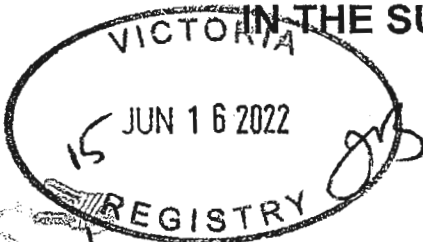


ORIGINAL

IN THE SUPREME COURT OF BRITISH COLUMBIA



Date: 20220401
Docket: S220637
Registry: Victoria

Between:

Philip Davidson, Karine Bordua, Zoran Boskovic and Clinton Chevrier

Petitioners

And:

**The Lieutenant Governor in Council, the Attorney General of British Columbia
on behalf of Her Majesty The Queen in Right of the Province of British
Columbia, the Minister of Finance of British Columbia, and
the Government of British Columbia represented by
the BC Public Service Agency**

Respondents

Before: The Honourable Madam Justice C. Ross

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners:

R.B.E. Hallsor, Q.C.
U. Sheikh

Counsel for the Respondents:

C. Rajotte

Place and Date of Hearing:
(via videoconference)

Victoria, B.C.
April 1, 2022

Place and Date of Judgment:

Victoria, B.C.
April 1, 2022

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[1] **THE COURT:** As I indicated at our previous sitting, I am prepared to give reasons with respect to this application. The reasons are oral and, in the event that transcribed reasons are ordered, I will be making edits, but nothing substantive.

Introduction

[2] The petitioners Philip Davidson, Karine Bordua, Zoran Boskovic, and Clinton Chevrier (the “Petitioners”) have sought judicial review of Order in Council 627 made by the Lieutenant Governor in Council (the “Order”), enacting the *Public Service COVID-19 Vaccination Regulation*, B.C. Reg. 284/2021 [*Regulation*]. The *Regulation* makes Human Resources Policy 25 – COVID-19 Vaccination (the “Policy”), which is stated to be a mandatory workplace COVID-19 vaccination policy for the BC Public Service (the “BCPS”), a term and condition of employment for all BCPS employees, and further states that if an employee is terminated under the Policy, they will be deemed to have been terminated for just cause.

[3] The Order and the *Regulation* were made on November 19, 2021, one business day before the BCPS employees could be placed on unpaid suspension under the Policy.

[4] In this application, the Petitioners seek an interim injunction prohibiting the respondents from enforcing the termination for just cause provisions of the Order and *Regulation* pending a decision of the petition on the merits. The petition is set for hearing on May 16, 2022.

Background

[5] By way of background, on October 5, 2021, Lori Wanamaker, the Deputy Minister to the Premier, Cabinet Secretary, and Head of the BCPS, announced that the BCPS would require its employees to provide proof of vaccination against COVID-19 as of November 22, 2021.

[6] On November 1, 2021, the Minister of Finance issued the Policy under s. 5(4) of the *Public Service Act*, R.S.B.C. 1996, c. 385 [*PSA*]. It stated that employees who did not provide proof of vaccination to their manager by November 22, 2021, would

be considered unvaccinated. Employees could request exemptions based on a medical condition or other protected ground as defined under the *Human Rights Code*, R.S.B.C. 1996, c. 210. Those who did so might be offered alternative work arrangements, if compatible with their job duties. If there were no such application or if they were denied, the employee would be immediately placed on the status of leave without pay. After three months, employees who have not been at least partially vaccinated are subject to termination of their employment.

[7] On November 19, 2021, the Order was adopted by the Lieutenant Governor in Council. It made the *Regulation* under s. 25(1) of the *PSA*. The *Regulation* states:

Definition

- 1 In this regulation, “**COVID-19 Vaccination Policy**” means the policy entitled “Human Resources Policy 25 – COVID-19 Vaccination” that was issued under section 5 (4) of the *Public Service Act* on November 1, 2021.

Term and condition of employment

- 2 The COVID-19 Vaccination Policy is a term and condition of employment for employees.

Termination deemed to be for just cause

- 3 If an employee is terminated under the COVID-19 Vaccination Policy, the employee is deemed to have been dismissed for just cause.

[Bold in original.]

[8] As of February 28, 2022, there were 41,097 BCPS employees, of which 32,405 were union and 8,692 were non-union employees. As of March 7, 2022, 354 employees made a request for an exemption from the vaccine requirement: 16 requests were approved, 47 requests were denied, 212 requests remained pending, and 79 requests were withdrawn. As of March 14, 2022, 389 employees were on leave without pay under the Policy, 288 employees were eligible for termination, and 15 employees had been terminated.

