In the matter of an arbitration

B E T W E E N:

The Corporation of the County of Wellington

("the County")

and

Canadian Union of Public Employees, Local 973.01

("the Union")

and in the matter of the individual grievances of Robinson, Belushak, Goerz and Stroh.

Elaine Newman, Arbitrator

Hearings held by video conference on June 4 and 6, 2024. Submissions taken July 29, 2024.

Appearances:

For the Union:	Samson Oort, CUPE National Representative Leila Paugh, CUPE National Representative Connie MacDonald, President, Local 973 Margret Wrobel, Chief Steward, Local 973.0 Amanda Robinson, Grievor Ann Belushak, Grievor Matthew Goerz, Grievor Jennifer Stroh, Grievor
For the Employer:	James G. Knight, Counsel Catherine Phelps, Counsel Susan Farrelly, Director of Human Resources Michele Richardson, Assistant Director of Human Resources Luisa Artuso, Social Services Administrator

A W A R D

Introduction

[1] This Award addresses four individual grievances. Each grievor was terminated from employment for cause, for failure to comply with the County's policy requiring all employees to obtain vaccination against COVID – 19.

[2] The Union did not challenge the reasonableness of the policy itself, the disciplinary approach, or the potential for termination in the face of non-compliance. It did challenge the policy on the ground that it was ambiguous. By Award dated May 21, 2024**,** having heard argument on that point, I held the policy to have been unambiguous and completely clear in its requirements for vaccination and consequences for non-compliance.

[3] Absent other objections to the policy it was agreed that the grievors would present evidence of their individual circumstances, reasons for refusing to become vaccinated, the impact of that decision, and the impact of the termination from employment.

[4] **The Issues**

1. Was there just cause for each termination?
2. If so, was the penalty of discharge excessive in any case?
3. If not, are there, in any case, grounds upon which to exercise discretion under section 48 (17) of the *Labour Relations Act, 1995*, to substitute a lesser penalty?

[5] **The Collective Agreement**

Article 3:00 Management Rights

The Union recognizes and accepts that it is the exclusive right and function of the Corporation to administer and manage any and all of the affairs of the Social Services Department except as specifically limited by the Agreement.

10:00 Suspension and Discharge

A claim by an employee, who has completed his probationary period, that he has been suspended or discharged without just cause, shall be treated as a grievance if he has proceeded according to Clause 9.02 and if written statement of such a grievance, signed by the grievor, is lodged at Step 2 with the grievor's Supervisor within four working days of his meeting with his immediate Supervisor. If the matter is not resolved at this step such grievance may be settled by confirming the employer's action or by reinstating the employee, with or without full compensation for the time lost or any other arrangement which is just and equitable in the opinion of the conferring parties or by the Board of Arbitration or single arbitrator if the matter is submitted to arbitration. If either party rejects the use of a single arbitrator then a three man board is automatic.

[6] The parties rely on the following authorities:

The Corporation of the County of Wellington v Canadian Union of Public Employees, Local 973.01, (Newman) May 21, 2024 unreported

USWA, Local 3257 v Steel Equipment Co., [1964] OLAA No 5

BCGEU v BC Safety Authority (Dismissals for Not Having COVID-19 Vaccination), 2023 CarswellBC 2331

Lakeridge Health v OPSEU, Local 348, 2023 CanLII 61431

Lakeridge Health v CUPE, Local 6364, 2023 CanLII 33942

Ontario Public Service Employees Union (Titley) v The Crown in the Right of Ontario (Ministry of Public and Business Delivery Services), 2024 CanLII 52279

London Health Sciences Centre v UNIFOR Local 27, 2024 CanLII 48714

Humber River Hospital v Teamsters Local Union No. 419, 2024 CanLII 19827

Toronto Professional Fire Fighters' Association, I.A.A.F. Local 3888 v. Toronto (City), 2022 CanLII 78809

Saskatchewan Power Corporation v International Brotherhood of Electrical Workers Local 2067, 2022 CanLII 139464

Consumers Cooperative Refineries Ltd. v. UNIFOR, Local 594, 2023 CanLII 88216

BC Hydro and Power Authority v International Brotherhood of Electrical Workers, 2022

Evidence of the Grievors

Amanda Robinson

[7] Ms. Robinson began employment with the Employer in February of 2018. At the time of her termination she was a registered early childhood educator, working as a teacher assistant at the Wellington Place Childhood Learning Centre, in direct contact with children from infant to four years. When she last worked, she was assigned to the infant room, with six infants under her charge.

[8] Ms. Robinson describes her personal circumstances as living in a relationship with a partner and one child. She describes her job as caring for children using a play-based curriculum, dealing with relationships with the families, and being a responsible and active team member. She impressed as a devoted and committed childcare professional, with pride in her work. There is no question that the loss of this job was deeply painful for her, and for her family.

[9] Ms. Robinson agrees that as early as October 2021, when she was placed on unpaid leave, she had communicated to the County that she would not become vaccinated. She agrees that she received all relevant and critical notices from the County explaining its position on protections arising from the COVID-19 pandemic. In particular, she received and understood all of the following:

- the Implementation Policy of October 8, 2021, asking all employees to become vaccinated;

- notice of being placed on unpaid leave for failure to become vaccinated on October 16, 2021;

- the County's change to a disciplinary approach for the failure to vaccinate, and the County's warning letter advising that failure to become vaccinated could result in termination;

- an invitation to a virtual Town Hall Meeting with Dr. Nicola Mercer, Chief Medical Officer of Health, held on January 28, 2022; and

- Notice of Termination February 25, 2022, after having been on unpaid leave for four months.

[10] Ms. Robinson explained the thoughts and circumstances that went into her decision to refuse to be vaccinated against COVID – 19. She testified to many conversations with her partner on the subject, particularly when it became apparent that she would be placed on unpaid leave. They decided that it would be "ok financially" for her to go on that unpaid leave, to give herself time to think and consider her options, and to clear her head from the conflicting information and advice she was hearing around COVID – 19 vaccines. She explained that she was very hesitant about deciding whether to be vaccinated or not, because there was too much conflicting information.

[11] Ms. Robinson's preference is to take what she described as an holistic approach to personal health and healing. She prefers not to medicate, and to let the body heal naturally. To her, the risks associated with the vaccine were greater than the risks of remaining unvaccinated.

[12] Ms. Robinson also explained that she often has strange reactions to new medications. She said that she "reacts in different ways" to medications and prefers to avoid them. No medical evidence was provided to substantiate medical reasons for her refusal to vaccinate. No application for exemption from the policy on medical grounds was asserted. She explained that hers was a healthy family and that she knew of no one who had contracted COVID - 19.

[13] Ms. Robinson added that when the County initially stated that its actions were not intended to be punitive, she felt confident that she could remain on unpaid leave, and eventually return to her job.

[14] Ms. Robinson attended the Town Hall Meeting provided by the Employer on January 28, 2022, and heard the information provided in that meeting by Dr. Nicola Mercer. She says that she was conflicted about the messaging in that meeting. Dr. Mercer spoke of the need for boosters to the vaccinations, whereas the Employer's policy spoke only of requiring proof of the initial two injections. There were two different messages, she explained, and that contributed to her difficulty in deciding to vaccinate. "It just didn't add up… It just didn't make sense to me".

