returning from layoff of over 90 days was an arbitrary and unwarranted denial of seniority rights. The employer conceded that many other employees might also have been working with a degree of hearing loss equal to or in excess of that suffered by the Grievor. The uneven application of the requirements was central to the conclusion that seniority rights were arbitrarily and discriminatorily denied. The facts and reasoning, in my view, are remote from that under consideration here, and I do not consider it useful authority on the point the Union asserts.

[106] Having said that, from an evidentiary perspective, I would consider it relevant in a case in which undue hardship is asserted by an employer, to hear evidence regarding (as I did here), and to consider (as I do here), the degree of risk that this Employer has accepted in respect of other employees.

[107] The Union relies on a recent decision of Vice Chair Lavinia Inbar of the Human Rights Tribunal in *Loder,* to demonstrate what might be done in a case in which a claim for

accommodation requires balancing with a safety issue. The decision provides an example of a complete engagement in both the procedural and substantive action held to have met the obligation to accommodate before facing the high bar of undue hardship.

[108] In *Loder,* the Applicant performed the job of housekeeper in a public hospital. She held a belief (ultimately determined to be outside of the protected creed-based category) that formed the foundation of her decision to refuse vaccination against measles, mumps, rubella and Hepatitis B. Serology tests showed that she enjoyed no natural immunity to these diseases. The Applicant was therefore in violation of the employer's policy that required vaccination.

[109] The employer's concern was for both the safety of the individual who might come into contact with infected patients, for the safety of other staff, and for the safety of the public. The employer undertook the following actions in the interests of exploring the "procedural" aspects of its duty to accommodate:

*met with the Applicant to discuss her position, to gather information on her refusal to vaccinate, and to ensure that the individual had adequate information regarding vaccination;

*sought advice from both the Local Public Health Authority and Public Health Ontario;

*placed the Applicant on paid leave of absence while evaluating risk and exploring accommodation options;

*provided the Applicant with a list of all positions and asked her to identify those positions that did not require contact with patients;

*performed a risk analysis of the situations the Applicant might herself face or generate for others;

*involved the Medical Director, the Head of Occupational Health, and Vice President of People and Workplace Health and directed each to turn their minds to what reasonable limitations should be placed on the Applicant, and to the hospital's ability to accommodate those reasonable limitations in a manner consistent with her skill set;

*retained a third-party company to perform a skill assessment of the Applicant;

*instructed those at a managerial level that "every position that is posted MUST be reviewed with the intent of determining if it would accommodate the Applicant's restrictions

*generated a "Risk Matrix" that assessed the risk level associated with each position in the organisation;

*evaluated the Applicant's present job to determine if accommodation could be made to achieve a reasonable level of risk;

*evaluated all jobs within the organisation to determine if any, should they become available, would accommodate the Applicant's restrictions;

*evaluated the information it had gathered, reviewed the regulations governing public health and determined that it could not accommodate the grievor without undue hardship.

[110] The Employer in *Loder* discharged the "substantive" portion of its obligation based on thorough examination of fact and opinion, rather than on assumption.

[111] The decision does not require these elements be included in every analysis of accommodation compliance. It does provide a useful example of what a motivated employer might include in its search for reasonable accommodation.

[112] The Union relies on the award of Arbitrator Ready in *Air Canada v IAMAW (November 13, 2024)* in which he addressed the situation of eleven Air Canada employees who had received exemption from mandatory COVID-19 vaccination policy, but who claimed a failure to accommodate. Arbitrator Ready rejected application of a "blanket" policy in favour of the well-established individualization of accommodation claims. He then considered the situation of the eleven individuals, and concluded that the employer had run afoul of its obligation to accommodate, by treating those with valid medical and religious exemptions in the same manner as those who refused vaccination for reasons of personal preference. Based on the evidence he heard, the Arbitrator concluded that had the employer conducted individualized assessment of the needs of each employee, it could have accommodated many in their present jobs by requiring masking, distancing, and frequent testing. He also determined that others could have been accommodated through "an array of options, including temporary transfers, re-bundling of duties, or changing the ways in which services were performed." Arbitrator Ready found that it would not amount to undue hardship to have maintained these eleven individuals on salary. He ordered that they be made whole for their economic losses.

In what ways did this Employer violate the procedural requirements of the duty to accommodate?

[113] Applying the law to the facts of this case is a process facilitated by the Employer's unconditional concession that it has violated both the procedural and substantive requirements of the duty to accommodate under the Code. The requisite findings of fact are as follows.