The Petitioners

[9] With respect to the circumstances of the Petitioners, Philip Davidson is 39 years old, living in Victoria, British Columbia. He has worked for the BCPS for 14 years, and up to November 23, 2021, he served as the Director of Policy and

Stakeholder Relations. Mr. Davidson was placed on leave without pay on November 24, 2021, and became eligible for termination under the Policy on February 24, 2022. Steps to approve the termination of his employment have not yet taken place.

[10] Karine Bordua is 49 years old, living in Langford, British Columbia. She has worked for the BCPS for 12 years and is serving as a Ministry Privacy Officer. She has made a request for exemption from the vaccination requirement but it has not yet been decided.

[11] Zoran Boskovic is 58 years old, living in Kamloops, British Columbia. He has worked for the BCPS for 25 years, and up to November 23, 2021, he served as a senior manager of major projects. He is currently on leave without pay for a period of time that is less than three months and is currently not liable for termination under the Policy. He was placed on leave without pay on January 19, 2022. If he does not provide proof that he has become at least partially vaccinated against COVID-19, he will become liable for termination under the Policy on April 19, 2022.

[12] Clinton Chevrier is 38 years old, living in Victoria, British Columbia. He has worked for the BCPS for eight and a half years and is working as a senior manager of interprojects. He has made a request for exemption from the vaccination requirement but it has not yet been decided.

[13] On March 1, 2022, the respondents advised the Petitioners that the respondents would provide the Petitioners with 14 days' notice of the Province's intention to terminate any of the Petitioners. To date, no such notice has been provided.

Legal Principles

[14] The parties are in agreement with respect to the governing test to be considered in relation to this application. A stay or an interim injunction is available where the applicant demonstrates that there is a serious question to be tried, that irreparable harm will result if the stay is not granted, and that the balance of convenience favours granting the stay. See *RJR-MacDonald Inc. v. Canada*

(Attorney General), [1994] 1 S.C.R. 311 [RJR] and *Snuneymuxw First Nation v. HMTQ*, 2004 BCSC 205 at para. 52 [*Snuneymuxw*].

[15] The overriding question is whether the interests of justice call for an injunction, see *674921 B.C. Ltd. v. New Solutions Financial Corp.*, 2006 BCCA 118 at para. 3; *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2018 BCCA 477.

[16] The jurisdiction for issuing an interlocutory injunction against the Crown is limited to constitutional issues and is to be exercised sparingly, only in rare cases, see *Snuneymuxw* at para. 69; *Harper v. Canada (Attorney General)*, 2000 SCC 57 at para. 9 [*Harper*].

[17] With respect to the first stage, whether there is a serious question to be tried, the standard to be met is not high. The analysis is similar to that employed in an application to strike pleadings; however, some reference to evidence is available.

[18] Irreparable harm refers to the nature of the harm. It is harm that either cannot be quantified in monetary terms or cannot be cured, see *RJR* at 341; *Ivy Lounge West Georgia Limited Partnership v. TA F&B Limited Partnership*, 2021 BCSC 997 at para. 38.

[19] There must be a sound evidentiary foundation to support a claim that irreparable harm will result, see *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 at para. 60; *Can. American Enterprises Ltd. v. The Office of the British Columbia Container Trucking Commissioner*, 2020 BCSC 2156 at paras. 63–65.

[20] Irreparable harm may include an increased risk of personal injury or assault, as well as psychological harm that is more than transient or trifling, see *Toronto Standard Condominium Corporation No. 2395 v. Wong*, 2016 ONSC 8000 at para. 32 [*Wong*].

[21] The balance of convenience is determined by comparing the irreparable harm to the applicant if the relief is not granted with the irreparable harm to the respondent or to the public interest if the interim relief is granted and the respondent ultimately succeeds on the merits. There is a presumption that a challenged law promotes the public interest and only in clear cases will interlocutory relief be granted in advance of a complete review of its merits, see *Harper* at para. 9 and *Ontario (Attorney General) v. G*, 2020 SCC 38 at para. 96.

Discussion

Serious question

[22] The Petitioners submit that the Order and *Regulation* interfere with their rights to life, liberty, and security of the person guaranteed under s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 [*Charter*]. They submit that these rights extend to bodily integrity and personal autonomy free from state interference. The Petitioners submit further that these rights include the right “to decide one’s own fate”, including directing the course of their medical care by informed consent.

[23] The Petitioners argue that the right of medical self-determination is not vitiated by the fact that serious risks or consequences, including death, may flow from the patient’s decision. The principle is the same in cases regarding the right to give informed consent to medical treatment, and the right to refuse consent to medical treatment or to demand that treatment be withdrawn or discontinued: citing *Carter v. Canada (Attorney General)*, 2015 SCC 5 at paras. 64–67.

[24] In addition, the Petitioners submit that the Order and the *Regulation* directly affect the contractual rights of the Petitioners and all other employees as their contracts are being unilaterally changed without their consent, and the contractual right to procedural fairness relating to termination for just cause is eliminated with the unlawful termination process left in its place.

