

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
AND POWERTECH LABS INC.

The “Employers”, “BC Hydro” or “Powertech”

AND:

MOVEUP (CANADIAN OFFICE & PROFESSIONAL
EMPLOYEES’ UNION LOCAL 378)

the “Union”

AWARD RE VACCINE MANDATE POLICY GRIEVANCE

Arbitrator:	Gabriel Somjen, QC
For the Employers:	Graeme McFarlane, Christopher Munroe and Andrew Nicholl
For the Union:	Jessica L. Burke and Jodie L. Gauthier
Dates of Hearing:	Written submissions
Date of Award:	June 30, 2022

1. This case results from the implementation by the Employers of mandatory Covid vaccination policies in late 2021. The background to implementation of the Policy by BC Hydro is set out in my earlier decision (*BC Hydro and Power Authority -and- International Brotherhood of Electrical Workers, Local 258 (Mandatory Vaccination Grievance)*, [2022] BCCAAA No. 26). (the “*IBEW*” case)

2. I upheld the Policy as reasonable, but that decision was limited to the circumstances of that group of employees. The employees in the units represented by COPE, Local 378 at these Employers perform different work than the IBEW group and the Union here argues that the different circumstances of the MoveUP employees should result in a different conclusion for some of these employees. The Union says many MoveUP employees should be “carved out” of the mandatory vaccination requirement of the Policy.

3. In cases like this a balance between the Employers’ health and safety interests and the interests of employees who decline to be vaccinated should be undertaken. Furthermore, if there is a less intrusive means of meeting the Employers’ interests that should be considered, in light of the serious intrusion on employees’ privacy and bodily integrity interests that a mandatory vaccination policy entails.

4. That analysis was followed in *IBEW* and is consistent with cases such as: *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*, [2013] 2 SCR 458:

A substantial body of arbitral jurisprudence has developed around the unilateral exercise of management rights in a safety context, resulting in a carefully calibrated “balancing of interests” proportionality approach. Under it, and built around the hallmark collective bargaining tenet that an employee can only be disciplined for reasonable cause, an employer can impose a rule with disciplinary consequences only if the need for the rule outweighs the harmful impact on employees’ privacy rights. (para 4)

At paras 27-29, the Court concludes:

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. [I.F., at para. 4]

In the earliest privacy cases using a balancing of interests approach, arbitrators generally found that employers could only exercise a unilateral management right to search an individual employee's personal effects if there was a reasonable suspicion that the employee had committed theft. Universal random searches - that is, random searches of the entire workforce - were rejected as unreasonable unless there was a workplace problem with theft and the employer had exhausted less intrusive alternative measures for addressing the problem (Morton Mitchnick and Brian Etherington, *Labour Arbitration in Canada* (2nd ed. 2012), at pp. 308-9; Brown and Beatty, at topic 7: 3625).

The balancing of interests approach was subsequently applied in assessing the reasonableness of unilaterally imposed employer policies calling for universal random drug or alcohol testing of all employees performing safety sensitive work. Universal random testing refers to the testing of individual employees randomly selected from all or some portion of the workforce. As in the search cases, arbitrators rejected unilaterally imposed universal random testing policies as unreasonable unless there had been a workplace problem with substance abuse and the employer had exhausted alternative means for dealing with the abuse.

5. Other decisions regarding mandatory Covid testing, including *IBEW* considered the balance between the interests of the employer and the employees as well as whether alternative, less intrusive, means were available that met the employer's interests. For example, in *Electrical Safety Authority v. Power Workers' Union (COVID-19 Vaccination Policy Grievance)*, [2022] OLAA No. 22 (Stout), the arbitrator stated:

Context is extremely important in assessing the reasonableness of any workplace rule or policy that may infringe upon an individual employees' rights. The authorities reveal a consensus that in certain situations, where the risk to health and safety is greater, an employer may encroach upon the individual employee rights with a carefully tailored rule or policy. (at para 68).

