IN THE MATTER OF AN ARBITRATION

B E T W E E N

HAMILTON HEALTH SCIENCES CORPORATION

(the "Hospital")

- AND -

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 7800

(the "Union" or "CUPE")

Individual COVID-19 Termination Grievances

Before:	John Stout – Chair Robert Little – Hospital Nominee Joseph Herbert – Union Nominee
Appearances	
For the Hospital:	Matthew Mihailovich (Counsel) Amanda Cohen (Counsel) Brooklyn Hallam (Counsel) Erin Cardwell (Senior Employee & Labour Relations Specialist)
For the Union:	Ryan Newell (Counsel) Jane Zhang (Counsel) Sophie Abbatt (Counsel) Kevin Cook (OCHU First Vice-President) Jillian Watt (President) Kim O'Hearn (Vice-President) Edward Harris (CUPE Representative) Trina Ritchie (Grievor)

AWARD

Introduction.

1. This award deals with the individual termination grievances filed on behalf of several former CUPE employees (the "Grievors"). The Grievors in each case were terminated from their employment with the Hospital for non-compliance with the Hospital's COVID-19 Vaccination Management Policy (the "Policy").

2. The parties were unable to resolve the grievances by mediation and proceeded to a hearing.

3. This matter was initially referred and heard before a Board of Arbitration chaired by the late Arbitrator Larry Steinberg. The parties agreed to appoint Arbitrator Stout as a replacement chair following his passing.

4. As set out below, the Board and counsel for the Hospital and the Union took strides to ensure that this case was fully documented through an agreed statement of facts, will say statements, extensive expert reports and transcripts of the expert testimony. The Board has reviewed this documentary record in making our decision below.

5. For the reasons outlined below, we have determined that the Hospital had cause to terminate the Grievors' employment but that, given the specific and unique circumstances of this case, the Grievors are entitled to their termination and severance entitlements under the *Employment Standards Act, 2000* (the "ESA").

The Facts

6. The parties relied on an agreed statement of facts (the "ASF"), which the Hospital supplemented with will say statements from Aaron Levo, the Vice President, Culture & Communications, and Susan Fuciarelli, the Director, Health, Safety & Wellness.

7. In setting out the facts of this case, the parties have referred to the specific communications and circumstances surrounding one of the individual Grievors, Trina Ritchie. A full list of all of the Grievors and grievances covered by this decision is included at Appendix A to this award.

8. Both parties also called evidence from expert witnesses – Dr. Neil Rau for the Union and Dr. Mark Loeb for the Hospital. Dr. Rau and Dr. Loeb prepared expert reports and reply reports responding to each other's expert reports that were entered into evidence. The experts testified in the presence of a court reporter.

9. A shortened version of the ASF, removing background paragraphs on the COVID-19 pandemic and the roll-out of the Directive and with the citations included by the parties, is reproduced below:

> **The Parties**
>
> 1. Hamilton Health Sciences Corporation (the "Hospital" or "HHS") operates a full-service public hospital that serves the City of Hamilton, the Town of Grimsby and the surrounding areas.
>
> 2. The Canadian Union of Public Employees ("CUPE" or the "Union"), Local 7800 represents service, office and clerical employees at the Hospital.
>
> 3. The Grievor was a full time Porter at the Hospital and a member of the CUPE bargaining unit. She started her employment with the Hospital on January 15, 2001. She was terminated on January 26, 2022 for non-compliance with the Hospital's COVID-19 Vaccination Management Policy (the "Policy"). At the time of termination, the Grievor's rate of pay was $24.8531 per hour.
>
> […]
>
> **The Hospital's Response to the COVID-19 Pandemic and Outbreaks**
>
> 50. The Hospital implemented numerous measures to protect its staff and patients against COVID-19 in accordance with provincial and public health regulations, guidelines and recommendations, from March 2020 onwards including but not limited to:
>
> > (a) Implementing screening measures for all staff and visitors to the Hospital, including assigning staff to Hospital actively screen visitors and initiating use of a symptom screening app for staff which reported any symptoms to Occupational Health;
> >
> > (b) Increasing the frequency of the cleaning and disinfecting of common areas and high touch points;
> >
> > (c) Posting signs to remind individuals about the importance of various hygienic measures such as washing hands;
> >
> > (d) Reassigned staff to work remotely where feasible;

(e) Physical distancing requirements were implemented across the Hospital.

