KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 34**

Date: **2025 03 05**
Docket: KBG-RG-02274-2023
Judicial Centre: Regina

BETWEEN:

CONSUMERS' CO-OPERATIVE REFINERIES LIMITED

APPLICANT

- and -

UNIFOR LOCAL 594

RESPONDENT

Counsel:

Eileen V. Libby, K.C., and Allison L. Graham	for the applicant
Samuel I. Schonhoffer	for the respondent

JUDGMENT
March 5, 2025

DANYLIUK J.

Introduction

[1] It was the time of COVID-19. The world was in the grip of a pandemic, the likes of which had not been seen for a century. People were concerned. People were scared.

[2] Precautions were needed in the workplace – indeed, in any place members of the public had contact with one another. Many businesses instituted protocols to ensure the safety of their workers as well as members of the public with

whom they dealt. Restrictions were commonplace.

[3] The applicant, Consumers' Co-operative Refineries Limited [CCRL], was one such business. CCRL instituted a vaccination/testing policy, the details of which are explored below. Two workers at CCRL, Dallas Shuparski and Ward Rubin, were given numerous chances to comply with this policy. They did not. Accompanying these opportunities for compliance were warnings of consequences if they refused to comply – escalating or progressive in nature. Ultimately, the sanction warned of was termination of employment. These workers still did not comply.

[4] In late January 2022 Shuparski and Rubin were terminated. Their union the respondent, Unifor Local 594 [Unifor], successfully grieved their termination before an arbitrator.

[5] From the arbitrator's decision, 2023 CanLII 88216 (Sask LA) [*Decision*], CCRL brings this application for judicial review. CCRL asks that the *Decision* of the arbitrator be quashed, the grievances dismissed, and that costs be awarded to CCRL.

[6] For the reasons set out below I have determined CCRL's application must succeed.

Background

[7] CCRL commenced this judicial review application through an Originating Application, which is the proper procedure.

[8] CCRL runs an oil refinery located at Regina. This is a significant operation. It is a unionized workplace with Unifor representing about two-thirds (roughly 600) of the employees. At all material times CCRL and Unifor were operating under a collective bargaining agreement operative from February 2019 to the end of January 2026. That agreement was in place through COVID and is the agreement

pertaining to this dispute.

[9] As already noted the COVID pandemic resulted in changes to the way CCRL operated. I note it is easy now to see that the pandemic was relatively limited in duration but at the time – that is, in the midst of the pandemic – it was unclear how long it would last. It is easy to take a misstep into revisionist history and view the events giving rise to this application through the lens of hindsight.

[10] COVID hit Canada around March of 2020 and remained in strong force for a couple years. CCRL took note of this and looked inside and outside the organization (such as to the Saskatchewan Health Authority) to determine what should be done to guarantee a safe workplace. A set of operating protocols was developed and implemented. As matters pertaining to COVID changed so did these protocols. Flowing from these protocols a number of safety measures were instituted in the CCRL workplace. Plexiglass panels were used to better insulate workers. Masks and sanitizer were placed throughout the refinery.

[11] Flash forward in time to late summer and early autumn in 2021. The so-called "fourth wave" of COVID had hit. The virus was mutating. Things were not getting better. Generally, members of the public were restricted in the workplace and even in their homes. Masking was a broad requirement. Gatherings were severely restricted. It is easy to conduct an *ex post facto* analysis now, years later. In the moment, the maxim "desperate times call for desperate measures" seemed to merit broad application. As well, COVID itself mutated and changed. Correspondingly the restrictions were something of a moving target.

[12] CCRL continued to be guided by its internal pandemic response team, which in turn looked to outside sources and authorities with a view to developing the best safety measures for CCRL and its workers. While optimism reigned from time to time, overall matters got worse.

[13] In the course of all this CCRL developed a vaccination/testing policy [Policy] in the fall of 2021. Prior to formally announcing and then implementing the Policy CCRL issued numerous communications to its workers. These are summarized in the arbitration decision. CCRL rolled out the Policy to its workers October 15, 2021 and in that announcement indicated the Policy would be fully effective on November 1, 2021. The overarching aim of the Policy was the health and safety of its employees. To do this, workers who had not been vaccinated and/or could not produce a negative COVID test taken within the last week would not be allowed in the workplace, as they were non-compliant with the Policy. As found by the arbitrator this was to "reduce transmission of the virus and to keep people at the workplace safe" (para. 10, *Decision*).

[14] The Policy was quite simple. CCRL's employees had two options:

1. Provide their vaccination status; that is, indicate they were vaccinated and provide proof of same. This was the Vaccination Option.
2. Get tested and provide the COVID test results showing the result as negative for COVID. This was at no cost to the employee as CCRL provided rapid testing kits at CCRL's cost. This was the Testing Option.

[15] There is no gainsaying that CCRL took COVID and the Policy seriously. One need look no further than the Policy itself at para. 4(e):

> (e) Employees who contravene this Policy or who are found to have submitted fraudulent Proof of Vaccination, fraudulent documentation supporting an accommodation request, or a fraudulent COVIDl-19 Test result may be subject to discipline, up to and including removal of access to FCL premises and/or termination of employment. FCL will not provide paid leave for employees that cannot or refuse to comply with this Policy.

