

IN THE MATTER OF AN ARBITRATION, PURSUANT TO THE
B.C. LABOUR RELATIONS CODE, RSBC 1996 c. 244 (the “Code”)

BETWEEN:

BC HYDRO AND POWER AUTHORITY

the “Employer”

AND:

MOVEUP (CANADIAN OFFICE AND PROFESSIONAL
EMPLOYEES UNION, LOCAL 378)

the “Union”

**SECOND SUPPLEMENTAL AWARD
RE VACCINE MANDATE POLICY GRIEVANCE**

Arbitrator:	Gabriel Somjen, KC
For the Employer:	Graeme McFarlane, Christopher Munroe and Gabrielle Berron-Styan
For the Union:	Jessica L. Burke and Jodie Gauthier
Dates of Hearing:	June 22, July 18 & September 6, 2023
Date of Award:	September 7, 2023

1. This second supplemental award relates to employees who are members of the Union and identified at paragraph 3, members 1 – 14 in the Employer’s statement of facts dated June 9, 2023.

2. The issue in this decision is whether these 14 employees should be “carved out” from the application of the Policy. The principles relating to these carve outs were set out in my previous Awards relating to this grievance. Some of the principles are repeated below from my awards of June 30, 2022 (“Award 1”) (paras 53-55, 57-60) and October 27, 2022 (“Award 2”) (paras 4, 6, 7, 12, 15, 17 & 20-26).

53. However, I do agree with the reasoning in those cases insofar as they reject the prospect of unvaccinated employees working with others even for short times. Carve outs should not apply to situations where employees cannot work without contact with other employees, contractors or the public, even for short times. It is not possible to determine a safe amount of time for such contacts of employees who are unvaccinated.

54. In paragraph 123 of the Employers’ submission they succinctly summarize the considerations I must take into account:

An arbitrator may consider, among other things, 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.

I agree with the Employers’ submission that they have a strong obligation to keep other employees, contractors and the public safe where there may be in person interaction with unvaccinated employees. That was part of the rationale for my decision in *IBEW*. However, the few cases that review working at home as an alternative to working in person with other employees (for example *ESA* and *Ellexicon*) find that working at home may be a reasonably less intrusive method of addressing the employer’s concerns in some situations. Working at home for unvaccinated employees or working outside with no contact with other employees, contractors or the public (if possible) meets many of the Employer’s concerns for the safety of those other persons or these employees.

57. I have carefully considered the arguments and excellent submissions of all parties. I conclude that carve outs are not warranted in cases where employees work or live in camp settings such as Site C, or where they must work in offices, labs or other indoor environments with other employees or even if they work outside where they have in person contact with other employees, contractors or the public.

58. However, I find that carve outs are appropriate and practical for unvaccinated employees who, during the height of the pandemic worked exclusively from home and can continue to do so. This may require some adjustment to the preferred work arrangements of the Employers including under the Model.

59. I also find that carve outs are appropriate for unvaccinated employees who work outside and have no in person contact with other employees, contractors or the public.

60. To the extent that the Policy did not provide these less intrusive measures, it is unreasonable, for this small number of employees in the MoveUP bargaining units.

4. Since that decision, the Employer suspended the Policy as of September 26, 2022 but issues of the precise application of the carveout directions remain. To their credit, the parties have worked diligently on resolving the details of the application of carveouts and have agreed on the circumstances of 23 unvaccinated employees. 16 employees should be carved out of the Policy and 7 should not.

6. The principles that should apply to determining whether any employee should be carved out of the Policy are derived from the same considerations that underlie the original decision, i.e. In the case of an employer policy a standard the employer must meet is whether the policy and its application are "reasonable". This is in accordance with the standards set out in KVP, taking into account the various interests of the Employer, the unvaccinated employees, as well as other employees, contractors, customers and the public.

7. In determining which employees should be carved out and in what circumstances, this is the test I propose to use. Neither party presented any specific precedent for how to apply that standard in these circumstances. That is not surprising because this Policy was implemented during the Covid-19 pandemic which has presented unique challenges for employers, unions and employees in circumstances that are different from many cases involving employer policies.