[15] On February 2, 2022, Ms. Robinson received a disciplinary warning letter advising that she had already taken three months to decide her course of action. She understood that the Employer was prepared to go ahead with disciplinary action. She and her partner discussed the circumstances, and she continued to lean against getting vaccinated. She knew that she was, potentially, giving up a career that she had worked hard to achieve. It took a lot, she said, for her to come to her decision.

[16] Ultimately, Ms. Robinson says that she felt that she presented no risk. She might have remained on unpaid leave without putting anyone at risk, and in the workplace her careful use of PPE, such as masks, gowns and goggles, would have eliminated any risk just as well as vaccination might.

[17] Ms. Robinson testified that she truly loved what she was doing as an early childhood educator, that she valued being an employee of the County, that she valued the connections she made as an employee of the County. She wishes to return to that employment. It has been very difficult for her to find employment that she sees value in. She has not found related work.

[18] Ms. Robinson had been off work, on unpaid leave, for four months by the time she was terminated on February 25, 2022. Ms. Robinson confirmed that she was aware of the

consequences of her decision, knew she would be terminated from employment, and having thought about it, made a painful but deliberate personal choice to avoid vaccination.

[19] After the termination, Ms. Robinson learned of a posting in the staff directory on "The Well". Ms. Robinson testified that the posting indicated she had been "terminated for cause". (I note that the grievor is mistaken on this point. The staff directory did list her as being terminated, but it did not say that she was terminated "for cause"). This was shocking and hurtful. Giving testimony on this point, she was upset and tearful, and said that she was still having trouble getting that photo out of her mind. She received an apology email from Susan Farrelly but did not accept that her apology was sincere.

Ann Belushak

[20] Ms. Belushak is a long service employee. She began working for the Employer in 2001, and before the onset of the COVID – 19 pandemic held a position as receptionist and intake worker for the Childhood Early Years Division. She had been in that role since 2013. She was re-deployed to perform screening for parents and children in the childcare program during the pandemic. Then, when the office re-opened for a period, she and her colleagues worked according to safe spacing guidelines and had no contact with the public. Throughout her twenty-one year employment history, she had no discipline imposed for any reason. She was on track to retire in 2025.

[21] Ms. Belushak explained that working for this Employer had been a great experience and she took pride in being a County employee. It was her experience that the County was an excellent employer – that it went above and beyond for its employees, took pains to ensure that jobs were protected, even when departments were changed or temporarily closed. The County, she said, always cared about its employees.

[22] For Ms. Belushak, even before the Employer encouraged all employees to become vaccinated, she felt that things were too uncertain for her to take that step. "There was a great push", she said, "a hard push, for everyone to get vaccinated – even the Prime Minister encouraged this step".

[23] But Ms. Belushak was afraid. She just did not feel comfortable getting the vaccine. She hoped that would never cause her job to be in danger. But ultimately, she says, she had to make a choice, and for her the choice was not to get vaccinated. She saw this as a personal medical decision. Although she accepts that people were trying to do their best – the doctors and the lawyers – that for her the only option was to remain unvaccinated. Her concerns, she says, "were magnified when it was announced that the AstraZeneca vaccine was not effective and should not have been administered." (No evidence was called on the issue of AstraZeneca. This was the grievor's perception of the issue.)

[24] Ms. Belushak said she was overwhelmed. Things were happening so fast, and the push to get vaccinated was so hard, that it did not make her feel comfortable. It did not make her feel safe.

[25] Ultimately, she was terminated, and from her perspective, termination for cause was like being categorized as the worst possible employee. She felt that it was punitive in nature after such long service on her part, and harmful to her reputation.

[26] In sum, Ms. Belushak was aware that the Employer was implementing a policy of requiring all employees to be vaccinated. She was aware that there would be disciplinary consequences for her failure to comply with that policy. But for her, it did not feel right or safe to take the vaccine. The prospect of vaccination frightened her. Despite knowing that she risked being terminated, she testified that the refusal to get the vaccine was the only decision she could make in the circumstances.

[27] Ms. Belushak now works as a cook in a grocery store. Her retirement plans have been scuttled.

[28] Ms. Belushak learned that her photo appeared in the staff directory with her status declared terminated. She felt as if she was being portrayed as a criminal. She received the apology from Ms. Farrelly but did not believe it was sincere. She felt that the photo had been posted to show others what happens when one decides not to become vaccinated.

Matthew Goerz

[29] Mr. Goerz had eighteen months of service when he was terminated from his position as a custodial and maintenance worker in the housing department. He managed two buildings and enjoyed excellent relations with the residents. He had no discipline on his record. He was an excellent employee who maintained his buildings in spotless condition and enjoyed good relations with residents. He earned the respect of his supervisors.

[30] Mr. Goerz is married and has one daughter. He has expressed, both through his testimony and a written statement, the deep personal anguish that his termination caused him, and the fear he had for his family.

[31] He received all notices issued by the County. On October 18, 2021 he received notice that he would be put on unpaid leave due to his failure to become vaccinated. He understood the reasons for that decision, which he calls "unfortunate". He did watch the video tape of the Town Hall meeting with Dr. Nicola Mercer but said that the information provided did not change his decision.

[32] Mr. Goerz testified that his decision to refuse vaccination was based on his religious beliefs. His claim for exemption from the policy on religious grounds was denied by the County, but he withdrew the grievance he filed challenging the denial. He chose not to be questioned and challenged on those beliefs. He testified that he did understand that his job would be in jeopardy if he failed to comply with the Employer's policy, but that he gave his religious beliefs supremacy. He says that he followed his conscience and his heart in making his decision.

[33] Mr. Goerz said that he did not feel that he had to follow the policy. He felt that his claim for religious exemption would be honoured. However, he does agree that by the time he withdrew his religious exemption grievance on March 14, 2022, he knew that his job would be in jeopardy if he did not vaccinate.

[34] Mr. Goerz explained that there were three occasions on which he had reason to feel that termination would not be invoked. First, when on unpaid leave, members of management told him that the leave status would be temporary. That gave him hope.

[35] Secondly, when Service Canada found that he had not committed misconduct within the meaning of the *Employment Insurance Act*, and granted his application for benefits, he felt that this decision would have impact and preclude termination for cause.

[36] Third, while on unpaid leave, Mr. Goerz had contact from the Employer, asking him to complete a course that he was required to complete. He did so and took from that experience some hope that he would be reinstated to active employment. Melissa, the person he was in contact with from Human Resources, had said, "fingers crossed we can put this to use…" Mr. Goerz is critical of her giving him false hope and criticizes the County for having failed to train their H.R. staff to be more realistic.

[37] In an effort to return to work from his leave of absence, Mr. Goerz offered to perform regular rapid antigen testing, and to wear full personal protective equipment while in the workplace.

[38] Mr. Goerz was articulate and moving in his expression of the pain he suffered in the wake of the termination. The job he had long hoped for was lost. He felt separated from his community and without purpose in his life. He feared not being able to provide for his family, particularly because he and his wife had only recently bought a house. The impact on him and his family, he explains, was devastating.

