BRITISH COLUMBIA LABOUR RELATIONS BOARD

INSURANCE CORPORATION OF BRITISH COLUMBIA

("ICBC")

-and-

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

and

POWERTECH LABS INC.

("BC Hydro" and "Powertech")

-and-

CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES' UNION, LOCAL 378

-and-

(the "Union")

PANEL:	Jennifer Glougie, Associate Chair
APPEARANCES:	Chris Leenheer, for ICBC Graeme McFarlane and Keri Bennett for BC Hydro and Powertech Jessica Burke and Gall Levit, for the Union
CASE NOS.:	2021-001288 and 2021-001292
DATE OF DECISION:	November 19, 2021

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Union applies under Section 133(5) of the *Labour Relations Code* (the "Code") for interim orders in relation to two applications it has filed alleging that BC Hydro, Powertech, and ICBC (collectively, the "Employers") breached their obligations under Section 54 of the Code when they implemented mandatory COVID-19 vaccination policies (the "Policies").

2 The Union asks the Board to issue interim orders under Section 133(5) of the Code suspending the application of the Policies until the Section 54 applications can be decided on their merits. The parties agree that the two applications for interim relief concern the same issues and should be decided together.

3 In order to decide this matter in a timely way, I set out only the background facts and arguments material to my decision.

II. BACKGROUND

4 The Union represents approximately 2,500 employees of BC Hydro and Powertech. On October 7, 2021, BC Hydro and Powertech announced that they intended to require mandatory COVID-19 vaccines for all employees and issued communications on October 14 stating that all staff must be fully vaccinated by November 22, 2021 and anyone not fully vaccinated at that time would be placed on leave without pay effective November 23, 2021. On October 21, 2021, BC Hydro and Powertech each issued COVID-19 Vaccination Policies identifying the deadlines by which employees were required to have a single and second dose of a COVID-19 vaccine or risk being placed on unpaid leave.

5 The Union also represents approximately 5,000 employees of ICBC. ICBC issued a communication on October 5, 2021, advising that all staff would be required to be vaccinated on or before November 15, 2021. On October 15, 2021, ICBC issued a COVID-19 Vaccination Policy requiring employees provide proof they are fully vaccinated by November 22, 2021 or risk being placed on unpaid leave.

6 In all of these cases, the Union says it did not receive a copy of the communications or the Policies themselves until the same day the Employers distributed them to employees.

7 The Employers say Section 54 does not apply to the decision to implement the Policies. In any event, they take issue with the Union's assertions about when it became aware of the Policies and when the application of the Policies will begin to have an affect on employees. BC Hydro and Powertech also say they have since adjusted the deadlines set out in their COVID-19 Vaccination Policies, after discussions with the Union.

8 The Union says it has been consistent in encouraging members to get vaccinated if they are able to. Nonetheless, the Union estimates that approximately 375 BC Hydro and Powertech employees and 111 ICBC employees remain unvaccinated at present and could face financial or disciplinary consequences for failing to comply with the Policies.

9 There are no Provincial Health Officer ("PHO") directives or orders requiring employees in these sectors to be vaccinated. Rather, WorkSafe BC guidance states employers should "support workers in receiving vaccinations from COVID-19". As of September 28, 2021, the PHO order does not require employees to wear masks in their working areas.

III. THE PARTIES' POSITIONS

10 The Union says the requirements for interim relief, established in *White Spot Restaurants Ltd.*, IRC No. C274/88 ("*White Spot*"), are met in the circumstances. It says an adequate remedy would not be possible if the Policies are allowed to be implemented without adequate notice; it says an interim order is required in order to protect the opportunity to negotiate an adjustment plan which could include a review of alternatives to the Policies as they are currently drafted.

11 The Union says the Policies will force approximately 375 BC Hydro/Powertech employees and 111 ICBC employees to disclose their vaccination status and/or be fully vaccinated against COVID-19. If they do not, they risk being placed on unpaid leave or suffering other disciplinary consequences when the deadlines identified in the Policies pass. The Union says the Policies have put these employees in the untenable position of suffering financial or disciplinary consequences if they do not subject themselves to medical treatment they do not want or disclose personal medical information they should not have to disclose.

12 The Union says there are numerous issues with the reasonableness of the Policies. It also says that none of these Employers had sufficient reasonable cause to justify imposing the Policies requiring mandatory vaccination at all.