(f) All staff were expected to maintain 6 feet of space between their colleagues. Significant changes were implemented in work areas, break rooms and patient waiting areas to accommodate these spacing requirements;

(g) Limits on meeting in person were instituted and maintained with all work-related meetings shifting to a virtual format where that was possible;

(h) Providing personal protective equipment to staff and implementing universal masking for staff, patients, and visitors;

(i) In clinical areas, implementing a high standard for personal protection equipment including implementing the requirement that all staff wear eye protection, a face shield, and medical grade masks when providing care to patients;

(j) Requiring all individuals in the Hospital to wear a mask at all times;

(k) Limiting the number of visitors per patient as necessary (i.e. during outbreaks, etc.);

(l) Restricting visitors to patient's rooms and precluding them from visiting common areas; and

(m) Implementing daily inpatient assessment for COVID symptoms.

51. All staff at HHS were provided with appropriate Personal Protective Equipment depending on their work environment including: face masks, gowns, and gloves. Staff in certain areas were also provided with face shields pursuant to IPAC's policy.

52. The Hospital implemented numerous steps to encourage social distancing at the Hospital. This included:

(a) converting meeting spaces into additional break rooms;

(b) placing stickers to indicate where staff should sit to ensure adequate spacing;

(c) placing signage and capacity lists in elevators and meeting rooms;

(d) removing tables and seating in rooms to reduce capacity;

(e) installing physical partitions including plexiglass screens;

(f) putting physical distancing stickers on the floor where lines tended to form;

(g) placing signage that reinforced physical distancing; and

(h) physically distancing patients in waiting rooms.

53. From the time that vaccines against COVID-19 first became available in Canada, the Hospital has consistently promoted vaccination for all of its employees. On or around December 24, 2020, the Hospital first invited staff working in patient care areas to get vaccinated. These communications provided "There may be a few residual doses (perhaps 5-10) available each day because of 'no-shows' or because people who were scheduled to receive the vaccine couldn't do so. To avoid wasting any doses, a few hospital workers from both HHS and St. Joseph's Healthcare Hamilton, may be identified every day to receive any remaining vaccine". These communications are attached at **Tab 5**.

54. The Hospital has also sent multiple memorandums and emails to staff throughout 2021 encouraging them to get vaccinated, and inviting them to various sessions to provide additional information about the COVID-19 vaccines. A copy of some of these memorandums and emails are attached at **Tab 6**.

55. On August 17, 2021, the same day the CMOH had issued Directive #6, the Hospital sent an HHS Dispatch email to all staff notifying them of the new directive. The email encouraged staff to get fully vaccinated and provided a link to help employees find the closest vaccination appointment. A copy of that email is attached at **Tab 7**. A follow up HHS Dispatch email was sent by the Hospital on August 20, 2021 (attached at **Tab 8**). The Hospital's senior

leadership also sent a Memorandum to all staff on August 19, 2021 about the introduction of Directive #6 and reiterated the importance of the COVID-19 vaccination. A copy of this memorandum is attached at **Tab 9**.

56. On August 19, 2021, the Presidents and CEOs of the Hamilton Niagara Haldimand Brant and Burlington (HNHBB) region hospitals issued a joint statement on the implementation of vaccination policies. The HNHBB statement also indicated that Hospitals would be required to implement regular and mandatory testing of individuals who were not fully vaccinated. A copy of this statement is attached at **Tab 10**.

57. Between August 19, 2021 and September 7, 2021, the Hospital continued to send updates to staff regarding the upcoming vaccination policy and expectations around vaccination (**Tab 11**).

58. On August 24, 2021, a memorandum was sent to all staff reminding them to submit their proof of vacation. The memorandum also advised that all Hospital's in the region – including HHS – would be implementing mandatory vaccination for new hires as of September 7, 2021 and would be working towards achieving a goal of 100% vaccination for all staff, physicians, students, contractors and volunteers (attached at **Tab 12**).

59. A follow up HHS Dispatch email and a memorandum was sent to all staff on August 30, 2021 advising staff they were required to submit their proof of vaccination by no later than September 1, 2021 (**Tab 13**). Further emails and memorandums were sent to all staff on September 1, 2021, September 3, 2021 and September 7, 2021 reminding staff to submit their proof of vaccination status (see **Tab 11**).