[16] I note here that "FCL" stands for Federated Co-operatives Ltd., a

corporation with which CCRL was affiliated in the sense of FCL being the parent corporation.

[17] Within this application and at the arbitration, it is not the Policy itself that is in issue. Unifor did not grieve the Policy or its implementation. Unifor actually communicated to its members indicating that the Policy was lawful and would withstand challenge. Rather, action taken by CCRL against two in-scope workers forms the basis of this matter. Out of some 620 union members working at CCRL at the time, only two would not comply with the Policy. The actions of these two members, as opposed to close to 1,000 other CCRL workers (about 620 of them union members) are at the heart of all this legal wrangling.

[18] Dallas Shuparski and Ward Rubin are the two workers. Neither complied with CCRL's COVID Policy. The arbitration decision is clear they refused to comply. They knew about the Policy. They understood it. They understood there could be sanctions for breaching the Policy, to and including dismissal. The arbitrator found this was the case at paras. 13, 33, and 45.

[19] CCRL did not react with significant discipline or dismissal immediately upon the first breach of the Policy by these two workers. Instead, CCRL used progressive discipline of each worker. Again, this was acknowledged by the arbitrator (para. 15). It is worthwhile for present purposes to trace the progressive discipline exercised with each worker.

[20] First, Mr. Rubin:

1. When Mr. Rubin's breach became apparent to CCRL, a decision was made to conduct an investigation. Accordingly as of November 17, 2021 Mr. Rubin was placed on a paid leave of absence.

2. It is worth noting the manner in which Mr. Rubin's breach of the

Policy became apparent to CCRL. It does not appear to me that he made any attempt to hide his position. Rather, he told a supervisor he disagreed with the Policy. He indicated he did not believe the Policy's terms were required so as to "achieve anything with respect to COVID". He disagreed that he should disclose any of his private health information or status. All of this was found by the arbitrator at para. 35 of the *Decision*.

3. On November 19, 2021 (within two days of his suspension) CCRL personnel met with Mr. Rubin. Mr. Rubin reiterated that he disagreed with the Policy and that he did not feel he had to disclose any of his health information. Again, see the *Decision* at paras 15 and 34-37.

4. On November 23, 2021 CCRL personnel again met with Mr. Rubin and with a Unifor representative. At that point CCRL formally advised Mr. Rubin that CCRL had determined he had not complied with the Policy and that there was no valid reason for his non-compliance. CCRL then inquired whether Mr. Rubin intended to comply with the Policy. He said no. As a result of Mr. Rubin's refusal to comply CCRL instituted discipline by means of a written warning. He was also put on a non-disciplinary unpaid leave for a maximum of two weeks. CCRL gave Mr. Rubin a letter outlining this step, which letter said that if Mr. Rubin kept disobeying the Policy there could be further discipline including termination.

5. On December 9, 2021 CCRL personnel yet again met with Mr. Rubin and his Unifor rep. CCRL asked if Mr. Rubin would now comply with the Policy. Mr. Rubin said no as nothing about the

situation had changed for him. As a result Mr. Rubin was suspended from work for three days; further, he was put on another non-disciplinary unpaid leave (again, a two-week maximum). Another letter reflected these steps, and this letter was worded the same way as the previous letter.

6. On December 28, 2021 CCRL personnel yet again met with Mr. Rubin. He told CCRL he had not complied with the Policy yet and he was not going to. He apologized for the "weird situation" but not for his non-compliance with the Policy. Mr. Rubin actually thought he would have been fired by now. A letter of discipline was issued and Mr. Rubin was put on a five-day disciplinary suspension and given another two-week non-disciplinary unpaid leave. In the letter CCRL told Mr. Rubin if he obeyed the Policy he could come back to work. I note this letter also included this statement from CCRL: "Failure to come into compliance will result in your employment being terminated."

[21] Next, Mr. Shuparski:

1. Right out of the gate Mr. Shuparski voiced his opposition to the Policy which became effective November 15, 2021. The week before the effective date, he told his manager that he would not comply with the Policy because he "did not believe in it" and it "went against his *Charter* rights". Even at that early juncture the manager warned Mr. Shuparski that this could result in termination of his employment. Mr. Shuparski persisted.

2. As occurred with Mr. Rubin, when Mr. Shuparski's post-Policy effective date breach became apparent to CCRL, a decision was

made to conduct an investigation. Accordingly as of November 15, 2021 Mr. Shuparski was placed on a paid leave of absence.

3. On November 18, 2021 CCRL personnel met with Mr. Shuparski to investigate. He told them he felt the Policy went against his *Charter* rights, and against the *Nuremberg Code*. He said he did not believe in the Policy. He said he had a right to know certain things including whether the virus had been isolated and if there was an "SDS" for the vaccines being administered. It is my assumption that he likely meant "Safety Data Sheet" but I do not know that.