13 The Union says Section 54 provides the parties with an opportunity to explore alternatives to the proposed measure. It relies on *874352 Ontario Ltd. (c.o.b. Comox District Free Press)*, BCLRB No. B368/94 ("*Comox District Free Press*") to argue that, where that opportunity is not fully realized and the proposed measure is of a permanent nature, the Board has recognized that simple damages will not be an adequate remedy. In that case, the Board ordered the employer not to dispose of its assets as part of a business closure to ensure a meaningful remedy to the Union if its application was successful. The Union says that, if its Section 54 applications are successful in the present case, without interim relief, it will have forever lost its ability to explore alternatives to placing employees on unpaid leave or requiring all employees vaccinated. It says a remedial order that the parties meet or an order for damages will not adequately compensate it if a breach is found.

14 The Union says that neither taking the vaccine nor being subject to a disciplinary suspension or termination is a reversible course of action. Both outcomes have serious and potentially dire repercussions for a significant number of employees in these bargaining units. The Union says ICBC's COVID-19 Vaccination Policy is particularly problematic because it will apply to employees who are already unable to work due to unrelated illness or injury. The Union says there can be no question that the imposition of a vaccine on these individuals represents a clear intrusion on their *Charter* rights. It says injunctive relief is necessary to prevent the Policies from requiring employees to undergo irreversible medical treatment, at least until the Union can access the rights conferred by Section 54 of the Code.

15 The Union relies on *Electrical Safety Authority and Power Workers' Union*, (unreported) November 11, 2021 (Stout) ("*Electrical Safety Authority*") and *Fraternal Order of Police Chicago Lodge No. 7*, 2021 CH 527 ("*Fraternal Order of Police Chicago*") to support its claims for interim relief. In *Electrical Safety Authority*, the arbitrator found that the employer's imposition of a mandatory vaccine policy was unreasonable because there was no specific problem or specific risk to justify it (para. 22). In *Fraternal Order of Police Chicago,* the Illinois Circuit Court granted the request for injunctive relief and prohibited the employer from enforcing its COVID-19 vaccine policies until the reasonableness of those policies could be adjudicated on their merits. The court held that irreparable harm would result to the employees if the injunction as not granted because "an award of back pay or reinstatement cannot undue a vaccine. Nothing can" (p. 3).

16 The Union says the Policies must be suspended until negotiations between the Employers and the Union have occurred. Otherwise, by the time a potential adjustment plan – and a potential alternative to mandatory vaccinations – is negotiated, employees may already have been disciplined, terminated, placed in undue financial distress, or been forced to take the vaccine against their will. While the Union concedes that employees' ideological opposition to the vaccine may not rise to the level of a ground protected by the *Human Rights Code*, R.S.B.C. 1996 c. 210, it is nonetheless sincerely held and may be constitutionally protected.

17 The Union also says it will suffer irreparable prejudice if the Employers are not required to consult with it before the Policies are enforceable. The Union says unvaccinated employees are experiencing increasing levels of frustration and helplessness which may cause reputational harm to the Union in the form of lost confidence and support among the membership. It says these losses are not amenable to quantification and, as a result, an appropriate remedy may be lost if interim relief is not granted.

18 BC Hydro and Powertech say that the purpose of interim relief is to prevent the effective frustration of the applicant's rights in the period of delay between filing the application and the decision on the merits. Here, they say, there is no potential harm that cannot be resolved by way of the remedial powers available to the Board on hearing the application on its merits. BC Hydro and Powertech argue that, even if the Board finds that they breached Section 54, any losses suffered by employees can be remedied by way of damages. As a result, the request for interim relief must be dismissed.

19 BC Hydro and Powertech say that the Board's decision on the merits of the Section 54 application will not address the Union's allegations regarding alternatives to mandatory vaccination or other issues relating to employee *Charter* or privacy rights. The Board's process will only address the extent to which they are obliged to provide further or different notice of its COVID-19 Vaccination Policy or engage in further good faith discussion with the Union about it.

20 ICBC says the Union has not met the first *White Spot* criterium and cannot prove an adequate remedy would be unavailable at the final hearing without an interim order. It says the Union is asking for remedies beyond the scope of what the Board can grant, even if a breach of Section 54 is ultimately found. ICBC says the Union asserts its COVID-19 Vaccine Policy is unreasonable and unlawful, yet no grievance has been filed. It says the remedies the Union seeks are within an arbitrator's jurisdiction to grant, not the Board's.

21 In reply, the Union reiterates that irreparable harm will result to the Employers' employees and to the Union's ability to advocate on their behalf if the interim requested is denied.