60. The Hospital also hosted a Town Hall for staff and physicians on September 2, 2021. The purpose of the Town Hall was to provide information on the requirements to Directive #6, as well as the decision of regional hospitals to require mandatory full vaccination for all new hires. At this time, the Hospital had 13 COVID-19 cases in the ICU, 15

ward level COVID-19 patients and 5 patients on extracorporeal membrane oxygenation ("ECMO").[1]

61. In this Town Hall presentation, the Hospital communicated that HNHBB hospitals were aligned with a goal of "100% vaccination of all staff, physicians and volunteers". A copy of the Town Hall slideshow presented to staff in attendance is attached at **Tab 14**.

The Hospital's Vaccination Management Policy

The Hospital's Initial Policy

62. On September 7, 2021, the Hospital implemented its COVID-19 Vaccination Policy which is as attached at **Tab 15** to this ASF (the "Initial Policy").

63. The Initial Policy was a vaccinate or test policy. Under the Initial Policy all regulated health professions, staff, physicians, volunteers, students and contractors ("Health Care Workers" or "HCW") were required to provide proof of vaccination, written proof of a medical reason or participate in the Hospital rapid antigen testing program.[2] The Initial Policy required submission to rapid antigen testing no more than 48 hours before the start of a shift and at least two times per week. Workers were required to demonstrate a negative test in order to work. Rapid antigen tests were provided by the Hospital at no cost to the employee.

64. On September 8, 2021, HHS' President and CEO Rob MacIsaac sent a memorandum to all staff advising of the implementation of the Initial Policy. A copy of this memorandum is attached at **Tab 16**.

65. The Hospital hosted a Town Hall regarding the Initial Policy on September 9, 2021. A copy of the Town Hall slideshow presented to staff in attendance is attached at **Tab 17**. During this Town Hall, the Hospital communicated that a failure to comply with the Initial Policy could result in an unpaid leave and/or discipline up to and including termination. The Hospital also communicated to staff that non-compliance mechanisms would begin to be enforced by September 21, 2021.

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[1] The Union does not dispute that this data was provided in the Town Hall presentation at Tab 14 but cannot verify the accuracy of the statistics provided therein.

[2] Tab 15, Policy, page 6.

66. The Hospital had internal discussions regarding potential consequences of non-compliance with the Initial Policy. A copy of some emails regarding this discussion are attached at **Tab 46**.

67. Highlights of the Town Hall meetings were recorded and were made available to employees who did not attend through the HHS Dispatch memos that were sent out to all staff. A sample of these HHS Dispatch memos are attached at **Tab 18**.

The Hospital's Revised Policy

68. The Hospital revised the Policy on September 13, 2021 (the "Revised Policy"). A copy of the revised Policy is attached at **Tab 19**. At this time, the Hospital had 16 COVID-19 cases in the ICU, 10 ward level COVID-19 patients and 7 patients on ECMO. Further, on average, 90-92% of all COVID positive inpatients were unvaccinated and 99-100% of COVID positive inpatients in the ICU were unvaccinated.[3] Another Town Hall was hosted in or around September 16, 2021. A copy of the Town Hall slideshow presented to staff is attached at **Tab 20.** [4]

69. The Revised Policy revised the dates for testing. Under the Revised Policy, workers who were unvaccinated were required to submit to rapid antigen testing on Mondays and Thursday.

70. Another Town Hall was hosted by the Hospital on September 30, 2021. A copy of the Town Hall slideshow presented to staff in attendance is attached at **Tab 21**. As of September 30, 2021, the Hospital had 13 COVID-19 cases in the ICU, 8 ward level COVID-19 patients and 8 patients on ECMO.[5]

71. On September 30, 2021, Director, Employee Labour Relations and Human Rights, Tiffany Roblin, sent an email to union leaders with respect to the Policy, which provided, in part, as follows:

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[3] The Union does not dispute that this data was provided in the Town Hall Presentation at Tab 19 but cannot verify the accuracy of the statistics provided therein.

[4] The Union cannot verify the date of the Town Hall Presentation at Tab 20.

[5] The Union does not dispute that this data was provided in the Town Hall Presentation at Tab 21 but cannot verify the accuracy of the statistics provided therein.

> Please note that the Hospital will begin enforcement of non-compliance mechanisms early next week with respect to our *COVID-19 Vaccination Management* policy. We have provided sufficient time and have followed up directly with staff to become compliant with the policy that came into effect on September 7.
>
> This will mean that as we work through the various groups of non-compliance, staff will be disciplined absent a reasonable explanation. Discipline will include suspension up to 3 days at this stage. This approach may reasonably change at the Hospital's discretion in the coming weeks.
>
> We will initially focus on those who have issued the hospital "legal liability" letters contesting our policy and who remain non-compliant, as well as those who have outright refused compliance when their leader has followed up with them. Also in this initial group will be anyone found to be non-compliant with testing obligations as those audits are conducted over the next week or two.