[39] Mr. Goerz became aware that his photo was posted in the staff directory stating his status as terminated. As with the other grievors involved in this hearing, the caption incorrectly listed his supervisor as Susan Farrelly. Mr. Goerz stated that he experienced extreme humiliation and mental pain as a result. He does not understand how the posting could have been an error and believes this issue should be fully investigated.

[40] Mr. Goerz impresses as a sincere individual with a strong work ethic and deeply felt responsibility to provide for his family. His oral evidence, and his detailed written

statement, clearly and honestly reflect the devastating impact on him and his family, due to his decision not to vaccinate.

[41] Very much to his credit, Mr Goerz was able to become re-employed by November of 2021, although at far less lucrative work moving furniture in a non-unionized position. He described this work as, "doing what high school kids do part time". However, he was subsequently successful in obtaining a unionized position in construction by May of 2022, and has continued in that field, although with a new employer since May 2023. He has abandoned any intention of returning to work for the County.

[42] In his written statement, Mr. Goerz asks many questions, some of which will remain unanswered. One of them was why he was terminated on March 14, 2022, when the others were terminated in February 2022. The answer, it seems to me, is that he had an outstanding grievance based on a claim for religious exemption when the others were terminated in February. It was not until March 14, 2022, when he withdrew his grievance before Arbitrator Jesin, that his termination was put into effect.

[43] Mr. Goerz is critical of what he saw as signals from the County that his inactive status was only a temporary measure. This, he said, represents bad faith. He should not have been misled by what he characterizes as promises of an eventual return to work.

Jennifer Stroh

[44] Ms. Stroh had worked for the County for about eight years, and in her newest role as a receptionist and office clerk for Ontario Works for the last year of her employment. She is a single mother of two teenaged girls. Since her termination she has worked as a caregiver for an elderly man who suffers from dementia.

[45] Ms. Stroh was on a short-term disability leave for part of the events giving rise to this grievance. Her first leave was for seventeen weeks in 2020. Her second was from October 7, 2021 to February 9, 2022.

[46] Ms. Stroh applied for but was denied long-term disability benefits. She explains that she was under extreme stress at the time. She withdrew her appeal from the denial of LTD entitlement because she felt it would exacerbate her stress to continue. She agrees that the County offered her a month's grace period before requiring her to decide about vaccination after the long-term disability claim was denied, giving her time to consider her options.

[47] In sum, by the time termination was imposed, Ms. Stroh had completed two periods of short-term disability, had abandoned her appeal from a denial of long-term disability benefits, and had been given a month's grace period to provide her with additional time to pursue her LTD appeal and to weigh her options regarding vaccination. There is no medical evidence in support of, and no claim for, exemption from the policy on medical grounds. Ms. Stroh was terminated May 2, 2022 – seven months after first receiving notice of the County's requirement to become vaccinated.

[48] The grievor admits that she did not comply with the Employer's policy requiring vaccination and says that she was undecided throughout the period between the first notification of the policy and the date of termination. She says that she was alone in the world, with no partner, no one to talk to, and was petrified by the decision whether to get vaccinated. She said, "there was a lot of information around, and I couldn't make a good decision on the mixed reviews I was getting". She added that whenever she thought about it, the choice put more pressure and stress on her.

[49] Although Ms. Stroh acknowledged that she was aware she would lose her job as a result of not complying with the County's vaccination policy, she was too afraid to risk taking the vaccine.

[50] In cross examination, Ms. Stroh was confronted with an email in which she solicited support for the "Freedom Convoy". She said that she did not believe that vaccination and masking mandates were necessary. Counsel for the County did not press this point with her in cross examination, or in argument. There is no evidence that her support for any social or political movement was a factor in her termination. There was no challenge to the

credibility of this witness, and I have been given no reason to doubt the honesty of her evidence.

[51] The impact of termination on this grievor was extreme and devastating. Throughout her evidence the grievor emphasized how much she appreciated the County as her employer. The County supported her, assisted with her educational goals, demonstrated a caring and supportive approach to her in her occupation. She planned to serve out her working life with the County.

[52] Ms. Stroh was very upset to learn that her photo had been posted on The Well, reflecting her status as terminated. She spoke to the union about it immediately. She received the apology from Susan Farrelly, but like the other three grievors, said that she did not feel that it was sincere.

Position of the County

[53] The County begins its argument by noting that in my Award of May 21, 2024, I confirmed that the relevant policy (Policy Statement 13.76, Schedule A to that Award) is reasonable in its requirements and consequences, and confirmed the availability of discipline, including termination, for non-compliance. These issues were not challenged by the Union.

[43] As indicated above, the Union did challenge the policy on the ground that it was ambiguous, which argument I dismissed, holding that the policy was clear and unambiguous in requiring all employees to become fully vaccinated. The policy was also clear in warning all employees that those ”who fail to comply with this policy may be subject to disciplinary action, up to and including dismissal”. I determined that employees knew that they had to become fully vaccinated, and that there was no misunderstanding or confusion on that point. They also understood the consequences for failure to comply. They understood that refusing to vaccinate could mean the loss of their jobs.

[44] This arbitration hearing was convened for the purpose of hearing the individual grievors and argument on the remaining issues. None asserted a claim for exemption from the policy based on grounds enumerated by the *Human Rights Code*. Each explained their reasons for having refused vaccination, and the impact of termination on them and on their families.

[45] The County argues that it took measures to patiently apply progressive discipline, moving from education to unpaid leaves, then to disciplinary warnings, giving each grievor several opportunities to fully consider their options. In the case of Mr. Goerz, the County deferred a decision to terminate pending a hearing before another arbitrator, in which it was expected that a Human Rights based claim for exemption would be advanced. That grievance was withdrawn, and the County resumed progressive discipline, escalating consequences to termination. In the case of Ms. Stroh, the County delayed termination to give her time to pursue an appeal from a denial of long-term disability benefits. The grievor did not pursue such an appeal, and the County then pursued termination. The other grievors, Ms. Robinson and Ms. Belushak, had lengthy periods of unpaid leave of at least three months, and adequate time within which to consider the options and make a personal choice about whether to become vaccinated.

[46] The County argues that in this situation, where the policy has been held to be reasonable and unambiguous, and where there is no evidence that the County proceeded too swiftly, or in an arbitrary manner, the issue of mitigation is not a relevant consideration. The County relies on BCGEU v BC Safety Authority in which it was held that after having placed each non-compliant employee on six weeks of unpaid leave, the next logical step in the process was discharge. There was no less intrusive measure that would have fulfilled the purpose of progressive discipline – none of the non-compliant employees were going to change their minds. As stated therein at para 397, Arbitrator Dorsey said:

Apart from foregoing the universal application of the policy, what less intrusive measure was the next step in progressive discipline? There was none. There was no explanation for abandoning consistent application of the policy that could be given to any employee who chose to overcome personal hesitancy and to take two doses of vaccine or who chose to resign.

[47] The County argues that termination was the only option available to it to enforce this policy, and there are no grounds upon which to substitute a lesser penalty.