IV. ANALYSIS AND DECISION

22 The Board may grant interim relief, as a discretionary remedy, under Section 133(5) of the Code. This discretion is exercised only in rare and exceptional circumstances: *White Spot*. The requirements for an interim order are set out in *White Spot* and summarized in *RBA Canada Inc.*, BCLRB Letter Decision B31/97, as follows:

> 1. whether an adequate remedy would be unavailable to the applicant at the final hearing without an interim order;
>
> 2. the existence of a strong link between an alleged breach of the Code the consequences of the breach and the interim relief sought;
>
> 3. the claim must not be frivolous or vexatious and must usually be based on a prima facie case;
>
> 4. an interim order must not penalize the Respondent in a manner which will prevent redress if the application fails on its merits; and
>
> 5. an interim order must be consistent with the purposes and objects of the Code. The discretion to grant an interim order will not be exercised absent a critical labour relations purpose or if granting of the interim order would grant the entire remedy sought or otherwise tilt the balance in favour of one party.
>
> (at para. 19)

23 The Union says that, because of the permanent nature of the vaccine and other consequences of non-compliance, an adequate remedy would be unavailable to it and the affected employees if the Employers were entitled to apply the policy before its applications under Section 54 could be adjudicated on their merits. However, the Board's decision on the merits of the Section 54 applications is not a decision on the reasonableness of the Policies themselves. The Board's role under Section 54 is to evaluate whether the Employers implemented the Policies in a manner consistent with the notice and consultation obligations set out in that provision. That is, a finding on the merits of the Union's applications will not determine the reasonableness of the Policies or the reasonableness of the Employers' decisions to implement them.

24 The Board recently summarized the purpose of Section 54 and the rights conferred by it in *West Coast Medical Imaging Inc.*, 2021 BCLRB 160 (Leave for Reconsideration of 2021 BCLRB 80) ("*West Coast Medical Imaging*"), as follows:

> Section 54, together with its companion provision in Section 53, contemplate a cooperative model of labour relations. Both provisions have been in place since 1993 and constitute long-standing statutory recognition of the valuable contribution unions and employees can make to the decision-making processes that affect their working lives: *UBC*, para. 22.

> Section 54(1) applies "[i]f an employer "introduces, or intends to introduce, a measure, policy, practice, or change [a "Change"] that affects the terms, conditions, or security of employment of a significant number of employees to whom the collective agreement applies". In determining whether Section 54 applies, the Board will take a contextual and purposive approach: *Pacific Press, A Division of Southam Inc.*, BCLRB no. B374/96 ("*Pacific Press*"), *Tolko*.
>
> When Section 54 applies, two important obligations are created. First, an employer is required to give the union at least 60 days' notice before the Change is implemented: *UBC*, para. 24, *Pacific Pool Water Products Ltd.*, BCLRB No. B324/2000 ("*Pacific Pool*"), para. 45, *Pacific Press*, p. 19, and *Money's Mushrooms*, BCLRB B82/2005, paras. 36-39 ("*Money's Mushrooms*"). Second, the employer and the union must meet, in good faith, and endeavour to develop an adjustment plan, which may include the topics set out in Section 54(1)(b)(i)-(iv), some of which may mitigate the effects of the Change. These discussions are the primary objective of Section 54 of the Code: *Tolko*, para. 32.
>
> (paras. 42-44)

25 Section 54 confers a substantive right to notice and consultation and must, therefore, be given a broad and liberal interpretation: *West Coast Medical Imaging*, para. 45; *Health Employers Association of British Columbia*, BCLRB No. B393/2004 (Leave for Reconsideration of BCLRB No. B415/2003); *Pacific Pool Water Products Ltd.*, BCLRB No. B324/2000 ("*Pacific Pool*"). Section 54 does not, however, confer on the Board the authority to assess the reasonableness of the Change or the rationale for implementing it; the decision to implement a Change is a business decision for the employer to make: *Wolverine Coal Partnership*, BCLRB Decision No. B185/2015; *West Coast Medical Imaging*, para. 55.

26 To that end, Section 54 does not require the parties to agree to an adjustment plan, only that they engage in discussions in good faith with respect to one: *Canfor Pulp Ltd.*, 2021 BCLRB 104 (Leave and Reconsideration of 2020 BCLRB 132), para. 49; *University of British Columbia*, BCLRB No. B371/94 ("*UBC*"), p. 30; *Wolverine*; *D & W Warehousing Ltd.*, BCLRB Decision No. B114/97 ("*D & W Warehousing*"), para. 36; *Foremost Foods Ltd.*, BCLRB No. B169/96 ("*Foremost Foods*"), para. 20.

27 There is no mechanism in Section 54 of the Code to resolve a disagreement about whether an adjustment plan should be agreed to or what its terms should be: *Foremost Foods*, para. 20. In *D & W Warehousing*, for example, the Board found the employer breached Section 54 by failing to consult with or give notice to the union before closing its business. The Board nonetheless refused to make a remedial order for severance pay to the affected employees because the employer would not have had

an obligation to agree to severance pay as part of any adjustment plan, had those negotiations taken place: para. 36. Where damages are ordered for a breach of Section 54, they are intended to compensate the union for the lost opportunity to negotiate, not for the failure to achieve a particular outcome: *D & W Warehousing*, para. 38.