He also notes at paragraphs 71 and 72:

In workplace settings where the risks are high and there are vulnerable populations (people who are sick or the elderly or children who cannot be vaccinated), then mandatory vaccination policies may not only be reasonable

but may also be necessary and required to protect those vulnerable populations.

However, in other workplace settings where employees can work remotely and there is no specific problem or significant risk related to an outbreak, infections, or significant interference with the employer's operations, then a reasonable less intrusive alternative, such as the VVD/T [voluntary vaccination disclosure and testing] Policy employed prior to October 5, 2021, may be adequate to address the risks.

In *Power Workers' Union v. Elexicon Energy Inc.*, [2022] OLAA No. 48 (Mitchell) at paragraph 8, the arbitrator states:

I have also found, however, that the policy is not reasonable at this time as it applies to unvaccinated employees who have been working exclusively from home and for whom there is no expectation of a return to the office until April at the earliest, or to employees who work exclusively outside or who can be accommodated such they can work exclusively outside.

I

6. As these cases are very fact-specific, I will now turn to the circumstances of the employees in this case to determine whether there should be a "carve-out" from the Policy for any of the MoveUP employees, as there was in the *Elexicon* case but not in the *IBEW* case.

7. The Policy applies to all BC Hydro and Powertech employees.

8. Of the approximately 2,422 MoveUP employees at BC Hydro, 47 remain unvaccinated and are on unpaid leaves. Of the 111 MoveUP employees of Powertech, 1 was unvaccinated but has subsequently been vaccinated and returned to work on May 9.

9. The parties submitted statements of fact which were largely not opposed. These were helpful in my determination, and I will refer to those facts where appropriate and as set out below. Most of the direct references are from the Employers' statement of facts.

1. British Columbia Hydro and Power Authority ("BC Hydro") is a Crown corporation established under the Hydro and Power Authority Act, RSBC 1996, c. 212. Pursuant to section 12(1.1), BC Hydro's purposes are:

- (a) to generate, manufacture, conserve, supply, acquire and dispose of power and related products,
- (b) to supply and acquire services related to anything in paragraph (a), and
- (c) to do other things as may be prescribed.

2. BC Hydro is the primary electricity supplier for the province of British Columbia. BC Hydro provides an essential service.
7. Powertech Labs Inc. (“Powertech”) is a wholly-owned subsidiary of BC Hydro. Powertech provides specialized testing and investigation services to support electrical utilities’ capital assets: generation, transmission and distribution, OEMs, automotive manufacturers, government and research organizations.
8. Powertech has approximately 24 different labs at a facility in Surrey.
9. Powertech’s largest customer is BC Hydro.
10. Powertech has approximately 230 employees, 111 of which are represented by the Union.
16. MoveUP Employees perform many different roles, including but not limited to clerical, administrative, customer support, IT support, accounting and billing, planning, engineering, design, property management, occupational health and safety, construction management, maintenance, laboratory assistance, and vegetation management roles.
17. MoveUP Employees work in all areas of the province. . . .
18. MoveUP Employees at BC Hydro work in eight Strategic Business Units:
 - (a) Capital Infrastructure Project Delivery (356 MoveUP Employees, excluding those on leave),
 - (b) Customer and Corporate Affairs (519 MoveUP Employees, excluding those on leave),
 - (c) Finance Technology and Supply Chain (283 MoveUP Employees, excluding those on leave),
 - (d) Human Resources (18 MoveUP Employees, excluding those on leave),
 - (e) Integrated Planning (235 MoveUP Employees, excluding those on leave),
 - (f) Operations (711 MoveUP Employees, excluding those on leave),
 - (g) Safety and Compliance (101 MoveUP Employees, excluding those on leave), and
 - (h) Site C (133 MoveUP Employees, excluding those on leave).
19. Prior to the COVID-19 pandemic, the majority of MoveUP Employees at the Employers worked on site in the Employers’ facilities, or in the field.
21. When working on site, the vast majority of MoveUP Employees at BC Hydro are seated indoors in cubicles open to larger room around them.

MoveUp Employees at Powertech often work in lab environments, which include indoor and outdoor labs, and the nature of their work sometimes requires individuals to be in close proximity with one another.