[48] The County also relies on the approach of Arbitrator Herman in Lakeridge Health v OPSEU, Local 348. He had concluded, by prior award, that the employer's vaccination policy, similar to the one here considered, was reasonable. He concluded that there was just cause for termination, based on non-compliance with a valid and reasonable policy. He also concluded that there was no need to consider the individual circumstances of each employee in deciding that termination was appropriate. The usual factors considered by arbitrators, such as length of service, past clear record of discipline, whether the incident was isolated, creation of special economic hardship and the like (as set out in USWA, Local 3257 v Steel Equipment Co.) do not nullify the need for termination as the final step in progressive discipline when the offence is non-compliance with a mandatory vaccination policy. There is no lesser disciplinary response that will serve the needs of the employer – protecting the health and lives of other employees and members of the public. The fact that an employee did not trust vaccines or was not confident getting them did not amount to a mitigating factor in the employee's favour.

[49] The County argues that a similar analysis and result is evident in the matter of OPSEU v Ontario, Ministry of Public and Business Delivery Services, 2024, in which Arbitrator Bernhardt concluded that non-compliance was sufficient to find just cause, (in that case a refusal to test) and the reasons for refusal did not amount to mitigating factors that would warrant alteration of the penalty. The employer's safety-related needs outweighed the grievor's concerns about testing. The existence of the usual factors (a good disciplinary record and good work ethic) was insufficient to outweigh the employer's critical interests.

[50] The County relies on the analysis provided by Arbitrator Wright in London Health Sciences v UNIFOR, Local 27, in which he considered and rejected the approach of Arbitrator Parmar in Humber River. In the latter award, Arbitrator Parmar rejected outright the ability of any employer to mandate enforced medical treatment upon any employee. Arbitrator Wright acknowledged that the law recognizes an individual's right to

make decisions about their bodily integrity, including consent to medical treatment. However, he concluded that the extraordinary challenges of the COVID – 19 pandemic require "a different analysis" (at para 45). It was in the context of this analysis that Arbitrator Wright said, at para 54, regarding the issue of just cause:

An employee who states that they have no plans to get vaccinated is effectively telling the employer that they intend never to comply with its reasonable health and safety rule. In most circumstances there is no question that such behaviour would be met with a disciplinary response – it is a clear form of insubordination.

[51] Concluding that the refusal to comply was misconduct worthy of discipline, Arbitrator Wright nevertheless determined that the penalty of discharge was excessive in the circumstances of that case. The grievor had not received the benefit of progressive discipline, and had no opportunity, as one might have on an unpaid leave, to reflect and consider the impact of her choice.

[52] The County argues that it is established law that non-compliance with a reasonable mandatory vaccination policy is insubordination that may attract discipline. Termination is appropriate where progressive discipline has been reasonably and consistently applied. On the facts of the instant case, the policy was clear and consequences for non-compliance made known, warnings were given, and employees were placed on unpaid leave for at least three months. Individual circumstances of Mr. Goerz and Ms. Stroh were explored, acknowledged and respected. Termination was deferred in each case. There was no "automatic" termination. Before progressive discipline was escalated, an opportunity was provided for each to submit individual claims for exemption under Human Rights or medical grounds. There was no other disciplinary option that would serve the safety interests of the employer. There was just cause to terminate. It was not an excessive penalty in these circumstances. Each grievor made a deliberate, informed personal choice. Mitigating factors were not relevant to the process, according to the Herman analysis. But if they are found to be relevant, there are no mitigating factors in this case that would outweigh the critical interests of the County in implementing the ultimate penalty.

County Position on "The Well" Incident

[53] Finally, the County addressed a different factual problem. After each of these grievors was terminated, it came to their attention that in the staff directory in the internal website, "The Well", their photographs appeared with their status listed as "terminated". The supervisor of each was named as Susan Farrelly, the Director of Human Resources. As was seen in the discussion of the evidence provided by each grievor, this came as a shock and a humiliation. The grievors assumed the posting was intentional and geared toward deterring others from non-compliance. The Union claims damages for this infliction of mental suffering.

[54] In response to the Union's concern, the County provided the evidence of Susan Farrelly, who explained that immediately upon learning of this incident, she took steps to correct it. An error was identified in the I.T. coding system, and the error corrected. Farrelly emailed a message of apology to each grievor, stating her regret on behalf of the County.

[55] The County argues that the incident has been explained as a coding error, that it was not intentional, and that immediate apology was the appropriate remedy. There is no ground upon which to award damages.

The Union's Position

[56] The Union argues that these facts arise in a municipal setting, and not in a health care setting. That sets the case apart from those such as Lakeridge and London Health Sciences, in which the safety consideration of the employers was set at a significantly higher level. In this setting, service to the public was required, but the work of the

bargaining unit was not focused on the health care of the infirm or elderly. The balance shifts when the safety consideration is lowered by the context.

[57] The fact that the policy may be "reasonable" is not a full answer to the question of whether the County had just cause to terminate. The Union argues that the issue of whether there was cause is a separate and distinct issue, requiring its own analysis and response. Citing the reasoning of Arbitrator Parmar in Humber, the Union argues that cause is never found when the policy of the employer seeks to violate the individual integrity of the employee's body. The Union quotes Arbitrator Parmar as follows, at para 58:

…the analysis of whether a rule or policy is reasonable is separate from an analysis of whether there is just cause for discipline for breach of that rule. As stated by Arbitrator Wright in Coca-Cola Canada Bottling Ltd. 'a just cause analysis is broader and more rigorous than is the determination of whether a workplace policy is reasonable' The fact that the employer's rule, requiring vaccination in order to work in the workplace is reasonable, is not a sufficient answer to the question of whether discipline is justified in the specific circumstances in which it was issued.'

[58] Furthermore, the Union argues that in some of the authorities relied upon by the County, such as the Bernhardt award in OPSEU v Ontario, the discipline was found to be for cause because the behaviour of the individual non-compliant employees was poor. Where refusals to test or vaccinate were accompanied by threats or warnings directed toward individual members of management, the seriousness of the refusal was augmented by intentional misconduct. There is no such misconduct in this case – there is just respectful disagreement with the value of and safety of vaccination. Respectful disagreement, or difference of opinion, cannot amount to cause for discipline.

[59] In the Union's submission, termination was not an appropriate response. The Union argues that the legitimate interests of the County – that of protecting the safety of all employees and the public served by the bargaining unit - could have been served through less intrusive means than termination. The County had placed non-compliant employees on unpaid leave. That effectively removed them from the workplace and had effectively

reduced any concern that unvaccinated employees might cause or spread infection. There was no need to escalate the discipline to the level of termination. Employees on unpaid leave were sufficiently punished by that response – they were making do without work and without pay. That was not easy for any of them. The unpaid leave was adequate to serve the interests of both individual and general deterrence while removing any threat from the workplace. As was said in the Firefighters case , discipline is only appropriate insofar as it is necessary to achieve the object of the rule. Vaccinated employees did not benefit from the termination of the unvaccinated.