4. On November 25, 2021 CCRL personnel again met with Mr. Shuparski. He was advised he was still non-compliant with the Policy and had no valid reason to be exempted from it. Mr. Shuparski was asked if he would comply with the Policy and he refused. CCRL put him on a non-disciplinary two-week maximum leave without pay and issued a disciplinary written warning. The letter to him stated that his continued failure to comply with the Policy could result in further discipline including termination of employment.

5. On December 13, 2021 CCRL personnel once again met with Mr. Shuparski and his Unifor rep. Mr. Shuparski was asked if he had changed his position and would now comply with the Policy. Mr. Shuparski replied in the negative, noting nothing had changed for him. CCRL gave Mr. Shuparski a three-day suspension. He was also placed on an unpaid non-disciplinary leave for a maximum of two weeks. CCRL again gave him a letter outlining this decision and again indicating that if he continued to refuse to comply with the

Policy there could be further discipline including termination of his employment.

6. At the end of that same month yet another meeting occurred. Mr. Shuparski acknowledged he had not followed the Policy and had no intention of doing so. He was given a five-day disciplinary suspension as well as another non-disciplinary unpaid leave for a maximum of two weeks. Another letter was issued and it contained this statement: "Failure to come into compliance will result in your employment being terminated" but if he followed the Policy he would be allowed to go back to work.

[22] Despite all these interactions and discipline action neither of these workers ever came into compliance with the Policy. They simply refused.

[23] While Unifor asserts there was "no evidence presented about the disruption in the workplace or operational need to terminate the employees" (para. 18 Unifor's brief on this application) this ignores the need (at that time) for full compliance due to health concerns arising from the pandemic. This also ignores that if employees begin ignoring valid and enforceable policies in the workplace chaos results. I remain unsure of just how much disruption Unifor thinks is required before an employer is entitled to intervene but two employees who steadfastly defy a health and safety Policy during an historical pandemic strikes me as a serious enough matter to warrant discipline and, ultimately, termination of employment.

[24] CCRL assessed the situation. At the end of December 2021 through to January 2022 CCRL was concerned with workplace safety. At that time COVID seemed entrenched. There was a new and more virulent variant, the so-called Omicron variant. At that time, COVID was winning. No one knew how long this virus would last. Many people believed life as we knew it would not return.

[25] Included in this wide consideration was further consideration of Messrs. Rubin and Shuparski. A meeting occurred on December 28, 2021 between CCRL personnel and the Chief Shop Steward of Unifor. Unifor suggested that the two men be put on unpaid leaves indefinitely instead of firing them. CCRL decided not to do this. CCRL's primary reason was that the duration of COVID was unknown. Correspondingly, no one knew the duration of the Policy within the CCRL workplace.

[26] Unifor followed up with CCRL via a letter of inquiry dated January 19, 2022. In that letter Unifor again proposed that Messrs. Rubin and Shuparski go on indefinite unpaid leave, to last until they complied with the Policy or the need for the Policy had passed. CCRL replied via email dated January 22, 2022. The position of CCRL was made abundantly clear in that email and the exact wording of same is worth reproducing:

> With regards to the status of the employees who remain out of compliance with the Vaccination Policy, CCRL expects that all employees cooperate and comply with all Company policies. The employer has an obligation to take its responsibilities under the current public health orders seriously and our approach and response to non-compliance has been clear and consistent in its application. To do otherwise would create confusion and misapplication of the policy and only serve to be counter intuitive to our health and safety objectives under our pandemic response and contrary to our legislative obligations.
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> Our two organizations have and continue to face opposition from a small number of our employees/members that are entrenched in their opposition to the vaccination policy and refuse to comply with the same. These employees have done so knowing that CCRL intends to fully enforce the entire policy, including but not limited to termination of employment in accordance with the policy provisions. We have consistently provided this information since mid-October, well in advance of the policy effective date; in direct conversations with employees; and in correspondence related to the corrective actions taken up to this point with non-compliant employees. It is our sincere hope that termination will not be necessary step, that the non-compliant employees will avail themselves of the opportunity to comply with the policy by exercising either the

> option of getting fully vaccinated or by satisfying the requirement for rapid testing as outlined under the policy.

[27] By the date of this letter each worker's leave (unpaid and non-disciplinary) had ended – Mr. Shuparski's on January 21 and Mr. Rubin's on January 22. Both had remained non-compliant with, and arguably defiant of, the Policy. CCRL took a hard look at both workers on an individualized basis. CCRL reached the decision that if either or both of these workers continued to not comply with the Policy their employment would be terminated. In spite of escalating discipline already administered neither worker had relented and complied with the Policy. Neither worker had any prior disciplinary record and both were considered good employees. By January 21 CCRL had informed Unifor of the intention to discharge both employees.

[28] In keeping with the individual assessment of each worker CCRL personnel met each of them separately – Mr. Rubin on January 24, 2022 and Mr. Shuparski on January 25, 2022. Both said they would not comply with the Policy. Both workers' employment was terminated.