10. In devising its Covid Policy in late 2021 BC Hydro emphasized two business priorities:

- (a) maintaining employee safety, and
- (b) preserving BC Hydro's ability to deliver its essential service.

11. BC Hydro implemented its Policy to apply to all employees:

82. The fact that the Policy applies to all employees reflects BC Hydro's "safety above all" motto and the essential nature of all of BC Hydro's workers, regardless of where or how they work.

84. BC Hydro originally advised employees that they would need to be "fully vaccinated" by November 22, 2021. BC Hydro extended this timeline to January 10, 2022 in response to concerns expressed by unions at BC Hydro with respect to the time needed to obtain two doses. BC Hydro announced the extension of this timeline on October 21, 2021.

87. Powertech also originally advised their employees that they would need to be "fully vaccinated" by November 22, 2021, and extended this timeline in response to concerns expressed by some employees that they assumed Powertech would follow BC Hydro's date extension. Powertech extended its deadline to be "fully vaccinated" until January 4, 2022 (not January 10) to coincide with their post-Christmas re-opening. This change was communicated verbally in an "all-staff" call on October 26, 2021 and confirmed in writing in an email from the CEO on October 27, 2021. A copy of this communication is attached as Exhibit "22".

93. MoveUP Employees who were not at least partially vaccinated, or refused to provide proof of vaccination, were placed on an unpaid leave of absence on November 23, 2021.

94. Additional MoveUP Employees at BC Hydro who refused to become fully vaccinated, or refused to provide proof of vaccination, were placed on an unpaid leave of absence in January 2022.

106. While the Policy originally provided that employees who did not become fully vaccinated may be subject to discipline, the Policy was amended after Arbitrator Somjen's award dated March 21, 2022, to remove the sentence which referred to discipline.

108. As at the date of this Statement of Facts, there are 47 MoveUP Employees of BC Hydro on unpaid leave under the Policy. The rest either have an approved accommodation or are vaccinated. In other words, more than 98% of MoveUP Employees have complied with the Policy.

109. There is only one Powertech MoveUP Employee on unpaid leave under the Policy. He has now received his first vaccine dose and has informed Powertech he will be fully vaccinated and ready to return to work on May 9, 2022.

12. During the height of the pandemic, in keeping with public health directions, many of the MoveUP employees at BC Hydro worked from home. A smaller percentage of the Powertech employees also worked from home.

13. In 2021 both Employers anticipated that many of the COPE employees working remotely could return to some office work, but this plan was delayed due to the advent of the Omicron variant in late 2021.

117. In response to the COVID-19 pandemic, BC Hydro directed most MoveUP Employees to work from home from March 16, 2020, as a temporary health and safety measure.

118. In contrast to BC Hydro, most Powertech MoveUP Employees are required to work from laboratories. Most MoveUP Employees continued to work from the Powertech facilities throughout the pandemic, though a minority (approximately 20) were permitted to work from home at least part of the time.

119. Similarly, MoveUP Employees at Site C cannot work remotely most of the time (other than for report writing or administrative tasks). Other than while work at Site C was curtailed at the outset of the pandemic, MoveUP Employees have reported to Site C throughout the pandemic.

120. More than 400 MoveUP Employees at BC Hydro work in Customer Service. Customer Service Account Representatives could not work remotely in March 2020 due to technology limitations. They continued to work at BC Hydro offices until late April 2020.

121. Approximately 15% of Customer Service Account Representatives attended at BC Hydro offices to perform their duties throughout the pandemic.

123. Through the spring and summer months of 2021, BC Hydro developed a "Flexible Work Model" pursuant to which some employees would be permitted to work remotely for one or more days per week. The Flexible Work Model was announced to employees in June 2021.

124. The Union agreed to the implementation of the Flexible Work Model by way of a Letter of Understanding dated August 6, 2021 (the “LOU”).

125. The Union subsequently agreed to the implementation of the same Flexible Work Model for Powertech MoveUP Employees by way of e-mail on November 23, 2021.