[25] The Petitioners also advance an argument based upon their equality rights pursuant to s. 15 of the *Charter*.

[26] The respondents concede that the Petitioners have met the burden of establishing a serious question to be tried on the issue of whether the Policy breaches their s. 7 rights by requiring them to obtain medical treatment to which they would not otherwise consent.

[27] I am satisfied that the first requirement of the *RJR* test is met.

Irreparable Harm

[28] With respect to irreparable harm, the Petitioners submit that they are at significant risk of suffering psychological harm that is more than transient or trifling, citing *Wong and Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at para. 91, and referring to BC Ombudsperson's referral report titled *Misfire: The 2012 Ministry of Health Employment Terminations and Related Matters* (Victoria: Office of the Ombudsperson, 2017). They submit that pursuant to *Wong*, this constitutes irreparable harm for the purpose of granting interlocutory relief.

[29] The Petitioners submit that pursuant to the Policy, any unvaccinated person will be terminated or remain on unpaid leave for indefinite duration. They submit that this amounts to irreparable harm. In addition, they submit that the *Regulation* denies them procedural fairness which amounts to irreparable harm.

[30] The Petitioners submit in addition that they will suffer the following irreparable harm:

- Loss of private medical information as their vaccination status has become widely known among their colleagues due to unpaid suspension, by the simple fact of their non-appearance and continued non-appearance from work on and from the date the unpaid suspension was known to be effective.

- Stigma and reputational harm regarding their vaccination status, given the prevailing societal views and the respondents' views about individuals who are not vaccinated.
- Stigma and reputational harm due to the automatically deemed just cause termination of their respective employments which is the sort of termination that is generally associated with neglect of duty, incompetence, disobedience, and even tortious or criminal conduct.
- They will each be hindered from pursuing further employment within the BCPS following their just cause termination under the *Regulation* and this harm continues indefinitely, as even once the pandemic is over and vaccination is no longer required, the black mark of deemed just cause termination will remain.
- Reputational harm from being terminated for just cause by government edict will have a significant negative impact on the Petitioners' respective standings in the community and their long-term career prospects, resulting in loss of career.
- They will each struggle to find new employment outside the BCPS, as when asked by a prospective employer why they are looking for work and why they left their current employment, they will be forced to reveal that they were terminated for just cause and either reveal their vaccination status, decline to answer the question, or give a vague non-answer. This harm will be in addition to their job prospects already being limited because the BCPS and many other employers are adopting similar vaccination mandates as a condition of new employment.
- Loss of dignity, identity, self-worth, and emotional well-being due to the manner of infliction in which they were suspended without pay and terminated for deemed just cause, and the associated stigma.

- Loss of mental and physical health due to the detrimental effects resulting from the manner of suspension and termination and the stigma of termination for just cause.
- The financial harm from unpaid suspension and deemed just cause termination will result in permanent monetary deprivation, which will seriously impair the Petitioners' ability to access the courts for judicial review, and financial harm caused by unpaid suspension and deemed just cause termination may force the Petitioners to make mitigation efforts out of necessity that are less lucrative or beneficial than they would be required to accept at common law. This will occur as the Petitioners will not be able to provide for their day-to-day needs to meet their financial obligations.
- Finally, the Petitioners submit that by virtue of the special nature of the BCPS employment, their relationship with the employer is distinct from employment relations in the private sector. In the Petitioners' submission, this distinguishes their situation from the case law which holds that loss of employment does not constitute irreparable harm for purposes of the *RJR* test.

[31] The respondents submit that the Petitioners have failed to establish that they will suffer irreparable harm in the event that the injunction is not granted. The respondents submit that for the purpose of the *RJR* test, irreparable harm must result from the injunction not being granted. The injunction sought would prevent the respondents from terminating their employment until the petition is heard and decided on its merits. It would not prevent the Petitioners from being placed on or continuing to be on unpaid suspension. Thus, in the present case, this is the difference between indefinite leave without pay and termination for just cause pending decision.

[32] In their submission, much of the harm the Petitioners allege is related to aspects and effects of the Policy that are not relevant for this purpose. The respondents submit further that at present only one Petitioner is eligible for dismissal and notice of intention to proceed with that dismissal has not been given.

Accordingly, the claims of irreparable harm arising from refusal of injunctive relief are purely speculative.

[33] The respondents submit that the case law is clear that loss of employment does not constitute irreparable harm. In the event that the dismissals are held to be wrongful, it is compensable in damages. In addition, it is clear that loss of employment causes distress for any employee, and public sector employees are not in any way distinguishable in this regard.