[114] The Employer's summary dismissal of the creed-based claim on the ground that it lacked sincerity created the foundation of the problem. From that point on, little attention was paid to the issue of accommodation. Manager John Martin had instructed clerical staff to review electrician work orders, in an effort to understand the working conditions of

electricians, and in particular, how much of their work was performed alone. This was a good effort, but insufficient to discharge the onus of gathering sufficient information to inform the task of exploring accommodation. Once the Employer dismissed the grievor's request on the ground that it lacked sincerity, there was no meaningful systemic consideration of a need to accommodate.

[115] To enumerate the failures that followed, I continue to note that, first, the Employer failed to meet with the grievor to discuss his need for accommodation. The grievor was the most informed source of information regarding the details of his day-to-day work and would have provided the benefit of his fourteen years' experience to the task.

[116] Second, although the Employer appropriately designated the grievor's manager, John Martin, to communicate with him regarding the refusal to vaccinate, it did not expressly instruct him to explore ways in which the grievor could be accommodated. Martin was knowledgeable and experienced, and his insights would have proved a valuable asset in the process.

[117] Third, the Employer failed to perform any risk assessment on the grievor's role in the workplace. It ought to have reviewed his duties, his daily activities, identified which activities and duties posed what risks to whom. It ought to have enumerated those electrician duties that brought one into contact with patients, co-workers and other staff, and identified which aspects of the job could be performed with minimal contact.

[118] Fourth, the Employer failed to assess whether the grievor could have been accommodated in his own job, using precautions such as masking, distancing, along with frequent testing for evidence of infection. It failed to consider whether the grievor could have been accommodated in his own job by shifting his work activities to those areas of the building that did not include patient rooms, or that were unoccupied outside of regular working hours. The Employer failed to consider altering the grievor's working hours in his own position, which may have enabled him to perform his own job while office, clinical and administrative spaces were less occupied or unoccupied.

[119] Again, given the Employer's unconditional concession of both procedural and substantive violation in this case, I have not been required to undertake the task of balancing the Employer's legitimate and vibrant concern for safety against this individual's right to religious freedom. I pause here to note that it is easy, in retrospect, to minimize the danger that this pandemic wrought. As the Employer has here argued, the context within which it made its determination is important to bear in mind. (see for example, the discussion in *Lakeridge* at para 149). At the time this request for exemption from mandatory vaccination was requested, vaccination rates across Canada were only beginning to acquire the critical mass necessary to stall the spread of widespread death.

[120] It would be unreasonable, in my view, to undertake findings in this matter without the appropriate context urged by the Employer. In *Empower Simcoe*, which involved different facts but similar context, the Divisional Court brought the critical context of public safety to its analysis with these words:

> [76] As has been noted throughout the submissions of Empower Simcoe with which I agree, the COVID-19 global pandemic required an immediate response in order to attempt to reduce the spread of a potentially deadly virus in circumstances in which full and complete information was not available but the well founded fear of a worst case scenario prompted a swift and firm response from public health officials and the institutions which they are responsible to advise.
>
> [77] As an historical footnote, I am mindful that after the deadly SARS outbreak in 2003, a Commission of Inquiry was established to review information, conduct public hearings, and make recommendations designed to prevent such a tragedy from ever reoccurring. In the executive summary of its report released in 2006 following an exhaustive inquiry, the Commission of Inquiry offered as one of its main recommendations the adoption of what it referred to as the "precautionary principle". That principle was articulated as follows: where there is reasonable evidence of an impending threat to public harm, it is inappropriate to require proof of causation beyond a reasonable doubt before taking steps to avert the threat. Reasonable steps need not await scientific proof.

> [78] In my view, the decisions of the OHRT in this case, given the fluid state of knowledge about the health emergency, required too high a degree of proof of danger and harm to be demonstrated by Empower Simcoe to justify the steps that took over those early months in 2020 to protect the health and safety of its residents,... as well as members of its staff and other persons who were required to enter the premises.
>
> [79] Despite all earlier admonitions of the SARS Commission of Inquiry, adequate supplies PPE were not readily available to Empower Simcoe at that time. The mechanics of how the virus could spread and the extent of the damage it might cause to those exposed - including persons with vulnerabilities - were not fully understood. Although these considerations do not justify any wholesale trampling of individual rights, they must be given adequate weight when steps are taken in good faith in an effort to protect those individuals and the public at large from extreme danger. In my view, the HRTO decisions do not give adequate attention to these considerations of public protection and urgency that form the context within with [sic] Empower Simcoe was required to act. Accordingly, this failure is ultimately a flaw that infects the internal rational of the HRTO decisions such as to render them unreasonable.