12. Some employees who normally worked in office positions before the implementation of the Policy were able to work from home. They were allowed to do so until implementation of the Policy. If they refused to be vaccinated they were placed on unpaid leave of absence without pay with the exception of some employees who were accommodated for human rights considerations.

15. Therefore, employees for whom the Union seeks a carveout from the Policy should be allowed to work from home if they can complete their normal duties and achieve the expected work outcomes as they are now required. This does not necessarily mean the same duties and work outcomes as existed pre-pandemic. That variation of the standard proposed by the Employer should be better for both the Employer and employees since some duties and work outcomes may have changed since the pandemic began.

17. If the required job duties can be performed virtually or remotely and the required work outcomes are possible then such an arrangement would be reasonable.

20. The second group of employees who may be carved out are employees who can work outside without physical contact with other employees, contractors,

customers or the public. These employees should be carved out if they can perform their normal duties while avoiding in-person contacts.

21. If some reasonable arrangements are required to avoid in person contact they should be considered. Some examples are set out below.

22. Picking up keys and returning them - If employees normally go into a Hydro facility to do this, a dropbox or other arrangement should be considered, if feasible.

23. If the employee requires equipment or material which they would normally pick up in a BC Hydro facility, arrangements should be considered to have these items picked up outside the facility or placed in the employee's vehicle while the employee is not present.

24. These are examples of arrangements that should be considered if they are feasible to allow the employee to avoid in-person contacts. This is not meant to be exhaustive; it merely illustrates some physical adjustments to the employee's work to allow unvaccinated employees to perform their duties safely.

25. The employer should not be required to assign the unvaccinated employee's duties to other employees.

26. Incidental or possible, hypothetical, contact with the public should not disqualify an employee from being carved out. For example, if a BC Hydro employee is approached by a person seeking directions, that should not disqualify a carve out. However, if contact with the public, customers, contractors or other employees is a normal part of the employee's duties a carveout should not apply.

3. I have considered the submissions of the parties regarding the 14 employees who are the subject of this decision.

4. At the time Award 1 was issued, the Policy was still in effect. The award was forward looking.

5. During the Pandemic, the Employer developed and improved methods of performing work remotely, including for the Design Team. Some of the work of the Design Team can be performed remotely.

6. However, some tasks and employment circumstances expected of the Design Team that are inconsistent with remote work remain because they must be done in-person and in proximity to employees, contractors, customers and/or members of the public.

7. For example, as part of their job duties, members of the Design Team are expected to perform site visits in-person, as required. Members of the Design Team performed these in-person visits in proximity to others before, during and after the COVID-19 Pandemic. This distinguishes them from other employees at BC Hydro who could perform all their job duties remotely or in a manner that was otherwise safe.

8. The frequency of this in-person work varied from employee-to-employee in the Design Team. However, based on the principles set out in Awards 1 and 2, any instances of in-person work with others is inconsistent with a carve-out.

9. While alternative methods of gathering data and participating in tasks such as electrical room inspections occurred remotely during the Pandemic and continue to be in use today in some circumstances, these methods are not completely reliable, and there remain instances where in-person work with others is required.

10. Consistent with the principles outlined in *BC Hydro -and- IBEW, Local 258*, [2022] BCCAAA No. 26, social distancing is also not a complete or adequate solution as an alternative to vaccination here.

11. If a member of the Design Team is not able to perform work in-person due to the choice to not get vaccinated, the Employer would be required to reassign this work to another member. This solution is not consistent with earlier awards in this matter.

12. Based on these principles I conclude that the 14 employees who are the subject of this decision should not be carved out from the Policy.

13. I continue to remain seized of any outstanding issues related to these grievances.

Dated at Vancouver, British Columbia, this 7th day of September 2023.

“Gabriel Somjen”

Gabriel Somjen, KC
Arbitrator