[29] As luck would have it the very next day the provincial government announced the intention to begin returning life to normal in Saskatchewan. In less than a month the regulations governing COVID safety were removed. CCRL's own Policy was removed March 21, 2022.

[30] Unifor decided to grieve the dismissal of both employees on February 1, 2022 (Rubin) and the next day (Shuparski), setting out that their terminations were unjust. The arbitrator in this case is a well-known, skilled, and highly experienced arbitrator. Over four days in June and July 2023 a hearing was held and the arbitrator heard evidence and argument. Then on September 7, 2023 the arbitrator rendered his arbitration decision in which he upheld the grievances and found the terminations of Messrs. Rubin and Shuparski were unreasonable.

[31] CCRL brought this judicial review application within the month (on October 5, 2023).

Issues

[32] The issues in this judicial review application are as follows:

(1) What is the standard of review?

(2) Was the arbitrator's decision reasonable?

(3) What order should be made in this matter?

Analysis

(1) What is the standard of review?

[33] Counsel are of one mind – and I agree – that the applicable standard of review is reasonableness. Each of us invokes *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653, as our guiding beacon.

[34] In my view, the touchstone direction provided in *Vavilov* is set out at paras. 82 to 87. There, the Supreme Court instructs:

> [82] Reasonableness review aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law: see *Dunsmuir* [2008 SCC 9, [2008] 1 SCR 190], at paras. 27-28 and 48; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 10; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 10.
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> [83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue

themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan* [2003 SCC 20, [2003] 1 SCR 247], at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

[84] As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: see *Dunsmuir*, at para. 48, quoting D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.

[85] Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

[86] Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification,

> transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid.* In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.
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> [87] This Court's jurisprudence since *Dunsmuir* should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive focus on the *outcome* of the administrative decision under review. Indeed, that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, at para. 12. In that case, although the outcome of the decision at issue may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis. This approach is consistent with the direction in *Dunsmuir* that judicial review is concerned with *both* outcome *and* process. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.
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> [Emphasis in original]

[35] As always, the devil is in the details. To apply the standard of review I must first examine the *Decision* to see if it is justifiable, intelligible and transparent, which are the features of a reasonable decision. I must then examine the *Decision* to see if it is justifiable within the context of the facts and the applicable law. I also accept that CCRL has the onus of demonstrating the *Decision* was unreasonable (*Vavilov*, para 100).

(2) Was the arbitrator's decision reasonable?

[36] The question before me is not whether I would have decided the issue the same way as did the arbitrator. The question for the Court is whether the *Decision* can be cast as reasonable. Does the *Decision* fall within the range of possible acceptable outcomes which are defensible in respect of the facts and law that would have been open to a reasonable decision-maker? Can it be said that the *Decision* reflects the existence of justification, transparency and intelligibility within the decision-making process? See, for example, *Vavilov*, at para 99.

[37] I have carefully reviewed the arbitrator's findings and his reasons as expressed in the *Decision*. I would summarize the most relevant findings as follows:

(a) Mr. Shuparski also grieved this matter on the basis that his human rights (both religion and creed) were violated. The arbitrator dismissed this claim, finding (para. 111) "the evidence falls far short of supporting the fact that Mr. Shuparski had a sincere religious objection to rapid testing". The entire reasons for dismissing this claim appear at paras. 95 to 111 of the *Decision*.

(b) The arbitrator noted that at no time did Unifor challenge the Policy itself, see para. 112, *Decision*). This finding of the arbitrator is important:

> **The reasonableness of CCRL's Vaccination Policy was not challenged by the union. It was a policy that was more flexible than many employer policies** developed during the COVID Pandemic for the purpose of insuring workplace health and safety. **The policy did not require employees to be vaccinated but allowed them a soft alternative – to self-administer a rapid antigen test twice a week and provide the employer with the results**. Ward Rubin and Dallas Shuparski chose not to comply with the policy accepting the loss of income

> coincident with an imposed leave of absence, and ultimately loss of their permanent employment. …
>
> [Emphasis added]

(c) In paras. 117 to 118 of the *Decision* the arbitrator noted and reviewed other arbitral awards which had dealt with very similar issues, *vis-à-vis*, COVID. He further noted that where, as here, the enforcement of a policy (rather than the policy itself) was challenged these other decisions went one of two ways:

(i) A lineal disciplinary analysis; or

(ii) A more nuanced approach being applied where the policy was valid but the enforcement of same was challenged.

(d) The arbitrator found (para. 130) that CCRL's termination of these two employees was unreasonable because, in essence, CCRL did not balance the competing interests of employer and employees. Rather, CCRL preferred its own interests and failed to properly account for the profound loss these employees would suffer through termination.

(e) The arbitrator ruled the terminations were premature as the Policy was expected to be temporary, and the two employees could be placed on an unpaid leave of absence without serious repercussions to CCRL's operations, health and safety issues (para. 132).

[38] As noted above I find this analysis to be unreasonable. There are numerous reasons for my conclusion.