[121] This Employer, as others in the sector, was required to conduct the balance between safety and individual rights under tremendous pressure, and with its priority clearly focused on protection of its vulnerable patients. In a public hospital setting, I would have held that it was reasonable to conclude that no degree of risk from unvaccinated employees was appropriate to those working in patient care areas, in close proximity to other staff, or in direct public-facing positions. It would have amounted to undue hardship upon the Employer had it permitted unvaccinated employees, including this grievor, to come into contact with patients, other staff, and members of the public. I am supported in this view by the many arbitral awards that have considered reasonable the mandatory vaccination policies of health sector employers, including the award relied upon by the Employer in this case, *Lakeridge* (at para 177).

[122] Based on the evidence heard, and even in this case of a legitimate high regard for safety, I am satisfied that had the Employer undergone the exercise of assessing the risk that this grievor posed, and examined in detail how that risk could have been minimized, it was likely to have found suitable reasonable accommodation for this grievor, enabling him

to perform in his own job of senior electrician, by modifying his daily routine, by re-organizing electrician tasks in such a way that he avoided contact with patients, coworkers, other staff and members of the public. This finding is consistent with the Employer's concession of a violation of the duty to accommodate. This was an environment in which electricians knew their responsibilities, organised the workflow among themselves, supported each other when someone needed modification or assistance, and operated in a flexible but efficient and cooperative setting. By accepting some inconvenience, some "hardship", I conclude that this employer was likely to have identified the appropriate accommodations necessary to meet its appropriately high standard of safety concern, while enabling the grievor to continue working as an electrician.

[123] To be specific, the grievor might have been required to mask and shield at all times when in the premises, and to submit to frequent testing. The grievor might have been required to work in administrative, office and clinical areas after regular working hours when these spaces were empty of patients and staff. The grievor might have worked in isolation in the electrician's workshop in the basement of the facility, excluding others from that space when he was present, while performing the routine maintenance and repair work of the electrician. He might have been called to other areas of the facility to complete work orders when these were unoccupied. The evidence supports a number of options that could have been bundled together, perhaps with some inconvenience and hardship on the part of the Employer, in order to maintain this man's employment and dignity.

[124] Had that exercise not resulted in a reasonable accommodation the Employer ought to have looked outside the grievor's own job to other positions in the organisation, for the purpose of identifying what other positions he might have been suited to perform, given his skill and experience.

[125] In the interests of thoroughness, I add that there is evidence that the Employer had accommodated at least one other employee in the workplace who was granted exemption from vaccination on a medical ground, while the Employer awaited medical review of the request. This individual was employed in an administrative capacity in an office, but had

some contact with others in the workplace. Masking and distancing were implemented. This evidence revealed that the Employer was prepared to accept some minimal and controlled risk by employing this individual, at least on a temporary basis, when the foundation of the exemption request was based on medical and not religious grounds. This evidence undermines the suggestion that any means of accommodating this grievor would have caused undue hardship.

[126] In addition to these procedural failings, the Employer failed to provide this grievor with any accommodation in any form. It treated him in the same manner that it treated those asserting exemption requests based on personal concerns. The Employer enacted a reasonable policy of requiring mandatory vaccination subject to exemption for those with valid medical and religious grounds. The Employer, in the end, failed to abide by its own policy.

Conclusions

[127] The employer violated the Code and the collective agreement in two significant ways.

[128] First, the employer rejected the grievor's religious objection on the basis that it lacked sincerity. It came to that conclusion without bringing a genuine curiosity to the task of inquiring into the objection. It designated a manager to do that but failed to follow up with that manager to get the benefit of his impressions. It demanded attestation from a faith leader, (contrary to the OHC guidelines and contrary to the jurisprudence), then disregarded the attestation without evaluation or reason. It did not conduct a good faith inquiry into the request for exemption, but dismissed it summarily. It provided no reasoning for its refusal of the request because there was no reasoned foundation upon which it could have done so.

[129] Second, the employer failed to meet its procedural and substantive obligation to accommodate the grievor's sincerely held religious claim for exemption from mandatory

vaccination. Although his Manager took it upon himself to examine the electrician's daily activities from work orders in a laudable effort to find some way to accommodate the grievor, the Employer did not conduct a meaningful assessment of potential accommodation options. No conversation was held with the grievor to explore accommodation possibilities, no examination of his duties was performed, no risk assessment was conducted. No examination was performed of what modifications could have been made to the grievor's work to enable him to continue working in his own position, through the bundling of tasks and adjustment of working hours. The conclusion that he could not be accommodated, I am convinced, flowed from the original determination that the claim was not sincere and did not warrant the effort of meaningful investigation.

[130] These two violations of the Code and the collective agreement warrant remedy. The matter is remitted back to the parties for consideration of remedy, failing resolution of which, I remain seised.

DATED at TORONTO this 3rd day of December, 2025

Elaine Newman

Elaine Newman, Arbitrator