[60] The Union adds that in a prior version of the County's policy, that which placed unvaccinated employees on unpaid leave, it was stated that nothing in the policy is intended to be punitive. By changing that approach, and by incorporating a disciplinary approach, the County was contravening its own policy. (It is noted that the County objected to this argument on the ground that it goes to the reasonableness of the policy itself, a matter that is not here in issue).

[61] In any event, the Union argues that employees required more time on unpaid leave. There was no reason to jump to termination so rapidly.

[62] On the issue of mitigation, the Union argues that the usual factors set out in USW v. Steel Equipment are relevant. These were four excellent employees with clear disciplinary records and excellent records of service. Each one of them cared deeply about their jobs and took pride in their work. For Ms. Belushak, retirement was close at hand after 21 years. For Ms. Stroh, with eight years of service, her job security was deserved. With respect to Ms. Robinson, a devoted young teacher, she had a career planned in the field of early childhood education and has not been able to secure work nearly as meaningful to her. And in regard to Mr. Goerz, he had found work with the County that he loved, and the rewards of a secure and challenging job that he had longed to achieve. Each of the grievors had individual attributes that warranted special and careful consideration before their jobs were snatched away.

The Union's Position on "The Well" Incident

[63] Each of the grievors has suffered in an unusual way with their terminations. Apart from the economic hardships and impact upon their families, each was humiliated by the County's posting of their photographs and terminated status in the staff directory. This caused each of them shock and mortification – as the termination declared that they were "the worst possible kind of employee", as one grievor put it.

[64] **Analysis and Conclusions**

i. Was there just cause for each termination?

ii. If so, was the penalty of discharge excessive in any case?

iii. If not, are there, in any case, grounds upon which to exercise discretion under section 48 (17) of the *Labour Relations Act, 1995*, to substitute a lesser penalty?

The Just Cause Issue

[65] These four grievances arise in the extraordinary context of a global pandemic, the details of which need not be recited in this award. It is enough to note that COVID-19 brought a threat to life and health that was unprecedented in our lifetimes. It brought death to millions around the world, disproportionately to infants, the infirm and elderly, leaving in its wake the broken hearts of their loved ones. It brought the debilitating effects of continuing symptoms, (long covid), to many able-bodied individuals, and has cost them the ability to support their families. This award arises, as well, in the context of additional damage caused by the pandemic – the financial wreck and emotional devastation caused to individuals and to the families of those who were deprived of the ability to work, and ultimately lost their jobs, because of their sincerely held concerns about vaccination. This award addresses the deep dilemma (so labelled by Arbitrator Mitchell in Power Workers Union v Elexicon Energy Inc., 2022 CanLII 7228 (ON LA) as quoted in the Firefighters' award at para 252) faced by reluctant workers to either take vaccine or lose their jobs.

[66] Although differing in their approach to the issue, "no arbitrator has said that a mandatory vaccination policy, however reasonable, has the effect of writing just cause protection out of a collective agreement". (Arbitrator Wright in London Health at para 39). The requirement to establish just cause in each case arises as a matter of law and cannot be changed by a unilateral employer policy. (See, for example, the discussion of Arbitrator Goodfellow in Central West LHIN v. CUPE, Local 966, 2023 CanLII 58388 (ON LA).

[67] The County's policy implemented in this case is Policy 13.76. It states in part:

Consequences of Non-Compliance with Policy

Employees who fail to comply with this policy may be subject to disciplinary action, up to and including dismissal.

[68] The Union has not challenged the reasonableness of this policy, recognizing that a breach may indeed attract discipline, including termination, notwithstanding the issue of bodily integrity. It is true, as the County argues, that this lack of challenge might end the discussion. The Union has not contested the disciplinary approach to which the County moved in seeking methods to enforce its policy. However, in the interests of providing a fulsome response to the Union's concerns, I address the issue as follows:

[69] Grievor Goerz, in the personal statement he provided at the time of his testimony, raised the point that in at least one Ontario labour relations award, the arbitrator ruled that discipline could never be imposed when the employer action or policy would violate an individual employee's bodily integrity and right to consent to medical treatment. He was quoting the words of Arbitrator Parmar, in her reasoning in Humber Valley Hospital v Teamsters 419.

60 For the above reasons, I do not find the caselaw upon which the Hospital relies as providing a persuasive authority to go against the well-established principles in the NAV Canada line of cases, and conclude that discipline is now an appropriate response to an employee's exercise of the right to determine whether to consent to medical treatment or disclosure of medical information. Such a conclusion would be a significant departure from

long-standing arbitral principles and, in my view, would require a fulsome analysis directly addressing the issue of medical consent to be persuasive.

61 In the case at hand, I find the Hospital did not have just cause to discipline the grievors for failing to get vaccinated and/or for failing to disclose private medical information. While there is no dispute that it was reasonable for the Hospital to require both of those things in order for the grievors to be able to work in the workplace, the reasonableness of that requirement did not eliminate the grievors' right to choose whether to be vaccinated. Whatever one may think of the wisdom of the employees' choice, it was theirs to make, and that is not conduct for which the Hospital may impose discipline.

[70] The Union relies on this argument in its assertion that there was no cause to discipline the grievors in these cases.

[71] Arbitrator Parmar provides compelling reasons for her conclusion that no employer policy that engages the issue of bodily integrity, and an employee's right to withhold consent to medical treatment, may be enforced through a disciplinary response. It may be enforced through non disciplinary means, such as removal of the employee from the workplace. Discipline may only flow from a vaccination policy if there is attendant misconduct, such as attending work without vaccination. But there is, she concludes, following detailed consideration of the authorities, no jurisprudence detracting from the decade's old principle that a disciplinary response is not appropriate to an employee's assertion of their right to refuse consent to a medical procedure.

[72] However, I am ultimately convinced by the reasoning of Arbitrator Wright, in the London Health matter. He acknowledged, (at para 45), that it is generally true that an employee can not be disciplined for exercising their right to withhold consent to undergo a medical procedure. However, he also said that "the COVID- 19 global pandemic requires a different analysis. The pandemic and the response thereto changed the world and continues to do so". This was also the approach taken by Arbitrator Herman in Lakeridge, in which he acknowledged the longstanding state of the law, in its respect for the primacy of individual integrity. But, he noted, "This is not a normal scenario". I agree.