[39] **First**, it ignores what the arbitrator stated at the forefront of his analysis. As noted in the preceding paragraph, at para. 112 the arbitrator specifically noted that CCRL's Policy was flexible when compared with other employers' policies. In fact, it

was so flexible that there was no requirement for employees to be vaccinated against COVID, nor did employees even have to show a good reason why they would not be vaccinated. Instead of vaccinating CCRL's employees had the "soft alternative" of testing. By any standards this testing was minimally intrusive, especially when compared with the health and safety risks at stake. All these two employees had to do was test themselves twice weekly and submit the results to CCRL. That's it. That's all the Policy required of them.

[40] **Second**, from reading the *Decision* as a whole it is clear that neither of these two employees had any good reason to refuse to comply with the Policy, which Unifor had already admitted was reasonable. In fact, Mr. Shuparski trumped up a phony religious claim to attempt to justify his refusal. This is particularly offensive when other individuals actually have valid claims under religion or creed not to comply with various employers' policies. This claim cheapens and denigrates valid claims made on this basis. The arbitrator failed to give sufficient weight to this callous tactic within his analysis.

[41] **Third**, there is a flaw in the reasoning of the arbitrator. While expressly finding (on uncontroverted evidence) that there was no Unifor challenge to the Policy itself, the effect of his findings was to put the Policy itself on trial. To be reasonable on these facts, the arbitrator was obliged to presume the Policy to be reasonable and valid. Even Unifor never challenged it. While the arbitrator moved on to attempt to balance the competing interests under the Policy – employees' right to privacy versus employer's duty to maintain a safe workplace – this ultimately transmuted into an attack on the Policy itself.

[42] In this regard CCRL notes in argument that Unifor relied on policy challenge cases before the arbitrator (Unifor's arbitration brief, paras. 127 to 141, in the Certified Record at Tab 96). These cases included *Toronto Professional Fire Fighters'*

Association, I.A.A.F. Local 3888 v Toronto (City) (2022), 344 LAC (4th) 1 (Ont LA); *Toronto (City) v Toronto Civic Employees' Union, CUPE Local 416*, 2022 CanLII 109503 (Ont LA); *BC Hydro and Power Authority v International Brotherhood of Electrical Workers, Local 258*, 2022 CanLII 25764 (BC LA); *Chartwell Housing REIT v Healthcare, Office and Professional Employees Union*, 2022 CanLII 6832 (Ont LA); *Unifor Local 973 v Coca-Cola Canada Bottling Limited*, 2022 CanLII 25769 (Ont LA); and *Revera Inc. (Brierwood Gardens) v Christian Labour Association of Canada Award* (2022), 339 LAC (4th) 83 (Ont LA).

[43] All of these decisions relate to the reasonableness of COVID policies themselves, as opposed to taking a policy as valid and then determining whether enforcement of same was reasonable. This is a crucial distinction, one with a difference to the analysis and the result. The focus should be on discipline, not the policy.

[44] I conclude the arbitrator's analysis misapplied these authorities. Instead of focussing on the termination and cases dealing with same, he included in his analysis the authorities which dealt with the reasonableness of the policies themselves. I take this from the *Decision* itself:

(a) At para. 116 the arbitrator noted that "COVID decisions" mainly involved challenges to the policies. He then identified the bifurcation that applied to case authorities.

(b) Further in para. 116 the arbitrator noted some COVID cases arose from direct challenges to overall policies and that others, **"like the present one, were individual grievances that invariably brought into issue overall policies or parts of policies".** It is my conclusion that herein lies a lack of reasonableness.

(c) Indeed, at paras. 121 and 122 of the *Decision* the arbitrator sets forth

a list of points that he relies upon. A plain reading of same illustrates how the arbitrator lost focus and assessed CCRL's Policy itself, rather than the implementation of the discipline aspects of same. His task was not to assess the Policy itself, but in essence that is what he did. This was unreasonable.

(d) At para. 130 the arbitrator stated CCRL had "ignored a fundamental finding of the Court in *Irving Pulp & Paper*", and in the *Toronto Firefighters* case. However, he did not note that both of those cases dealt with challenges to policies themselves, as opposed to discipline under those policies. CCRL points to the passage at para. 27 of *Toronto Firefighters* which illustrates the nature of this misapplication of the law.

[45] Thus it was not for the arbitrator to question the validity or reasonableness of the Policy, including the discipline enforcement terms of the Policy. This was not placed before him in either grievance. The arbitrator ultimately strayed into this area, and his straying was unreasonable within the meaning of the law.

[46] **Fourth**, CCRL challenged the arbitrator's *Decision* as unreasonable based on his failure to follow legal precedent and in this regard relies on *Vavilov* at paras 112, 113, 130 and 131. In this regard CCRL's challenge to reasonableness is twofold. First, CCRL says the arbitrator failed to apply well-established arbitral jurisprudence when determining whether the termination of Messrs. Rubin and Shuparski was justified, and fails to explain why he did not apply it. Second, CCRL says the arbitrator did not follow judicial authority regarding admissibility of post-termination evidence. I shall examine each of CCRL's arguments in this regard.