72. Ms. Roblin sent a further email on October 1, 2021 which stated, in part, as follows:

> The level of discipline will be determined by the circumstances (i.e., type of non-compliance) and based upon the employee's response in the meeting with the hospital and their union representative.
>
> Folks will be familiar with the various steps being taken across the province in order to ensure compliance with vaccination management policies. We believe that staff have been given an appropriate amount of time and notification (both verbal and written) to become compliant with our current policy. Anything short of a suspension will not result in any changed behaviour by these staff.
>
> The steps being taken are also consistent with our regional peers.

73. A copy this email exchange is attached as **Tab 22**.

The Hospital's Mandatory Vaccination Policy

74. On October 7, 2021, Mr. MacIsaac sent another memorandum of all HHS staff announcing that the Hospital would be adopting a mandatory vaccination policy (the "Mandatory Policy"). This memorandum is attached as **Tab 23** and reads in part:

> Effective November 30, 2021, Hamilton Health Sciences (HHS) will require all our staff and physicians to be fully vaccinated for COVID-19, subject only to limited exemptions. Our approach to this matter is consistent with other Ontario hospitals who have also implemented mandatory vaccination policies.
>
> This development is consistent with the direction I have been communicating at our town halls for many weeks. As a leading health science organization, HHS has a responsibility to safeguard our patients, our workforce, and our community from the threat of COVID-19, using evidence-based approaches. We have not provided more than ample time, opportunity, and guidance for our workforce to take on this responsibility.
>
> Unfortunately, we continue to fall short of our goal of 100 per cent vaccination rate for our workers. Moreover, there are those who are not respecting even our current requirements of reporting and testing. Since September 7, 2021, HHS' COVID-19 Vaccination Management Policy requires all staff and physicians to report their vaccination status. As of October 5, 2021, 97 per cent of HHS staff and physicians have reported their vaccination status. Of those, 92 per cent or over 11,750 individuals are fully vaccinated.[6]
>
> Effective this week, those who have still not complied with the current policy will be subject to disciplinary measures, including unpaid leave(s) of absence and/or dismissal. This includes individuals who have not reported their vaccination status and those who are not complying with education and self-testing requirements.

[6] The Union does not dispute that this dispute that this data was provided in the Revised Policy at Tab 23 but cannot verify the accuracy of the statistics provided therein.

> The deadline for mandatory vaccination of November 30, 2021 gives all unvaccinated and partially-vaccinated individuals a last chance to receive first and/or second doses. After that time, individuals who are not in compliance with our mandatory vaccination policy will be subject to disciplinary measures up to and including dismissal.

75. The Mandatory Policy provided that in order to be in compliant, staff were required to do the following by November 30, 2021:

> (a) Provide proof of vaccination, or an approved medical or human rights exemption by November 30, 2021; and
>
> (b) Continue participating in mandatory rapid antigen testing until the employee was fully vaccinated.[7]

76. Workers seeking a non-medical or human rights exemption were required to submit a request for an exemption by October 15, 2021.

77. The Hospital hosted another Town Hall on October 7, 2021. A copy of the slideshow presented to staff in attendance at the Town Hall is attached at **Tab 24.** During the Town Hall, the Hospital outlined the timeline for compliance with the mandatory requirements under the Mandatory Policy. Staff were advised that they were required to receive their first dose by October 19, 2021.

78. Between October 7, 2021 and October 19, 2021 the Hospital continued to send updates to staff regarding the requirements under the Mandatory Policy and the timelines for compliance. A copy of these communications are attached at **Tab 25**.

79. On October 14, 2021, the Hospital sent emails directly to staff who had not provided proof of compliance with the Mandatory Policy.

80. The Hospital hosted another Town Hall on October 28, 2021. A copy of the presentation made to staff in attendance in this Town Hall is attached at **Tab 26**. At that time, the Hospital had 8 COVID-19 cases in the ICU, 15 ward level

[7] Fact sheet on HHS Covid policy October 7.