28 The Union seeks to have the propriety of the Policies determined before its members are faced with the decision to become vaccinated, disclose their vaccination status, or suffer disciplinary and financial consequences. However, I am not persuaded that the types of remedies that would be available for a breach of Section 54 (assuming one is found) can only be preserved through an interim order as the Union alleges.

29 While I agree that the Board has broad remedial discretion, in light of the purpose and scope of Section 54, remedies for a breach will usually include: a declaration, an order that the parties meet in good faith to discuss an adjustment plan, or damages in the form of lost wages to employees and/or to the union for the loss of the opportunity to consult, or some combination thereof: *Tolko Industries Ltd., Quest Wood Products*, 2020 BCLRB 57 (Leave for Reconsideration of BCLRB No. B33/2019), para. 30; *Money's Mushrooms*, BCLRB B82/2005. I am not persuaded that these remedies would be inadequate or will be unavailable to the Union if interim relief is not granted.

30 The Union relies on *Comox District Free Press* to argue that the Board will grant interim relief in the context of a Section 54 application where the failure to do so may create an "impassable barrier" to alternatives to the Change itself: p. 4. There, the Board ordered that the employer's assets not be sold or removed from its premises pending a determination of whether the decision to close the operation was made in breach of the Code. I disagree with the Union that the circumstances of the present case create an "impassable barrier" in the same way the Board found existed in *Comox District Free Press*. From a remedy perspective, employees continue to have an alternative to the "irreversible" vaccination, which is to be placed on unpaid leave; an adequate remedy for that consequence – an order for damage to affected employees - does remain available to the Union even in the absence of interim relief, in the event its applications are successful on the merits.

31 In any event, I note that, since *Comox District Free Press*, the Board has generally declined to issue interim relief in the face of a business closure: for example, *7-Eleven Canada Inc.*, BCLRB Letter Decision No. B453/99; *Money's Mushrooms*, BCLRB No. B69/2005.

32 I am not persuaded that either *Electrical Safety Authority* or *Fraternal Order of Police Chicago* is relevant to the question before me. In *Fraternal Order of Police Chicago*, the court ordered interim relief until such time as the vaccine policy could be assessed on its merits through the grievance process. The arbitrator's decision in *Electrical Safety Authority* was the result of the type of inquiry the court contemplated; he was specifically tasked with assessing the reasonableness of the policy and the employer's rationale for imposing it. For the reasons I have already given, the Board's

inquiry on the merits of the Section 54 application does not include an assessment of the Policies themselves, only whether they were implemented in a manner consistent with Section 54.

33 I agree with the Employers that the remedies the Union seeks to preserve on behalf of employees through the present application are those that an arbitrator might award, if they found the Policies were not implemented in a manner consistent with the collective agreement. To the extent an interim order is required to preserve those remedies, in my view, it must be made by an arbitrator tasked with determining the merits of the Policies themselves. This finding is consistent with the result in both *Electrical Safety Authority* and *Fraternal Order of Police Chicago*. I agree with the Board in *Rio Tinto Alcan Inc.*, BLCRB No. B46/2015 (at para. 20) that for the Board to grant interim relief over an issue that is properly within the jurisdiction of an arbitrator in this case would improperly tilt the balance in favour of the Union.

34 Finally, the Union says, without interim relief, an adequate remedy will not be available to compensate it for the loss of opportunity to negotiate the Policies before they were implemented and the potential reputational harm that might result as a consequence. I note, however, that where a breach of Section 54 is founded on the failure to meet and negotiate in good faith to discuss an adjustment plan, the usual remedy is to order that such a meeting occur: *UBC*. This is so, even where the Changes have already been announced or implemented: *UBC*; *Wolverine*. The Board recognizes that, even they are no longer able to discuss alternatives to the Change, there is value to the parties in discussing measures to reduce the impact of the Change: *UBC*; *D & W Warehousing*. Moreover, as I have already said, the Board has consistently held that damages to the Union for the loss of that opportunity may be appropriate: *Tolko*, para. 30; *Wolverine*; *Pacific Pool*; *D & W Warehousing*. In the circumstances, I am not persuaded that, without interim relief, an adequate remedy would be unavailable to the Union to compensate it for the lost opportunity to discuss an adjustment plan, if its applications are ultimately successful on the merits.

35 For all of the reasons given, I am not persuaded that an interim order is required to ensure an adequate remedy is available to the Union if its applications under Section 54 are successful on their merits. As a result, I do not need to consider whether the other *White Spot* factors are met in the circumstances.

V. CONCLUSION

36 For the reasons given, the Union's applications for interim relief are dismissed.

LABOUR RELATIONS BOARD

JENNIFER GLOUGIE
ASSOCIATE CHAIR