[73] Arbitrator Wright said:

Citing those same paragraphs from Lakeridge Health, Arbitrator Parmar finds that the award does not "grapple in any meaningful way with the principle that discipline is not an appropriate response to an employee exercising his or her right to consent to receiving medical treatment or disclosing medical information" I disagree. What Arbitrator Herman does is illustrate the many interests at play in the hospital besides simply the individual employees right to choose not to be vaccinated. He points out that one consequence of that choice is to put at greater risk patients and staff who may thereby contract life threatening illnesses. He also highlights that there is both a statutory and contractual overlay to be considered: there is a duty on employers under the Occupational Health and Safety Act to take reasonable steps to protect the health and safety of employees, and employees have a right under the collective agreement as well as under the OHSA to a *safe work environment. That is the context in which an employee's choice not to be vaccinated must be analyzed. On the evidence before him, Arbitrator Herman found that keeping unvaccinated employees on unpaid leave as opposed to terminating them, would compromise the hospital's ability to attract and retain staff. Based on the considerations set out in the paragraphs quoted above and that finding of fact, Arbitrator Herman came to the following conclusion: "the need to protect the health of its employees and patients, and to act in a way that enabled the hospital to continue to provide its services in a relatively safe manner, outweighed the rights of individual employees to preserve their employment status when they declined to get vaccinated".*

[74] At paragraph 49, Arbitrator Wright continued:

We live and work in community with others; we all possess certain individual rights, but we are also bound together by myriad duties and obligations. These competing interests must be balanced against one another. In October of 2021 with the delta variant of COVID-19 near its height, and with safe and effective vaccines readily available, employees in the hospital sector particularly had a duty to keep one another safe, and to make sure vulnerable patients were not put at higher risk of infection and death. It was with these considerations in mind in Lakeridge Health that arbitrator Herman concluded as follows:

it is a legitimate response to a breach of the policy to discipline employees who refused to comply with the reasonable requirement that they be vaccinated in order to protect other employees, patients in hospital and visitors. Employees were not forced to get vaccinated; they were required to get vaccinated only if they wish to continue to work for the hospital.

[75] Arbitrator Wright continued in his analysis to consider the factual circumstances under which the pre-COVID authorities arose. These, he concluded, did not raise the same complex array of competing rights and duties. Fitness to work or accommodation cases did not address complexities raised at the level of the COVID-19 pandemic.

[76] This approach conforms to my view that the burdensome employer responsibility of protecting the lives of other employees and members of the public, did alter the analysis that is required in cases such as these. The pandemic necessarily caused a shift in the legal landscape, bringing primacy to the imperative of protection of the general public.

[77] Given the respective interests of the employer and its employes, I am satisfied that the circumstances of the pandemic must bring to bear a different analysis from that usually considered in cases where the issue of bodily integrity comes into play. The fact that the grievors' bodily integrity was put squarely in issue does not, in my view, eliminate the possibility that discipline could be brought to bear for violations of the policy. Just cause for discipline in such circumstances is an available defense to an employer in such circumstances even where there is no additional misconduct on the part of the employee. Refusal to comply with the policy is sufficient cause.

[78] The Union argued that the authorities of Lakeridge and London Health are authorities which arise in the context of the hospital sector. Arbitrator Wright, for example, relied on the particular duty in the hospital sector to ensure that vulnerable patients were not put at higher risk of infection and death. The Union argues that the context of the present case is different. In the municipal context, employee contact with the public is not on the same knife's edge particular to the healthcare sector.

[79] However, it bears pointing out that, in this case, one of the grievors, Ms. Robinson, was an early educator working in the infant room of a childcare facility. Her work brought

her into direct contact with a vulnerable category of individual. Another grievor, Mr. Goerz, worked in a housing development with a broad array of individuals, some of whom may have been particularly vulnerable to harsh consequences from exposure to COVID-19. I am not persuaded that the characteristics of the municipal sector substantially differentiate the facts of this case from those considered in the Lakeridge and London Health awards. The grievors would in the course of their work come into contact with an array of members of the public as well as with other employees. I consider the interest of protecting those members of the public sufficiently compelling in and of itself.

[80] The griever **Amanda Robinson**, early childhood educator, made the deeply painful decision not to comply with the vaccination policy. As early as October 2021 she notified the employer of that decision. She received all relevant notices and warnings from the County explaining the consequences of her decision. She received and understood the educational information provided by the County regarding the safety and efficacy of vaccines. She spent months on unpaid leave and had adequate time to consider her options. She made an informed and deliberate personal choice to make the very difficult decision to give up a job that she loved and a job that she worked hard to obtain.

[81] Without judging the personal choice that she made, I can come to no conclusion other than that there was cause to discipline Ms. Robinson for her violation of the vaccination policy. There is nothing in her evidence that would support the view that a lengthier period of unpaid leave would have had an impact on Ms. Robinson's personal choice. She simply was not going to respond to discipline less harsh than termination. As the County argues, after having provided the warning and lengthy unpaid leave, I am satisfied that the Employer had reason to conclude that there was cause to terminate.

[82] The grievor **Ann Belushak**, a receptionist and intake worker for the childhood early years division, loved her job and took pride in being a County employee. Ms. Belushak felt that there was too hard a push for everyone to get vaccinated and did not feel comfortable getting the vaccination. Ms. Belushak received and understood the educational information provided by the County and spent months on unpaid leave. Like Ms. Robinson, she made a deliberate choice and exercised her right to make a personal medical decision not to

vaccinate. No disciplinary response short of termination would have resulted in a different outcome. I am satisfied that in light of her deliberate violation of the vaccination policy, the County had reason to conclude that it had cause to terminate.

[83] The grievor **Matthew Goerz** agreed that his decision not to vaccinate was deliberate and personal, and he stood by his right to make that personal choice. This grievor, perhaps more than anyone, expressed with detail and passion the strength of his personal belief and the devastating impact which the loss of his job had upon him. But it bears mentioning that the refusal in this case was not one asserted under the *Human Rights Code*. It has been held in Lakeridge that the strength of a personally held belief that falls outside of that category does not justify a refusal to comply with a reasonable vaccination policy. Accordingly, the County had cause for discipline, and given that no level of discipline short of termination would have altered Mr. Goerz's decision not to vaccinate, the termination was for cause.

[84] The grievor **Jennifer Stroh** explained in evidence that she made her personal decision not to vaccinate following a period of disability. She says that she felt alone and had no one to talk to. She says that the circumstances created enormous stress for her, and the choice put her in a most difficult and painful position. Ms. Stroh exercised her right to make the personal choice that she did. However, her choice cannot be characterized as anything but a deliberate and fully considered refusal to comply with the County's vaccination policy. I conclude that in the case of Jennifer Stroh, the County had cause to discipline, and that the termination was for cause.

Was Termination Excessive in the Circumstances?

[85] The authorities here relied upon address the question of termination as the ultimate disciplinary response in the context of considering whether the policy was reasonable. As noted earlier, this is a case in which the Union did not challenge the reasonableness of the policy, and, as argued by the County, this may eliminate the need for this element of analysis. However, again in the interests of providing thorough reasoning in answer to the Union's argument, I note the following in concluding that in this case, termination was not an excessive response to the refusal to vaccinate.

[86] It is true, as the Union argues, that to be considered "reasonable" a unilaterally enacted employer policy must adopt the approach that is least intrusive to the achievement of the legitimate goals of that policy. A recent and relevant reference to this point is found in the award of Arbitrator Ish in Consumers' Cooperative. He said, at para 130:

The main reason for this conclusion (that the policy was unreasonable) is that the employer's response ignored a fundamental finding of the Court in Irving Pulp & Paper. As Arbitrator Rogers set out in the Toronto Firefighters 2022 case, at para 312, in reference to Irving Pulp & Paper: "the Court accepted that, in determining reasonableness, labour arbitrators would assess such things as the nature of the employer's interest, any less intrusive means available to address the employer's concerns, and the policy impact on employers.