COVID-19 patients and 3 patients on ECMO.[8] The Hospital also communicated the following updates with respect to vaccination compliance:

> (a) 99% of the Hospital's staff and physicians had reported their vaccination status to the Hospital[9]
>
> (b) Of the 99% who had reported, 93.5% were fully vaccinated which was 500 more than October 7 (when the Policy was implemented)[10]
>
> (c) Vaccinated individuals represented 92.6% of all Hospital health care workers[11]
>
> (d) 4% of all employees/physicians remained unvaccinated[12]

81. On November 4, 2021, Mr. MacIsaac sent another memorandum to all staff. The memo confirmed that HHS would be proceeding with the implementation of the mandatory vaccination requirement of the Policy notwithstanding the provincial government's decision not to make COVID-19 vaccination mandatory for all hospital healthcare workers. A copy of the memorandum is attached at **Tab 27**.

82. On November 9, 2021, HHS updated the policy document to reflect the mandatory vaccination requirement that would be effective as of November 30, 2021. A copy of the Mandatory Policy is attached at **Tab 28**.

83. On November 16, 2021, HHS sent another HHS Dispatch email advising staff that it was standing by its mandatory vaccination policy coming into effect on November 30, 2021 and that this position was based on the science showing that vaccines are a safe and effective tool

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[8] The Union does not dispute that this data was provided in the Town Hall Presentation at Tab 26, but cannot verify the accuracy of the statistics provided therein.

[9] The Union does not dispute that this data was provided in the Town Hall Presentation at Tab 26, but cannot verify the accuracy of the statistics provided therein.

[10] The Union does not dispute that this data was provided in the Town Hall Presentation at Tab 26, but cannot verify the accuracy of the statistics provided therein.

[11] The Union does not dispute that this data was provided in the Town Hall Presentation at Tab 26, but cannot verify the accuracy of the statistics provided therein.

[12] The Union does not dispute that this data was provided in the Town Hall Presentation at Tab 26, but cannot verify the accuracy of the statistics provided therein.

against COVID-19. A copy of the HHS dispatch is attached at **Tab 29**.

84. On November 25, 2021, Mr. MacIsaac sent a memorandum to all staff regarding compliance with the Mandatory Policy. A copy of the memorandum is attached at **Tab 30** and reads in part:

> In September, Hamilton Health Sciences (HHS) implemented its vaccination management policy which requires all staff and physicians to disclose their vaccination status. Those who have not disclosed have been required to complete their regular rapid testing.
>
> HHS has provided ample time for everyone to comply with the vaccination management policy with the first requirements coming into effect nearly three months ago.
>
> To date, 68 individuals have been subjects of our discipline process for not complying with reporting or testing. This includes seven dismissals. **Between now and November 30, all individuals who have still not reported their vaccination status will receive notice of immediate termination**.
>
> Next, on November 30, is the HHS mandatory vaccination component of the policy coming into effect. It requires all HHS staff and physicians to be fully vaccinated against COVID-19. As of today, more than 96% of HHS' workforce have complied.[13] This means that just over 360 staff and fewer than five physicians remain unvaccinated.[14]
>
> With the deadline for mandatory vaccination requirement coming on November 30, the following measures will be taken:
>
> - **Staff and physicians who are not fully vaccinated by November 30 will receive a notice of termination on December 1, effective January 26, 2022. However, this termination notice may be**

[13] The Union does not dispute that this data was provided in the Memorandum at Tab 30 but cannot verify the accuracy of the statistics provided therein.

[14] The Union does not dispute that this data was provided in the Memorandum at Tab 30 but cannot verify the accuracy of the statistics provided therein.

rescinded if employees become fully vaccinated by January 26 (this means getting their second dose on, or before, January 12).

- Individuals who have received a single vaccine dose by the deadline will have the opportunity to avoid termination by signing a written agreement, undertaking to become fully vaccinated by January 26, 2022. Those who don't meet this commitment will be terminated, effective January 26.

- Medical reporting for those who are unvaccinated and choose to go on sick leave following November 30 will be closely scrutinized. Those without a legitimate reason, according to Health, Safety and Wellness processes or policies, will not have their medical leave approved.

85. The Hospital delivered another Town Hall presentation on November 25, 2021 which was offered to all staff and which provided an update on the Mandatory Policy and the requirements for compliance. The Hospital communicated that those who remained unvaccinated as of November 30, 2021 would receive a notice of termination on December 1, 2021 with termination effective January 26, 2022. A copy of the presentation that was delivered to staff in attendance in the Town Hall is attached at **Tab 31**.

86. Staff who did not provide proof of two doses of a two-dose COVID-19 vaccine series or one does of a one-dose COVID-19 vaccine series who were actively working for the Hospital and who did not have a valid exemption to the Mandatory Policy were provided with a notice of termination following the November 30, 2021 deadline.