[47] I first look at the alleged failure to follow established arbitral jurisprudence. Here, CCRL places heavy reliance on *William Scott & Co. v C.F.A.W.,*

Local P-162 (1976), [1977] 1 CanLRBR 1 (WL) (BC LRB) at para 11. The additional authorities are set out at para. 54 of CCRL's brief filed with this Court.

[48] CCRL states that the *William Scott* case requires arbitrators to determine two things:

- Did the employee engage in conduct which provided just and reasonable cause for some form of discipline?
- If so, was termination of that employee's employment a just and equitable form of discipline, or should some lesser penalty be substituted?

[49] In this context it must be borne in mind that Rubin and Shuparski were not obligated to get vaccinated under the Policy. They had the softer option of testing. They refused to do either.

[50] Here, CCRL relies primarily on two decisions. The first is *Poulos v Treasury Board (Regional Development Corporation)*, 2022 CanLII 37635 (NB LA). There the employee worked for over 20 years then switched jobs. She had a clear record for discipline and received decent performance reviews. She survived six months of probation but was fired for cause six weeks thereafter, on September 28, 2021. This was during COVID and the cause was said to be her failure to comply with a policy binding on all employees. Under that policy every employee had to provide proof of vaccination or else do three at-home tests and give the employer the results. Poulos refused to do either. She received a written warning, then a five-day suspension and then was terminated upon her return after the suspension. Poulos' grievance was dismissed by the arbitrator. It was noted that Poulos' conduct in refusing compliance with the employer's COVID policy was serious enough to be incompatible with the fundamental terms of employment and that her refusal to comply amounted to wilful disobedience (paras. 94-95). Further, it was determined that the termination decision

needed to be assessed as of the date of termination and not through the lens of subsequent events. I note at para. 100 the arbitrator said, “No one could predict with any certainty in September 2021 what would happen the next month let alone six months hence”.

[51] CCRL also relies on *Canadian Union of Public Employees, Local 9 v City of Moose Jaw*, 2023 CanLII 127020 (Sask LA). This case involved a civic policy that employees had to provide proof of vaccination or a negative COVID test result. Failure to do either would result in discipline up to and including termination. There, Ms. Travland (the Grievor) would not comply. She was sent home on an unpaid leave with a written warning. Next she was suspended for five days without pay. The next step was a two-week unpaid suspension. The employer gave her a further ten days to come into compliance with the policy or else she would be terminated. She did not comply. She was terminated.

[52] A three-person arbitration panel reached a unanimous decision dismissing the grievance and upholding the termination. The panel specifically noted that no other steps in the progressive discipline had been challenged by the union and concluded (para. 65) that Travland’s “refusal to comply was culpable behavior worthy of discipline”. Then, at paras. 108 to 112, the panel concluded that the employer’s decision to terminate Travland’s employment was a reasonable one in the circumstances.

[53] Considering all this, I find the arbitrator’s *Decision* that termination was not reasonable here to be an unsupportable, unreasonable decision. Within the ambit of *William Scott* these employees engaged in conduct which provided just and reasonable cause for discipline. That being so, termination of those employees’ employment was a just and equitable form of discipline.

[54] The arbitrator was unreasonable when he failed to consider and

implement the following chain of logic. CCRL's Policy itself was unassailed before him. Rubin and Shuparski had choices under the Policy: vaccinate, or test. Both decided to do neither despite numerous warnings and instances of progressive discipline. Having chosen to be defiant and not comply, without providing any justification or extenuating circumstances, Rubin and Shuparski (and Unifor) can hardly be surprised that discipline ensued. In these circumstances Rubin and Shuparski were not entitled to decide which of CCRL's health and safety policies (including the Policy) they would follow and which they would not. Their refusal to comply was studied, deliberate. Termination was justified, just as it was in *City of Moose Jaw*.

[55] I turn to the second aspect of CCRL's fourth argument: authority on use of post-termination evidence. CCRL asserts, and I accept, that post-termination evidence has limited admissibility. Such evidence can only be used where it explains whether the termination was reasonable and appropriate, at the time the termination occurred.

[56] In this regard CCRL notes the decision in *Cie minière Québec Cartier v Quebec (Grievances arbitrator)*, [1995] 2 SCR 1095. An employee missed a lot of work because of an alcohol problem. The employee was terminated, but after that successfully sought treatment. An arbitrator found the treatment was a factor and reinstated the employee. The Supreme Court reversed this decision and at para. 13 said:

> [13] This brings me to the question I raised earlier regarding whether an arbitrator can consider subsequent-event evidence in ruling on a grievance concerning the dismissal by the Company of an employee. In my view, **an arbitrator can rely on such evidence, but only where it is relevant to the issue before him**. In other words**, such evidence will only be admissible if it helps to shed light on the reasonableness and appropriateness of the dismissal** under review **at the time that it was implemented.** Accordingly, once an arbitrator concludes that a decision by the Company to dismiss an employee was justified at the time that it was made, he cannot then annul the dismissal on the sole ground that subsequent events render such