126. BC Hydro originally planned to return most MoveUP Employees to in-person office work on January 10, 2022, but that plan was delayed due to Omicron.

129. BC Hydro has returned MoveUP employees to a Flexible Work Model, effective April 11, 2022, pursuant to which most MoveUP Employees have returned to the office for at least two days per week.

131. ... Pursuant to BC Hydro’s Flexible Work Model, each BC Hydro position is “mapped” to one of four role types:

- (a) Field Employees who cannot work from home. Limited work from home may be approved by the manager on an occasional ad hoc basis. As at March 31, 2022, 317 BC Hydro MoveUP Employees are mapped to this category.
- (b) Resident Employees who work primarily from the office at least 4 days per week. Resident employees are eligible to work from home 1 day per week. As at March 31, 2022, 176 BC Hydro MoveUP Employees are mapped to this category.
- (c) Hybrid Employees who work from the office at least 2 days per week. Hybrid employees are eligible to work from home up to 3 days per week. As at March 31, 2022, 1,276 BC Hydro MoveUP Employees are mapped to this category.
- (d) Remote Employees who work from home 4+ days per week. Remote employees will be required to work in the office as determined by their manager. As at March 31, 2022, 176 BC Hydro MoveUP Employees are mapped to this category.

132. Employees have the option, but are not required, to work remotely according to their position type.

133. As set out above, the majority of BC Hydro MoveUP Employees are “mapped” to a hybrid, field or resident position. Only a small minority are classified as remote.

134. Most remote workers are still required to attend at the office at least one day per week. The exceptions are MoveUP Employees classified as “remote” who work in the following groups:

- (a) 6 payroll employees (required to attend the office one day every two weeks);

- (b) Approximately 145 Customer Service Account Representatives (required to attend the office once every two weeks); and
- (c) Conservation and Energy Management Program Team (who are required to attend the office twice per month).

135. At Powertech, 20 MoveUP Employees are presently working remotely for one or more days per week pursuant to the Flexible Work Model. No Powertech MoveUP Employees work entirely remotely.

137. The LOU is in effect until September 30, 2022, but may be extended. Either the Union or the Employer may cancel the LOU on 60 days' notice. If that occurs, the Union and Employer have agreed that the Memorandum of Understanding #78 re: Telework Project and 85D re: Telework for MU 85 Employees in the Collective Agreement will continue to apply, and any MoveUP Employees who have not entered into agreements pursuant to those provisions will be required to return to work.

14. Notwithstanding the delay in implementing the Flexible Work Model (the "Model"), MoveUP employees who had been working remotely were required to be vaccinated by November 23, 2021 and if they refused were placed on unpaid leave, even though many would have been able to continue working remotely if they were vaccinated (until April 2022). The Model was implemented on April 11, 2022.

15. In this decision I will only address the issue of whether "carve outs", or exemptions from the Policy, should apply for any of the MoveUP employees.

II

Arguments

16. The parties made extensive arguments on a number of points. I have considered them all and will refer to some in more detail.

17. The Union argues that in this case, unlike in the *IBEW* case, there is a practical alternative to vaccination that would allow employees in this bargaining unit to work safely without vaccination. The Union submits that for many MoveUP members the types of carve outs from the Policy that were identified in *Elixicon*, would be appropriate. It argues that many MoveUP members work in administrative and office roles that can be performed remotely. Indeed, during much of the pandemic many of these employees did work from home.

18. Other MoveUP members who work in the field often work outside and alone.
19. BC Hydro says, at paragraph 117 of its statement of facts, that most MoveUP members worked from home, from March 16, 2020. In contrast, most Powertech employees continued to work at the Powertech facilities throughout the pandemic.
20. The Union argues that allowing employees to work from home is even safer than requiring vaccinated employees to work in an office.
21. The Union notes that, although the Employers claim in person attendance likely results in better business outcomes, there is no evidence of diminished productivity due to remote work.
22. The Union says there may even be some benefits from having some employees work from home.
23. The Union argues that for MoveUP employees who work in the field, this can be done safely.
24. The Employers argue that no "carve outs" should be considered in this case. Some of their points will be summarized and some will be addressed in more detail later in my decision. A good summary of the Employers' arguments is set out at paragraph 2 of their written submission:

2. In summary, the Employers submit that the Policy is a reasonable and proper exercise of their management rights because:

- (a) The Policy is consistent with the terms of the Collective Agreement. BC Hydro and Powertech are entitled to promulgate rules and policies. There is nothing in the Collective Agreement that fetters this management right.
- (b) BC Hydro and Powertech have both a management right and a legal obligation under the Workers Compensation Act to implement health and safety policies. The Policy is a reasonable exercise of that management right and is consistent with public health guidance.
- (c) As the primary electricity supplier for the province of British Columbia, BC Hydro provides an essential service to British Columbians. All employees of BC Hydro work together to provide its essential service, regardless of their role. The Policy is critical to ensuring that BC Hydro has a workforce that can continue to provide that essential service during the pandemic.
- (d) The Employers have the management right to require employees to attend the workplace (including work sites and customer sites) as much or as little as the Employers decide is necessary. Under the Employers' Flexible Work Model, no employee may work from home 100% of the time. Further, in an emergency, the Employers must be able to recall all employees back to the office on short notice. Unvaccinated employees

- pose a heightened and unjustified risk to the health and safety other persons in the workplace.
- (e) The Policy is a justified and reasonable intrusion into employee privacy given the significant hazard posed by COVID-19 and the fact that the vaccines are safe and effective.
 - (f) Vaccination is safe and the most effective protection available against COVID-19. The Employers are not required to accept less than the most effective measure to address the possible consequences of COVID-19.

III

Decision

25. I will only address the issue of whether certain MoveUP employees should be carved out, or exempt, from the Employers' vaccination Policy. Should I decide yes, the details of who and how such carve outs apply will be considered by the parties and then by me, if necessary, in a subsequent decision. The central issue at this stage is whether there is a practical, less intrusive method to accomplish the Employers' health and safety goals, while balancing that against the unvaccinated employees' interest in maintaining privacy and protecting against bodily intrusion.

26. I recognize the response to this pandemic has changed over time and that public health guidelines can change. The union raises this in its response submission. It refers to a recent decision in which the arbitrator noted the changing knowledge about the pandemic and vaccination policies. In *FCA Canada Inc. v. Unifor, Locals 195, 444, 1285*, 2022 CanLII 52913 (ONLA) (Nairn) the arbitrator found at para 107:

...based on the evidence supporting the waning efficacy of that vaccination status and the failure to establish that there is any notable difference in the degree of risk of transmission of the virus as between the vaccinated (as defined in the Policy) and the unvaccinated. Rather, the evidence supports a conclusion that there is negligible difference in the risk of transmission in respect of Omicron as between a two-dose vaccine regimen and remaining unvaccinated. There is, under the definition in the Policy, no longer a basis for removing unvaccinated employees from the workplace.

27. Since my decision is about carve outs from the Employers' Policies, I will not comment on the Policies beyond that issue but recognize changes to the progress of the pandemic and responses to it are dynamic and arbitral decisions are responding to those changes, as appropriate.

28. The Employers argue that employees are not being “forced” to take a vaccine but have a choice to be vaccinated or placed on a leave of absence without pay. As the Union argues, this understates the reality of the employees’ situation.

29. It is true that employees are not physically forced to take a vaccine but if they refuse and do not have an accommodation, they are placed on an unpaid leave of absence. This has an economic and social impact that makes the Policy more coercive than a simple “choice”. This has been recognized in other decisions, as in *Elexicon* at paragraph 92:

Whatever may constitute irreparable harm in an application for injunctive or interim relief, in the context of an assessment of the reasonableness of a mandatory vaccination policy, it would be inaccurate and disrespectful to the legitimate interests of employees in maintaining their income and their employment in my view, to ignore the genuinely coercive nature of a policy which threatens the loss of income and possible termination of employment if it is not complied with. Employees everywhere rely on their employment whatever their skill levels, but it must also be recognized that in an industry like electrical power transmission there are skilled trades and other occupations and professions where the employees may not easily find another employer in the same geographic area to work for. Even if they could do so, they would have to give up their seniority and other benefits of long service which they earned in the course of their employment. The coercive impact of the threat of loss of income, benefits, and employment and the impact on stability and careers is very real. In my view, of course employees have a choice, but just saying that the choices are hard is insufficient when it comes to determining the reasonableness of the policy. In my view, arbitrators should take into account in the balancing exercise the deep dilemma of employees who strongly do not wish to be vaccinated whatever their motives, and who may have few or no other realistic choices to work elsewhere or who will have to give up a significant amount of earned benefits and stability if they choose not to get vaccinated. Just because there are hard choices, as opposed to no choice at all, does not make the policy not coercive, or render it more reasonable. Of course, the policy may be reasonable notwithstanding the potential consequences to the individual employees, but in my view, there is little legitimacy in a decision that finds the policy to be reasonable while denying the lived reality of employees faced with the coercive impact of these policies.

This issue was also addressed in the *IBEW* case at paragraph 45.

30. At paragraph 19 of the Employers’ submission they state:

Further, even remote work is not “safe” for MoveUP Employees. While the chance of workplace transmission is obviously reduced for an employee that never reports to a BC Hydro workplace, COVID-19 continues to spread rapidly in British Columbia. As will be explained further below, unvaccinated MoveUP

Employees working at home may still contract COVID-19 in the community and suffer serious adverse health consequences, even death. Lengthy absence or isolation periods may result in business interruptions for the Employers. There is a “real benefit” to the Employers in having a vaccinated workforce, regardless of where or how employees work.

This suggests that remote work is less safe for employees than working in person together in an office, if vaccinated. The Union argues the opposite: i.e. that working at home, unvaccinated, is more safe because employees can still get Covid in an office environment while vaccinated, but at home they are not exposed to, or exposing other workers.

31. I do not have before me evidence that compares the relative safety of working at home, unvaccinated, with working in an indoor environment with the vaccination. However, I do not need to determine which of these options is safer; my role is to determine whether there is a practical, less intrusive method that meets the Employers’ health and safety concerns.

32. I can conclude that working at home unvaccinated is less intrusive to the employees and goes a long way to meeting the Employers’ concerns.

33. The fact that many MoveUP employees worked from home from March 2020 through April 2022 demonstrates that these Employers recognized the feasibility of working remotely before and even after the vaccine mandate (between November 23, 2021 and April 11, 2022).

34. I agree with the Employers that it is still possible for employees to get Covid working from home or outdoors, without in person contacts, albeit not from coworkers. It is also possible for vaccinated employees working together in an office or other indoor environment to get Covid from coworkers or transmit it. Neither option is completely effective.

35. What I can conclude is that working from home and, possibly, working outdoors with no in person contact is feasible and less intrusive as an alternative to mandatory vaccination for some employees.

36. The Employers argue that the "blanket" policy which applies to all BC Hydro and Powertech employees is reasonable since, as of April 11, 2022 (earlier for Powertech) all MoveUP employees must report to the office, at least on some occasions.

37. The Employers say they have a management right to determine how and where work is performed. I agree with this principle in general terms, even where (as here) there is no management rights clause in the collective agreement. However, as the Union argues, the management right to determine where and how to work is not absolute.

38. Where there is a unilateral policy, as here, requiring mandatory vaccination, it will be subject to the *KVP* consideration of reasonableness, even though there is a management right to determine such policies as well as where and how employees should work.

39. That analysis brings us back to whether the Policy should apply to employees who may be able to work safely from home or outdoors, with appropriate safeguards.

40. To say management has the right to assign a work location does not answer the question of whether it is reasonable to require all employees to work in an office environment when unvaccinated employees may be able to work safely from home or outdoors.

41. I accept the Employers' argument that there are advantages to employees working in an office situation at least some of the time but those advantages to the Employers and to employees must be balanced against the significant intrusion on unvaccinated employees.