87. The Hospital had 212 confirmed positive COVID cases and 4 COVID related deaths in December of 2021 and 716 confirmed positive COVID cases and 34 COVID related deaths in January of 2022.[15] A summary of the data regarding COVID-19 positive patient cases and deaths and COVID-19 positive staff cases is included at **Tab 4**.

88. On January 6, 2022, Ms. Bonenfant advised union leaders that despite Niagara Health System's decision to

[15] The Union does not dispute that this data was provided in the Summary Document at Tab 4 but cannot verify the accuracy of the statistics provided therein.

pause its mandatory vaccination policy due to staffing shortages, HHS would continue to enforce the policy. A copy of Ms. Bonenfant's email dated January 6, 2022 is at **Tab 32**.

89. On January 10, 2022, Ms. Bonenfant advised union leaders that an employee who is not fully vaccinated is required to continue to conduct and report their Rapid Antigen Self-Testing results on Mondays and Thursdays. Ms. Bonenfant noted in her email that "there are approximately 60 staff who have failed to submit their [Rapid Antigen Self-Testing] results since December 2, 2021 and will be issued a Notice of Termination to take effect prior to January 26, 2022." The email also noted that if these employees submit their test results within the deadline, the termination would be voided, but the Termination Notice issued to them in December for January 26, 2022 would remain in effect. A copy of Ms. Bonenfant's email dated January 10, 2022 is at **Tab 33**.

90. As set out in the memorandums and HHS Dispatch emails included above, the rate of vaccination among active HHS staff, was as below on the following dates:[16]

(a) September 30, 2021 – 92% **(Tab 21)**

(b) October 5, 2021 – 92% **(Tab 24)**

(c) October 28, 2021 – 93.5% **(Tab 26)**

(d) November 16, 2021 – 95.8% **(Tab 34)**

(e) November 25, 2021 – 96% **(Tabs 30, 31)**

(f) January 26, 2022 – 98% **(Tab 35)**

91. The Hospital terminated the employment of 138 staff, including 70 members of the Union, on January 26, 2022 for non-compliance with the Mandatory Policy.

Relevant Hospital Policies

92. At the material times, HHS had in place the following policies relating to pandemic and outbreak management at the Hospital, attached at Tabs **36** to **40**.

[16] The Union cannot verify the accuracy of the statistics provided therein.

(a) Health, Safety and Wellness Policy;

(b) Joint Health & Safety Committee Workplace Inspection Protocol;

(c) Regional Hospitals Infection Prevention & Control: IC – Outbreak Investigation and Management Policy;

(d) Communicable Disease Protocol; and

(e) Footwear and Personal Protective Equipment Policy

The Grievance

93. On October 14, 2021, the Hospital wrote to the Grievor advising of her continued non-compliance with the Policy and reminding her of the deadline for mandatory vaccination. The Hospital warned that individuals who were not in compliance with the mandatory policy by November 30, 2021 would be subject to disciplinary measures up to and including dismissal (**Tab 41**).

94. On October 29, 2021, the Hospital sent another reminder letter to the Grievor advising her of her continued non-compliance with the Policy. The letter advised that on November 30, 2021 individuals who were not in compliance with the Hospital's mandatory vaccination policy would be subject to discipline measures up to and including dismissal (**Tab 42**).

95. On December 1, 2021, the Hospital provided notice of termination, effective January 26, 2022, to the Grievor (**Tab 43**).

96. The Grievor was provided a final notice of termination on January 19, 2022 (**Tab 44**).

97. The Hospital terminated the Grievor effective January 26, 2022.

98. The Grievor actively worked (and complied with testing requirements) until the date of her termination.

99. CUPE filed a Grievance on behalf of the Grievor on January 31, 2022. A copy of the Grievance is attached at **Tab 45**.

10. All of the documents noted as Tabs to the ASF were filed as evidence in this proceeding.

The Expert Evidence

11. Dr. Rau and Dr. Loeb both prepared reports and reply reports. Although both experts agreed on a number of points there was a clear divergence on the effectiveness of vaccines in protecting employees in the workplace.

12. Dr. Loeb acknowledged that vaccine effectiveness wanes over time and that the effectiveness of the vaccines changed as different strains of the COVID-19 variants emerged and became dominant. He maintained, however, that by virtue of vaccination alone or by hybrid immunity individuals who were vaccinated were more protected from COVID-19 and remained more protected into the early fall of 2023. His evidence was that the science supported a policy requiring health care workers to be vaccinated with two doses until the fall of 2023.