> an annulment, in the opinion of the arbitrator, fair and equitable**. In these circumstances, an arbitrator would be exceeding his jurisdiction if he relied on subsequent-event evidence as grounds for annulling the dismissal. To hold otherwise would be to accept that the result of a grievance concerning the dismissal of an employee could vary depending on when it is filed and the time lag between the initial filing and the final hearing by the arbitrator.** Furthermore, it would lead to the absurd conclusion that a decision by the Company to dismiss an alcoholic employee could be overturned whenever that employee, as a result of the shock of being dismissed, decides to rehabilitate himself, even if such rehabilitation would never have occurred absent the decision to dismiss the employee.
>
> [Emphasis added]

[57] After years of some controversy the subsisting ambit of this decision was acknowledged in *Haghir v University Appeal Board*, 2019 SKCA 13, [2019] 7 WWR 593. From a reading of *Haghir* I conclude that arbitrators must take care to remain reasonable insofar as they consider post-termination evidence, and the use they make of same.

[58] In the case at bar, it was not reasonable for the arbitrator to look at what occurred after Rubin and Shuparski were terminated. The Policy of CCRL was instituted for a valid reason pertaining to health and safety. Their own union took no quarrel with the Policy. That restrictions would be relaxed, that COVID would largely "retreat" (based in no small measure on citizens complying with health directives, vaccinating and testing), those things could not have been definitely known to CCRL at the time of the termination of these two employees. The use of this evidence in this way by the arbitrator was unreasonable.

[59] I have considered both aspects of this fourth argument of CCRL. I agree with CCRL that the arbitrator applied an approach not in accord with the prevailing authorities applicable in Saskatchewan. Either aspect of this fourth argument, on its own, is sufficient to show the *Decision* to be unreasonable. Combined, that conclusion

is inescapable. I have come to this conclusion on the following grounds:

(a) As argued by CCRL, the arbitrator failed to consider *William Scott* either expressly or by implication. There is no real analysis present of the conduct of Rubin and Shuparski; that is, was their conduct such that some type of discipline was required? Similarly, there is no real analysis of whether that conduct – as opposed to other factors – merited dismissal.

(b) CCRL argued, and I agree, that the arbitrator did not wrestle with the central question: the conduct of these two employees. Too much time was spent on the surrounding circumstances rather than dealing with the conduct of Rubin and Shuparski. In this regard the type of analysis done in *Poulos* and *City of Moose Jaw* is preferable because it is a reasonable analysis, within the meaning of *Vavilov*. The emphasis on the reasonableness of the Policy rather than the employees' conduct within that valid Policy leads to the conclusion that the *Decision* is unreasonable.

(c) There is a duty on arbitrators to explain their analysis if there is a departure from a standard, accepted arbitral approach to the interpretation of certain issues. An example of judicial intervention in such unreasonable analyses is found in *P&H Milling Group a Division of Parrish & Heimbecker, Limited Saskatoon v United Food and Commercial Workers Local 1400*, 2023 SKCA 14, 478 DLR (4th) 604, particularly at paras. 13 to 14. At para. 13, it was noted that where a "consensual view" exists on a point, "that consensus is a valuable benchmark for assessing the reasonableness of a decision" on judicial review. At para. 14 the Court of Appeal

noted the arbitrator "did not perform *any* analysis" of the appropriate provisions. Notably at para. 14 the Court of Appeal identified this as an error due to unreasonableness:

> … The arbitrator's failure to employ the approach to collective bargaining agreement interpretation consistently adopted by her arbitral peers is a departure from established arbitral authority. As such, the arbitrator bore the "justificatory burden of explaining that departure in [her] reasons". The majority in *Vavilov* instructed that where a "decision maker does not satisfy this burden, the decision will be unreasonable" … .

(d) Here, *William Scott* is an arbitrator's compass on this topic. Here, the *Decision* contained **no** analysis of that decision, nor the test it established, nor the authorities flowing from it. He also gave no explanation for this stark departure from established authority. I am satisfied this, too, makes the *Decision* unreasonable.

(e) Similarly, the arbitrator did not grapple with the authorities limiting the use of post-termination facts and events. Indeed, a public statement of Saskatchewan's Premier was referenced by the arbitrator, notwithstanding that such statement was made a day after Rubin and Shuparski were terminated. An arbitrator cannot properly indulge in revisionist history. At the very least that is contrary to *Haghir*. This, too, contributes to the unreasonableness of the *Decision*.

(f) Finally, and somewhat in the alternative, there is inadequacy in the arbitrator's reasons. While I have determined above that he should not have departed from accepted arbitral authority, if he was going to do so then the arbitrator should have provided detailed reasons why he was doing this. See *Vavilov* and *P&H Milling*. There are no

> reasons given for ignoring the "standard" lenses through which these legal matters are viewed by arbitrators. The above findings feed into this aspect of the analysis. As well, there is also no explanation from the arbitrator as to why he tried to adapt a different lens for use in this case. The overall inadequacy of these reasons is unreasonable.