42. The Employers argue that arbitrators have only considered "carving out" employees from a vaccine policy where the employees are already working at home. The Employers particularly refer to *Elexicon* to support that proposition. I agree that at the time of his decision, arbitrator Mitchell was faced with three employees who were working exclusively from home. He did not say what his decision would be once the employer considered returning all employees to work; he only said that the Policy and its application could be reviewed if that happened.

43. In this case I am faced with both scenarios. MoveUP employees were required to be vaccinated as of November 2021 but a large number of employees in this group were still required to work from home exclusively until April 11, 2022. That is similar to the situation in *Elexicon*. If I were to follow that reasoning, many MoveUP employees who were not vaccinated from November 2021 to April 2022 and who would have worked exclusively from home should be carved out.

44. Since the Model was implemented on April 11, 2022, I am now faced with what was a hypothetical scenario at the time of the *Elexicon* decision.

45. The Employers say that because the Union agreed to the Model which requires all employees to attend at the office, at least sometimes, I should not carve out any employees from the Policy. As the Union points out, the Model was agreed to by the Union before the Policy was announced or implemented. Therefore, the Union cannot be held to have agreed to the Model overriding the reasonableness requirement for the Policy since they did not know about it at the time of execution of the MOU. The situation might be different with respect to Powertech where the MOU was signed in November 2021

46. The Union's argument on this point has merit, at least for BC Hydro.

47. Even if the Model was agreed to after the Policy came into effect, I must still review the reasonableness of the Policy taking into account the Model and any other relevant circumstances but not necessarily being bound to strictly apply the Model in circumstances where a reasonable alternative to vaccination would be working exclusively from home or safely, outdoors.

48. I also note that the Model agreement may be cancelled and if it is, the parties revert to terms in the collective agreement including MOU #78 RE Telework Project and MOU #79 RE Telework Project. MOU #85D is also related for certain MoveUP employees. It specifically allows for telework in exceptional circumstances, including pandemics.

49. The Model and these other provisions of the parties' agreements are important considerations but, in the end, I must still determine the reasonableness of the Policy as it applies to this group of employees.

50. The Employers argue that if some employees are allowed to work unvaccinated there would be unintended consequences such as unfairness to employees who did get vaccinated but would have preferred not to. Whatever decision I make may have consequences for the Employers and unvaccinated employees and other employees, but I still must make my decision based on the principle of reasonableness in the context of this case.

51. The Employers argue that all employees must be vaccinated because even employees working from home may be required to attend at an office in cases of an

emergency. That is a valid concern, but it does not address the circumstances of the 47 employees on leaves. If they were vaccinated, they would be able to attend at an office if required. Since they are on leaves, they are not able to attend in an emergency or at all. If they were allowed to work from home, they could do their regular work but not attend an office in an emergency. In either case these 47 unvaccinated employees cannot attend in an emergency.

52. The Employer relies on cases such as *City of Richmond v. IAPF, Local 1286 and CUPE, Locals 718 and 394* (COVID-19 Vaccination Policy Grievance), [2022] B.C.C.A.A.A. No. 3 (Noonan) and *Lavergne-Poitras v. Canada (Attorney General)*, 2021 FC 1232. These are cases where the applicant was seeking interim relief. Therefore, the test that was applied was different than the reasonableness test required pursuant to *KVP*.

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.

55. 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 *Elexicon*) 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.

56. The Employers argue that imposing mandatory unpaid leave is reasonable for unvaccinated employees. I agree that is an appropriate response if there is no practical, less intrusive alternative. The Union argues there is.

IV

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.**

61. I have made this decision to guide the next phase of this case. At present, I make no decisions on issues of compensation or which employees, or groups of employees, may be subject to carve outs and in what conditions. I leave those issues to the parties to discuss and, hopefully, agree on the outcome. If there are any disputes concerning those issues, or any other matters I have not addressed in this decision, I will determine them through the hearing scheduled for September 12 & 20, 2022.

Dated at Vancouver, British Columbia this 30th day of June 2022.

“Gabriel Somjen ”

G. Somjen QC, Arbitrator