13. Dr. Rau focused his evidence on the lack of effectiveness of COVID-19 vaccines to prevent infection, and in turn, transmission. In his opinion, as of January 2022 it was clear that vaccines did not protect against infection or transmission. His evidence focused on the waning effectiveness of COVID-19 vaccines. Dr. Rau opined that the Policy, which mandated vaccination, was not supported by the available science when the Grievor was terminated in January of 2022.

14. In considering the evidence of both experts, we agree with the comments made by Arbitrator Hayes in *Quinte Health v. Ontario Nurses' Association*, 2024 CanLII 14991 and reiterated by Arbitrator Nyman in *Orillia Soldiers Memorial Hospital v. Ontario Nurses' Association,* 2025 CanLII 73709. These cases are "not to be resolved by choosing the opinion of one expert over the other". The issues before the Board are labour relations issues that are to be decided applying labour relations principles.

The Hospital's Evidence

15. Ms. Fuciarelli participated in the Subject Matter Expert (SME) group on behalf of HHS. She was also part of the Incident Management System (IMS) team, which was tasked with the implementation of the Hospital's response to the pandemic. As the Director, Health, Safety & Wellness, Ms. Fuciarelli was also involved in the development and implementation of the Policy.

16. Mr. Levo was also part of the IMS team. In addition, he was part of the President's Team, which is the executive group tasked with strategic and enterprise-wide decision making. The focus of the President's Team during COVID-19 was on risk management and on balancing the impact of the COVID-19 pandemic against the hospital's operational needs.

17. Both Ms. Fuciarelli and Mr. Levo testified (via will-say statements) that the pandemic placed an unprecedented strain on the hospital and its staff. Both also

testified to the communications that were provided by the Hospital to staff and the importance that HHS placed on staff receiving vaccinations and the hospital reaching a 100% vaccination rate.

18. Both of the hospital's witnesses also testified to the internal discussions that occurred within HHS regarding a move to a mandatory vaccination policy and the discussions regarding the appropriate consequences for non-compliance with the Policy. The hospital's witnesses spoke to the fact that a relevant consideration was the approach that was being taken by other Ontario hospitals and hospitals within the region. Another key consideration was the seriousness of non-compliance with a health and safety policy.

19. Ms. Fuciarelli also provided evidence about the reason for HHS's decision to provide notice on December 1, 2021 and to make the effective date of termination January 26, 2022. She testified to the fact that the hospital wanted to ensure that staff had ample opportunity to make their decision on vaccination with a full understanding of the consequences for non-compliance.

Analysis and Decision

20. It is now well-established in the healthcare sector that the imposition of a mandatory COVID-19 vaccination policy in the context of the COVID-19 pandemic and issuance of Directive 6 is reasonable.

21. The Grievors in this case were terminated in or around January and February of 2022. We accept Dr. Loeb's opinion that the Policy remained reasonable and supported by the scientific evidence at that time. This same conclusion was reached by Arbitrator Nyman in *Orillia Soldiers*.

22. Having accepted that the Policy was reasonable at the time that the Grievors were terminated, the issue becomes whether the Hospital had just cause to terminate their employment. In line with the test set out in the seminal decision in *William Scott & Co. v. C.F.A.W., Local P-162,* 1976 CarswellBC 518 (BCLRB) that requires the Board to consider first, whether the breach of the Hospital's mandatory vaccination policy provided grounds for discipline and then, whether termination was excessive in the circumstances.

23. Arbitrator Wright succinctly addressed this first question in his decision in *Ontario Shores Centre for Mental Health Sciences and OPSEU,* 2025 CanLII 70376. In considering the conclusions of the Divisional Court in *Humber River Health v. Teamsters Local Union No. 419,* 2025 ONSC 2270*,* Arbitrator Wright wrote:

> [46] From the foregoing, the Union is no doubt correct in asserting that the Court's decision is binding in the two respects it identifies: first, for the proposition that it is unreasonable to conclude that an employee can never be disciplined for breaching a mandatory vaccination policy; and second, for the proposition that arbitrators must balance employee rights and employer needs in the context of the COVID-19 pandemic. However, I find

