

Ontario Superior Court of Justice dissolves injunction to stay terminations under hospital's mandatory vaccination policy

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On October 29, 2021, the [Ontario Superior Court of Justice dissolved an injunction](#) it granted on October 22, 2021, which had temporarily suspended the termination of certain University Health Network (UHN) employees who refused to comply with a mandatory COVID-19 vaccination policy. The Court's decisions in *Blake v. University Health Network*^[11] (*Blake*) are the first decisions by an Ontario court relating to the implementation of a mandatory COVID-19 vaccination policy by an Ontario hospital.

Background

On August 17, 2021, the Chief Medical Officer of Health issued Directive 6 under section 77.7 of the *Health Protection and Promotion Act* (the Vaccine Directive), requiring hospitals and healthcare organizations to implement COVID-19 vaccination policies.

As a result of the Vaccine Directive, several Ontario hospitals and other healthcare organizations, including UHN, implemented policies requiring all employees to be fully vaccinated against COVID-19, failing which their employment would be terminated. These policies generally provide for processes for employees to apply for medical and human rights exemptions, as well as adjudication of those exemptions.

Our earlier Osler Updates provide [an overview of the Vaccine Directive](#) and [highlight key considerations for hospitals and healthcare organizations](#) assessing exemptions from mandatory policies.

The UHN proceedings

In the first court challenge to a hospital's mandatory COVID-19 vaccination policy, a number of UHN employees — both unionized and non-unionized — commenced an action disputing the validity of UHN's mandatory COVID-19 vaccination policy. Among other things, the employees' action sought an injunction to stop the termination of employees who refused to comply with the policy (i.e., unvaccinated employees who did not qualify for an exemption from mandatory vaccination).

On October 22, 2021, the Court heard an urgent motion by the employee plaintiffs to stay (or stop) their terminations, which were scheduled to take effect that day given their non-vaccinated status.

Court grants interim injunction suspending the termination of employees for 6 days

Following a brief hearing, Justice Dunphy granted an interim or temporary injunction suspending the termination of the employees until a preliminary hearing on October 28, 2021, to facilitate careful consideration of jurisdictional issues and to allow the unions representing UHN employees to participate.

The Court was clear that it was granting the temporary injunction to preserve the status quo until further argument could be made, given the last-minute nature of the hearing and the importance of the issues. In its reasons granting the interim injunction, the Court observed that "this would be a very hotly contested application. The issues are strongly debated in the public sphere", and emphasized the court's role to be constrained, thorough and objective.

The Court found that the status quo could be maintained in granting the injunction, including because none of the affected employees were scheduled to work between October 22 and the October 28 hearing, so "what danger their presence at work might potentially have posed is not in issue because they will not be working anyway."

Court dissolves interim injunction, denies injunction pending trial of action

On October 29, the Court released its decision dissolving the interim or temporary injunction, and declining to continue the injunction for the non-unionized employees. In its decision, the Court underscores that it is not addressing the merits or legality of the vaccine policy adopted by UHN. Rather, the decision addresses three jurisdictional issues:

- whether the unionized employees have standing to ask the court to make a determination regarding their employment
- whether the court has jurisdiction to grant either the temporary or permanent injunction sought by the employee plaintiffs — i.e., make a determination with respect to the employment of the unionized employees — or whether that determination was solely the jurisdiction of a labour arbitration
- whether to continue the temporary injunction for the non-unionized employees

All of the unions representing UHN intervened at the jurisdiction hearing and were aligned with each other and with UHN in submitting that the unionized employees did not have standing before the court. Rather, UHN and the unions argued that the exclusive jurisdiction of unions to resolve disputes arising in the collective bargaining context must be secured against interference from the courts.

In concluding that the unionized employees did not have standing, the Court observed that "the Legislature has gone to great pains to erect high walls surrounded by a deep moat" to protect the labour relations sphere from court intervention. Finding that the essential character of the employees' dispute goes to the very core of the collective bargaining agreement and relationship, the court held that "there are few aspects of a collective agreement more fundamental than establishing what does and does not constitute just cause for the discipline or termination of employment." The Court noted that it was quite material that none of the intervenor unions have been silent regarding the implementation of the mandatory COVID-19 vaccination policy, and that all of them have filed a variety of individual and policy grievances in relation to the policy.

In considering whether it had residual jurisdiction to grant an injunction that is outside of the jurisdiction of a labour arbitrator, the Court recognized that no remedy exists to undo a vaccine once administered, and that the policy in question and the COVID-19 vaccine are both relatively new and their application in the collective bargaining context is yet to be settled. However, the Court held that these were not questions for the Court to determine; they are within the exclusive dispute resolution process within that collective bargaining relationship. The Court stressed that none of the intervening unions had asked the Court to maintain the temporary injunction despite having standing to do so, and that the decision of those unions is one that is “entitled considerable deference in our civil court given the fundamental nature of the labour relations principles involved.”

With respect to the non-unionized employees, the Court held that there was no basis on which they could meet the legal test for an injunction, given the employment regime of termination at will outside of the collective bargaining sphere. If the non-unionized, non-vaccinated employees were wrongfully terminated, they will be entitled to monetary compensation, and therefore cannot establish irreparable harm (i.e., harm that is not compensable by monetary damages) in relation to the termination of their employment as a result of non-compliance with the mandatory COVID-19 vaccination policy. Importantly, as only jurisdictional issues were before the Court at the October 28 hearing, the Court did not consider whether non-compliance with COVID-19 vaccination policies and mandatory vaccination in particular constitutes cause for dismissal from employment. This issue will certainly be the subject of future litigation, including potentially by the non-unionized employees in *Blake*, if they continue their action against UHN.

Blake provides clarity for hospitals and other employers with unionized workforces as they work to implement mandatory COVID-19 vaccination policies, by

- reaffirming the fundamental principle that unions have a monopoly over representation of unionized employees
- confirming the jurisdiction of labour arbitrators to adjudicate disputes arising from COVID-19 vaccination policies, despite the novelty of these policies and the vaccines

Finally, *Blake* signals the beginning of an anticipated wave of disputes arising from COVID-19 workplace policies.

Court challenges to mandatory COVID-19 vaccination in other jurisdictions

In Alberta, four physicians have commenced legal proceedings against Alberta Health Services (AHS) and the current AHS Chief Executive Officer, challenging the AHS Immunization of Workers for COVID-19 Policy. In their statement of claim, the plaintiff physicians allege a breach of their rights under section 7 of the *Canadian Charter of Rights and Freedoms* (the Charter), and contraventions of the *Freedom of Information and Protection of Privacy Act*, the *Health Professions Act* (Alberta) and the *Criminal Code*. At the date of this publication, AHS has not yet submitted a statement of defence in response. We continue to monitor developments in this case and its potential impact on physician privilege issues.

In Saskatchewan, the Court of Queen’s Bench recently dismissed an application filed by a former People’s Party of Canada candidate and two citizens’ groups, who argued that the province’s vaccination policy violates their Charter rights.

Osler has extensive experience in advising our hospital and healthcare clients regarding COVID-19 vaccination policies and any related issues and disputes for both employees and

professional staff. For questions relating to vaccination policies and addressing organizational issues relating to COVID-19 generally, please contact one of the authors.

The authors wish to thank articling student Hannah Davis for contributing to this update.

[1] *Blake v. University Health Network*, 2021 ONSC 7081; *Blake v. University Health Network*, 2021 ONSC 7139.