[60] Therefore I find the set of arguments advanced by CCRL (which collectively form the fourth reason the *Decision* is unreasonable) to be valid grounds for granting this judicial review application.

[61] **Fifth**, while further reasons are not required to find the *Decision* unreasonable, in this case there are two such further reasons advanced by CCRL.

[62] In this regard CCRL's first argument is that the arbitrator "misapprehended a relevant fact that fundamentally affected his analysis" (para. 83(a), CCRL's brief). This is the arbitrator's finding that Rubin and Shuparski had "clear and unfettered" disciplinary records when their employment was terminated. CCRL contends this is incorrect as each had received a written reprimand and two suspensions resulting from their non-compliance with the Policy. Unifor did not grieve these disciplinary steps and, it is argued, is deemed to have accepted same. CCRL says this was a mistake of the arbitrator which rendered his ruling unreasonable. In this regard *Vavilov* applies.

[63] At para. 126 of *Vavilov*:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, at para. 47. **The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them**: see *Southam* [[1997] 1 SCR 748], at para. 56. **The reasonableness of a decision may be jeopardized where the**

> **decision maker has fundamentally misapprehended or failed to account for the evidence before it.** In *Baker* [[1999] 2 SCR 817], for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: *ibid.*
>
> [Emphasis added]

[64] CCRL's position on this first point is that it does not matter that the discipline arose from breaches of the Policy, the truth is that each of these grievors had a discipline history.

[65] CCRL's second point is the converse of the first: the arbitrator ignored relevant factors. CCRL says the arbitrator failed to consider:

- The conduct of Rubin and Shuparski was serious, as they simply refused to comply with the valid Policy despite ongoing and progressive discipline.
- They displayed no remorse and made no apology.

[66] CCRL says these items also point to the *Decision* being unreasonable.

[67] Taking all of these reasons in a cumulative fashion I must find the Decision to be unreasonable. To reinstate two defiant, unreasonable workers in light of an uncontested Policy and in light of multiple opportunities to maintain their employment is not a reasonable answer to this situation. I am not simply substituting my own view for that of the arbitrator. I have focussed on the arbitrator's reasoning process, as directed by *Vavilov.*

[68] I have therefore concluded that the *Decision* is unreasonable and cannot stand.

(3) What order should be made in this matter?

[69] CCRL asks this Court to quash the *Decision* and dismiss the grievances.

[70] This is a diversion from the general remedy, which is to remit the matter to the original arbitrator for reconsideration in light of the reasons contained herein. The general rule is remission: *Vavilov*, para 142; *Cyrynowski v Joseph*, 2020 SKQB 289 at para 40. The exceptions to the general rule are "limited" according to *Vavilov*, but they do include situations "where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose".

[71] CCRL argues this is such a case. It argues that termination of Rubin and Shuparski is clearly justified and that remitting the matter to the arbitrator would be redundant. Further, CCRL argues that such a remedy is consistent with the *Decision* itself. In support of this argument at para. 91 of its brief CCRL cites para. 118 of the *Decision*:

> [118] The *Poulos* case is virtually "on all fours" with the facts in the present case. The grievor there refused to follow the policy for reasons related to her perceived right to privacy, personal autonomy and physical integrity. She did not qualify for an exemption under human rights legislation on the basis of any of the listed grounds of discrimination. The situations of Mr. Rubin and Mr. Shuparski are very similar. Their objection to the testing under the policy was based on their firm beliefs but those beliefs were, as I have determined above, secular in nature. Thus, if the analysis set out in the *Poulos* case (and other similar cases dealing with COVID policies) is followed, the present grievances would be dismissed on the basis that the employer's enforcement of its Vaccination Policy was reasonable, and termination of employment was justified.
>
> [Emphasis added]

[72] Employers cannot, through written policy or otherwise, direct employees to do absolutely anything the employer wishes. That is not what happened here. Here,

two employees out of some 900 total believed they could refuse to comply with the Policy that their own union had deemed reasonable. Two employees were willing to jeopardize the health and safety of everyone else in that workplace. Two employees were given multiple chances to comply, multiple warnings, multiple stages of progressive discipline, and still insisted they were entitled to disobey a valid directive from their employer. Two employees were determined to maintain a course of conduct that was untenable, that sowed chaos in their workplace at a time when one of the largest health threats in recent memory was active in this country, in the world.

[73] I acknowledge employers need to be reasonable with their employees but the converse is also true. Here, the course of action taken by Messrs. Rubin and Shuparski was unreasonable. It was a course destined to bring them to the point of termination. I see no reason to remit this matter to the arbitrator. Dismissal was clearly an option for CCRL once it had attempted lesser discipline.

Conclusion

[74] The judicial review application of CCRL is allowed, and I hereby quash the *Decision*. Further, I order the grievances of Mr. Rubin and Mr. Shuparski are both dismissed. Finally, assessable costs are granted in favour of CCRL based on Column 2 of the tariff.

[75] My thanks to both counsel for their valuable assistance through their written and oral submissions.

_____J.
R.W. DANYLIUK