[87] Arbitrator Ish continues to say that the removal of the non-compliant individuals from the workplace through indefinite leaves of absence, would achieve the goal of the policy, and cause no prejudice to the employer.

[88] The analysis found in the Firefighters award concludes that the mandatory vaccination policy was reasonable. There were no less intrusive means to best achieve the employer's objectives, as those were informed by both the precautionary principle and the employer's statutory responsibilities under the *Occupational Health and Safety Act*. The award concluded at paragraph 266, however, that the enforcement mechanism was tantamount to automatic termination, and therefore invalid:

Having found the mandate to be reasonable, in conformity with the precautionary principle and the OHSA, because of the City's need to protect employees against COVID-19 infection, the necessity of hospitalization, possibly in intensive care, long COVID and death, I join arbitrator Somjen in BC Hydro to ask "Since I have upheld the policy as reasonable, what does the possibility - here the inevitability - of discipline for the unvaccinated add to resolving the employer's health and safety concerns? My answer is that the employer has not made out the invariable need for discipline or the establishment of a disciplinary record in the exceptional circumstances present here. An unpaid leave or other non disciplinary exclusion, while coercive, is less so than a disciplinary suspension and discharge for cause. In my view, such

response would reflect, as well as can be done collectively, the balancing of interests recognized by virtually all arbitrators who have considered policies that provide for the possibility of disciplinary action and, as an interim if not final measure, provide for the removal of the individual from the workplace without compensation.

Disciplinarily suspending and then terminating the unvaccinated firefighters for cause did not add to the protection afforded other employees or persons who might come into contact with members of the service.

[89] However, having taken into account the views of Arbitrator Ish in *Consumer Co-operative* and Arbitrator Rogers in the *Firefighters'* award, and the arguments of the Union on the facts here present, I would respectfully take a different approach – that articulated by Arbitrator Dorsey in BCGEU, at para 396. That analysis leads to the conclusion that having warned, and placed non-compliant employees on unpaid leave, there was no step in the progressive discipline chain that would have served the goals of the policy. He said:

The principles of progressive discipline offered the employer no insight into what next step in the circumstances might persuade [the grievor] to become compliant with the policy. As the BC Supreme Court said in September 2022:

Finally, I accept that it is extraordinary for an employer to enact a workplace policy that impacts an employee's bodily integrity, but in the context of the extraordinary health challenges posed by the global COVID-19 pandemic, such policies are reasonable. They do not force an employee to be vaccinated. What they do is force a choice between getting vaccinated, and continuing to earn an income, or remaining unvaccinated, and losing their income. [The griever] made her choice based on what appears to have been speculative information about potential risks.

Apart from foregoing the universal application of the policy, what less intrusive measure was the next step in progressive discipline? There was none. There was no explanation for abandoning consistent application of the policy that could be given to any employee who chose to overcome personal hesitancy and to take two doses of vaccine or who chose to resign.

[90] I am ultimately persuaded by the reasoning urged by the County in this case that once a reasonable policy was presented to employees, once they were provided with information and education, once they were placed on unpaid leave for at least three months, and once clearly warned that non-compliance would put their jobs in jeopardy, the only means left to the employer in continuing to enforce policy was termination.

[91] The legitimate goal of the County was not only that of protection for employees and members of the public, but the continuation of safe and effective access for the public to the provision of services. The balance of interests required in considering whether a less intrusive mechanism existed must, in my view, consider not only the activation of the protectionist principle, but the resumption and continuation of public service. That could not be achieved with non-compliant employees remaining on staff but putting themselves in no position to attend at work to provide those services. As Arbitrator Goodfellow said in Central West LHIN v. CUPE, Local 966, at para 156:

Nor, in my view, can it reasonably be suggested that placing employees on indefinite unpaid leaves of absence is, in any way, an alternative means of accomplishing the goals and objectives of the policy. The goal of the policy is to keep employees safe and working; it is not, as the Employers highlighted here, to keep employees safe and not working. The object of the policy is to get the work done, safely, with as much of the existing employee complement as possible. It is not to get the work done with temporary replacements – employees who, if they could be found on such contingent terms, would then need to be oriented and/or trained and who would then, presumably, be subject to termination should circumstances, including the state of mind of the non-compliant, change – all while the Employers were attempting to cope with the greatest public health crisis ever faced. That, in my view, is not a less intrusive means of accomplishing the objectives of the policy; it is a less effective means of enforcing it. The disciplinary aspect of the policy was coercive, and it was meant to be. The goal was to achieve compliance.

[92] The goal of the County was to achieve compliance. There was no less intrusive means to achieve that goal other than implementing the next step in progressive discipline. Termination was not excessive in these circumstances.

Substitution of a Lesser Penalty

[93] The Labour Relations Act, Section 48 (17) provides:

Substitution of penalty

(17) Where an arbitrator or arbitration board determines that an employee has been discharged or otherwise disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject-matter of the arbitration, the arbitrator or arbitration board may substitute such other penalty for the discharge or discipline as to the arbitrator or arbitration board seems just and reasonable in all the circumstances. 1995, c. 1, Sched. A, s. 48 (17).

[94] The entire analysis requires a balancing of interests – from the initial consideration of the reasonableness of the policy itself to the reasonableness of the enforcement mechanism. But it has been stated that the usual principles of mitigation, as enumerated in USW and Steel Equipment do not apply. For example, Arbitrator Herman in his first Lakeridge award said:

187. The Union asserts that employees should have been provided with an opportunity to present their views and circumstances before being placed on leave or terminated. Typically, the individual circumstances of employees being disciplined, such as length of service, discipline record, or reasons for the employee's conduct, are generally to be considered before discipline is imposed. This case does not arise, however, in a typical disciplinary context. The customary right of an employee to have personal circumstances considered in determining the justness of discipline or discharge has significantly less applicability, if any, in a context where placing an employee on leave or termination, because they decline to get vaccinated, is justified on the basis that it is necessary for them to be vaccinated in order for the Hospital to be able to continue to provide its core services.

188. No circumstance or explanation from an individual employee has been suggested that might justify an exemption from the requirement to get vaccinated, other than a religious or medical exemption, or a request for an extension of time to get vaccinated. Where any of these reasons were raised by employees, the Hospital delayed leaves or terminations until the exemption claim had been determined or until the employee requesting an extension either got vaccinated or indicted that s/he would not be doing so.

189. It is difficult to see how long service or a clean disciplinary record, for example, would act to prevent or nullify a leave or termination that is a reasonable part of a mandatory vaccination policy. Or why factors such as an employee relying on misinformation, or having a real fear of vaccination, or having concerns about the safety of vaccinations, would be sufficient to nullify what is otherwise a justified leave or

termination. Individual circumstances (other than exemptions based on religious or medical grounds) do not address the validity of requiring mandatory vaccination as a condition of employment, or the justification for placing an employee on leave or terminating an unvaccinated employee, nor in the circumstances do they provide mitigating factors against termination.

[95] I respectfully depart from this approach.