> that the Court's decision is broader than that. At paragraph 57 of the decision, the Court found that the Arbitrator's decision was unreasonable not only because it failed to balance the safety risks posed to the hospital's patients and staff by the pandemic against the individual's privacy interests, but also because "the Arbitrator failed to consider that Humber was under a legal obligation to ensure compliance with its vaccination policy". The Court arrived at that conclusion based on its analysis in *Central West LHIN*, an award which it said "definitively upholds an enforcement mechanism that includes potential disciplinary termination from employment for non-compliance". The Court also began its analysis of *Central West LHIN* by nothing that the arbitrator "found that whether there was a 'less intrusive' alternative, such as placing employees on indefinite leaves of absence, applies only to an analysis of the reasonableness of the mandatory vaccination requirement, not to the consequences of non-compliance". In short, the Court found that in order for an employer to ensure compliance with its mandatory vaccination policy, a breach of that policy must, by itself, provide grounds for a disciplinary response that may include the potential for termination. Based on the foregoing, I conclude that the Court's decision in *Humber River Health* is binding authority for the proposition that a breach of a reasonable mandatory vaccination policy provides grounds for discipline without an employer having to prove some special circumstance exists over and above the pandemic, as such discipline is required to ensure compliance. At a bare minimum, the Court's decision is highly persuasive authority for that proposition of law.

24. We agree with Arbitrator Wright's statements above. This same finding was also supported by Arbitrator Goodfellow in *Central West LHIN v. Canadian Union of Public Employees, Local 966,* 2023 CanLII 58388 and Arbitrator Wright in *London Health Sciences Centre v. Unifor, Local 27,* 2024 CanLII 48714. The Grievors failed to comply with a reasonable health and safety rule that was imposed by the Hospital. That failure was misconduct that warranted a disciplinary response.

25. The answer to the second question, namely whether the termination of the Grievors was excessive, fall on the particular circumstances of these cases, which are unique. The Hospital provided the Grievors with a notice of termination on or around December 1, 2021. The notice advised that their termination would be effective two months later, around January 26, 2022 unless they provided proof in the interim that they were vaccinated, at which point the notice of termination would be voided.

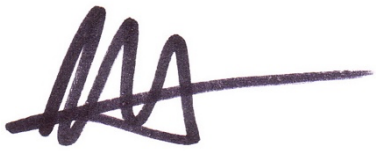
26. In the circumstances of this case, we find that the Grievors were terminated for just cause. However, given the unique facts of this case and the specific manner in which the Hospital opted to implement the termination under its Policy, we find that the Grievors are not disentitled to termination and severance pay pursuant to the ESA. We find that this approach is also consistent with this Chair's previous

decision in *William Osler Health System v. CUPE, Local 145*. The unique circumstances in this case call for a similarly unique result.

27. Accordingly, we order that the Hospital provide the Grievors with their termination pay and severance pay calculated in accordance with the *ESA*.

28. The grievances are partially allowed. We remain seized should any difficulties arise in implementing this award.

Dated at the the Township of The Archipelago, Ontario this 8th day of July 2026



John Stout – Chair

"I agree"
Joseph Herbert- Union Nominee

"I agree"
Robert Little – Employer Nominee

Appendix A

Grievor	Grievance Number
Andrews, Wendy	CS2-22-015
Avilma, Roselaine	CS1-22-015
Bartko, Malgorzata	CS2-22-006
Hadley, Ian	CS4-22-014
Harrington, Kayla	CS1-22-007
Harvey, Melanie	CS2-22-007
Hastings, Jamie	CS1-22-002
Heinbecker, Ellasandra	CS2-22-009
Hill, Karri	CS2-22-013
Jillard, Chelsea	CS1-22-004
Kellman, Sandra	CS1-22-012
Lacy, Jordan	CS2-22-012
LaRiviere, Julie	CS1-22-017
Lawrence, Melissa	CS1-22-006
Licata, Elisabetta	CS1-23-034
Lukezic, Andrea	CS1-22-016
Lunshof, Elisha	CS6-22-001
Lyon, Danielle	CS1-22-013
Malysz, Connie	CS4-22-010
Massie, Kristina	CS4-22-008
Meghan, Natasha	CS4-22-029
Nicholson, Emma	CS6-22-003
Nixon, Victoria	CS1-22-001
Plug, Katarzyna	CS4-22-016
Polillo, Lindsay	CS5-22-002
Rigitano, Jessica	CS2-22-017
Ritchie, Trina	CS4-22-015
Rivas, Karen	CS5-22-006
Rogers, Stephanie	CS1-22-009
Sotelo, Aimee	CS6-22-002
Stanivuk, Rada	CS2-22-011
Stremble, Zachary	CS2-22-010
Tendam, Ernestina	CS4-22-013
Wallbank, Katie	CS1-22-003
Williams, Alisha	CS1-22-025