

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”

**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
Date of Hearing:	October 26, 2022
Date of Award:	October 27, 2022

1. As a result of the Covid-19 pandemic, BC Hydro implemented a Policy requiring all employees to be vaccinated against Covid-19. That Policy was the subject of a grievance by the Union on behalf of 46 employees who did not get vaccinated and were placed on a leave of absence without pay.
2. I decided that issue in a decision dated June 30, 2022 which found the Policy to be reasonable, except in the case of certain employees who should be "carved out" from the application of the Policy.
3. At paragraphs 57 to 60 of that decision I gave some general directions as to the criteria for carving out certain employees from the application of the Policy.
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.
5. That leaves 23 employees in dispute. The parties have asked me to issue a supplementary award to deal specifically with whether carveouts should apply to the 23 employees remaining in dispute. The parties made brief submissions and thorough written submissions leading up to this hearing on October 26, 2022. Based on these submissions I clarify my June 30, 2022 decision as set out below.
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.

8. In determining what adjustments or considerations should be made to allow unvaccinated employees to work while the Policy is in effect, the test is not the same as considerations in Human Rights accommodations. Neither party suggested such an analysis, nor do I believe they apply here.

9. The Union argues that if reasonable changes to an employee's work arrangements can be made to allow the employee to work while unvaccinated, the Employer should consider these changes.

10. The Employer argues that while it may have to modify the application of the Flexible Work Model as it may apply to unvaccinated employees, it stresses that any changes to work arrangements for unvaccinated employees should not change the pre-pandemic job duties of the employee and there should be no diminishment of the pre-pandemic outcomes for that job.

11. Based on these arguments and the helpful written submissions that I reviewed, I clarify the directions in my initial decision of June 30, 2022 as follows.

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.

13. Some of these employees were able to complete many or all their normal duties from home prior to the implementation of the Policy. Some duties of some employees were not performed or were delayed during the emergent circumstances of the pandemic.

14. Since employees have been able to return to work in their normal workplaces as of April 11, 2022, it is reasonable for the Employer to expect performance of all of the normal job duties and work outcomes required of these employees whether they work at their workplace or from home because the emergency situation existing up until April 11, 2022 has subsided, although the pandemic may not yet be over.

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.

16. This does not mean they must complete those duties in the same location and manner as before. For example, if the Employer prefers employees to attend the office in person for certain periods (as set out in the Flexible Work Model) but the employee can attend required meetings virtually, the Employer should consider this possibility.

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.

18. I recognize that there may be desirable work arrangements such as more in person meetings. These goals, while important and laudable, may have to be suspended while the employee works remotely, provided that the duties and outcomes required are met.

19. I do not think it is reasonable to require the Employer to assign normal job duties of the employee working remotely to other employees but technical arrangements such as virtual meetings and working from home should be considered.

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.

27. I am hopeful that, with these clarifications, the parties will be able to agree on which employees can be carved out and which cannot.

28. I remain seized of this matter should there be any remaining issues to be determined, including any issues regarding remedy and employees who resigned or retired during the relevant period, as well as employees who were initially placed on a leave of absence but were later vaccinated.

Dated at Vancouver, British Columbia, this 27th day of October 2022.

“Gabriel Somjen”

Gabriel Somjen, KC
Arbitrator