[96] In what I consider a persuasive approach to the issue of mandatory vaccination policies, in Central West, Arbitrator Goodfellow upheld the reasonableness of the policy and drew a critical distinction between the reasonableness of the policy, and the application of the policy to the individual circumstances of each employee. The individual grievance, he concluded (at para 186 of his award) was the appropriate place for consideration of the individual reasons for refusal to vaccinate, and the considerations that influenced the decision of each non-compliant grievor.

[97] In adopting that reasoning, in North Bay, I said, at para 5:

That award (Central West) definitively upholds an enforcement mechanism that includes potential termination from employment for non-compliance, while clarifying that the forum of the individual grievance is the appropriate place for consideration of individual consequences.

[98] It is undisputed throughout the relevant authorities that a policy that provides for automatic termination will not be upheld as reasonable. (See for example, the discussion in London Health.) It has been emphatically stated by Arbitrator Mitchell in Elexicon and by Arbitrator Rogers in the Firefighters award, that the "deep dilemma" faced by individuals who had to make the choice not to vaccinate must not be overlooked.

[99] How then is it possible to conduct an analysis of a termination grievance in such circumstances if one of the fundamental elements of labour relations theory is ignored? How is it possible to consider the individual circumstances of each grievor without exploring mitigating circumstances? This is the purpose of the statutory discretion to consider a lesser penalty. As said in USW and Steel Equipment, at page 361:

This board, therefore, has come to the conclusion that there are sufficient factors in the instant case which mitigate against the severe penalty of discharge imposed on this grievor by the company, and that this penalty should be reduced. The penalties substituted therefor, which while recognizing the seriousness of the offence committed by this grievor and while recognizing that it should be severe enough not only to teach this griever a well-deserved lesson but also deter other employees from a similar course of conduct, still recognizes the principle that justice must be tempered with mercy.

[100] From my perspective, it is the application of section 48 (17) of the *Labour Relations Act, 1995* that not only provides the opportunity for such consideration but requires it.

[101] The usual factors contemplated by USW v. Steel Equipment Co., such as the length of service, the prior record of discipline, the financial consequences of the discharge, whether the offence was an uncharacteristic first offence, whether the offence was a spur of the moment act, should be considered in the case of each grievor. Absent that process, the individuation of the analysis, as required by Central West, is disregarded.

[102] I turn to the facts presented by each of the grievors and consider the effect of these mitigating circumstances.

[103] First, I take note of the fact that **Ann Belushak** began working with the County in 2001. By the time of her termination in 2022, she had twenty-one years of service, characterized by a clear disciplinary record. She was close to retirement and planned to work out her service with the County.

[104] Seniority is one of the most important benefits of unionized employment. The theory, simply enough, is that employees, through their years of devoted service, earn enhanced job security. This is not an illusory benefit. It is not one to which arbitrators may pay lip service, and then disregard. After a lifetime of devoted work, a unionized employee is entitled to count on that seniority as a very real and bankable asset. After twenty-one years, a unionized employee is entitled to rely on their plans for retirement, and for security in that retirement. Arbitrators have long respected seniority as inviolable and have weighed it heavily in considering the application of mitigating circumstances when a job of

a long service employee is on the line. To disregard that earned benefit would, in my view, ignore one of the fundamental and most critical principles of labour relations law.

[105] Despite her failure to accept responsibility for refusing to comply with a reasonable policy, I consider Ms. Belushak's long service a most influential mitigating factor on assessing whether to exercise my discretion to substitute a lesser work penalty. After more than two decades of service, it is my view that she was entitled to count on that stability and security. She has earned the right to continue to work toward her secure retirement.

[107] I exercise my discretion to substitute a lesser penalty in her case. The termination is voided, and a lengthy suspension is substituted. That suspension will run from the date of her termination to the date on which the County revoked its Policy 13.76. During that period, Ms. Belushak should have remained on unpaid leave. After that time, if in compliance with all employer policies, she should have been returned to work. I remain seized, while leaving the details to the parties.

[108] It is important to state that it is certainly not "automatic" that every long service employee should have been exempt from an employer's implementation of termination, where progressive discipline failed to achieve compliance with a vaccination policy. Each case must be determined, and remedy fashioned, on its individual merits. I conclude only that in this case, the circumstances of this long service individual warrant a reduction in penalty.

[109] Second, I turn to the situation of **Ms. Stroh**, who at the time of her termination, had accumulated a moderate seniority of eight years. I acknowledge the extreme difficulty that Ms. Stroh had in making the decision to refuse vaccination, but do not consider any of the usual mitigating factors of sufficient weight to warrant substitution of penalty. There is no acceptance of responsibility for the insubordinate act of refusing to comply with a reasonable employer policy. There is an explanation, and there is significant hardship. However, in the absence of long service, I do not consider the circumstances of Ms. Stroh's termination to warrant alteration.

[110] Third, I turn to **Amanda Robinson**, with three years' seniority, who loved her work as an early childhood educator, and has not been able to find work of equal value. I acknowledge this as a significant loss and set back to her career plans but am not convinced that the circumstances warrant a substitution of penalty. Ms. Robinson was put on notice of the requirement, educated, warned, and placed on unpaid leave. There is nothing in her evidence to indicate that she has, at the end of that experience, altered her view that she was entitled to make the decision she made, and entitled to refuse to comply with the policy. There is no question that this was her decision to make, but I find no circumstances particular to her case that warrant substitution of a lesser penalty.

[111] Finally, **Matthew Goerz**, with eighteen months of seniority, presents as a short service employee, but one who has indeed suffered from these events, both emotionally and financially. To his credit, Mr. Goerz has been able to find unionized re-employment in the construction industry and has mitigated his loss in a new and satisfying career. I do not find grounds upon which to substitute a lesser penalty.

[112] I have considered Mr. Goerz's allegations of bad faith. In reviewing this evidence, the only answer I can provide to Mr. Goerz is to say that in a state of world-wide upheaval, my impression is that the County, and its management representatives appear to have been doing their best in a state of complete unknown. I do not attribute their messages of optimism as bad faith.

The Staff Directory Issue

[113] Each of the grievors testified that their photograph was published on "The Well" with their status listed as "terminated for cause". They are mistaken in this. The actual listings refer only to their status as "terminated".

[114] The only explanation for this publication, and for the incorrect identification of their supervisor as Susan Farrelly, is that there was a coding error that inadvertently caused this event. I have no doubt that for each grievor, this was humiliating and painful.

[115] Immediately upon the matter coming to her attention, Susan Farrelly corrected the listings (which included non union employees) and issued the apology referred to in this award. These were the appropriate steps to take.

[116] I am satisfied that the listing in the staff directory was indeed a technical coding error. There is no evidence, as some have suggested, that this was intentionally implemented to provide a warning to other employees for the consequences of non-compliance with County policies, to demonstrate the authority of the employer or to intentionally inflict further emotional suffering on any of the grievors. The consequence of the error was humiliating for the grievors, but it was an inadvertent error.

[117] No damages are awarded in respect of this incident.

Conclusions

[118] The grievance of Ms. Belushak is allowed in part, in recognition of her long service and seniority of twenty-one years. The remaining grievances are dismissed. I remain seized as required.

DATED at Toronto this 21st day of August, 2024.

Elaine Newman

Elaine Newman, Arbitrator