[34] The cases cited by the respondents in support of this proposition included *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, 2021 ONSC 7658; *Lavergne-Poitras v. Canada (Attorney General)*, 2021 FC 1232; *Wojdan v. Canada (Attorney General)*, 2021 FC 1341; and *Blake v. University Health Network*, 2021 ONSC 7139, all of which are directly relevant to the circumstances of the present case.

[35] Finally, the respondents submit that contrary to the assertions of the Petitioners, dismissal is only relevant if the reasons for the dismissal are relevant to the criteria for the new position. Therefore, the Petitioners would have the ability to secure positions in the BCPS if the vaccine mandate ends by a court order or decision.

[36] I agree with the respondents that the harm that is relevant to the second stage of the *RJR* test is harm that will result if the stay is not granted. Further, I agree with the respondents that many of the harms alleged by the Petitioners in this application will not be caused by the refusal of the stay. For example:

- a) being placed on or continued on unpaid leave for an undefined duration by virtue of the Policy in lieu of termination is actually the result the Petitioners seek in this application;
- b) loss of private medical information as their vaccination status has become known among colleagues by virtue of their unpaid suspension likewise is not

a result that would flow from a refusal of the stay and would not be alleviated by granting the stay;

- c) stigma in the community and reservations of other employers about their own vaccination policies likewise are not results that flow from the refusal of the stay; and
- d) the financial harm from unpaid suspension again does not flow from a refusal of the stay, again since continuation of suspension in lieu of dismissal is in effect what is being sought.

[37] I agree with the respondents that the jurisprudence is consistent that a claim for wrongful dismissal is compensable in damages and therefore interlocutory relief is not appropriate. I do not agree with the Petitioners' submission that their employment in the BCPS is of a different character, such that loss of employment would entail irreparable harm for employees in the public sector, although it would not for private sector employees.

[38] A similar argument was advanced by the plaintiff in *Armstrong v. The West Vancouver Police Board*, 2007 BCSC 164, a decision cited by the respondents. In dismissing that application for interim injunction, Justice Ralph stated in para. 38:

[38] In my view, however, the essence of Chief Armstrong's claim is that he has been wrongfully dismissed from his position as Chief Constable. If he succeeds at trial, his losses are capable of being quantified in monetary terms and there is no suggestion that the Police Board would be unable to pay the damages. The claim for damages includes a claim for aggravated and punitive damages, which could be available if the Police Board has conducted itself in a manner calling for denunciation. In that sense, the payment of damages for wrongful dismissal is considered to be an "adequate remedy" if Chief Armstrong succeeds in his action and, therefore, the case for an injunction is not made out.

[39] I find that the Petitioners have not established that they would suffer irreparable harm if the interim relief sought is not granted.

Balance of Convenience

[40] The Petitioners submit that the balance of convenience favours the Petitioners. They submit that they are all currently on unpaid leave and would remain so if the relief sought is granted. Thus, if the relief is granted, there is no financial risk to the Province and no risk that the unvaccinated could spread COVID-19 in the workplace. The termination of the Petitioners' employment would not confer any greater benefit or prevent any further harm with respect to the COVID-19 pandemic. By contrast, if the relief sought is not granted, they face consequences of dismissal for cause.

[41] The respondents submit that in considering the balance of convenience, the Policy and *Regulation* must be presumed to have been passed in the public interest. Moreover, this is not the forum in which to assess whether the impugned legislation will, in fact, produce a public good.

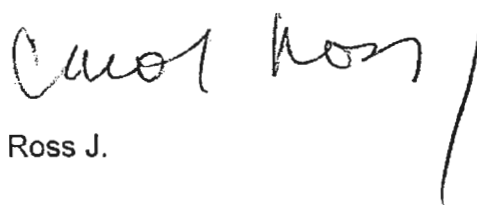
[42] Counsel notes that there are only a few Petitioners. However, in weighing the public interest, the concern must be with the implications of a cascade of stays if the same relief were to be applied to everyone who is similarly situated.

[43] Finally, counsel submits that the respondents have shown a public interest in not having permanent positions remain unfilled indefinitely. Allison Jenson, Director of Employee Relations in the Employee Relations Division of the BCPS, described the operational impact of having the Petitioners on leave in her Affidavit #1. She noted that, while with respect to several of the Petitioners the operational impact has been modest, in one case there has been a significant impact on the ability to deliver timely major project reviews and statutory decisions.

[44] In my view, the balance of convenience favours the respondents. While the continuation of the Petitioners' leave meets the objective of enhancing workplace safety from the transmission of COVID-19, I agree with the respondents that the impact must be viewed in the larger context. There is a public interest in being able to fill positions, as opposed to leaving them unfilled for lengthy periods of time.

Determination

[45] In the result, I find that the Petitioners have not established two of the three branches of the *RJR* test, and accordingly the application for interim relief is dismissed.

A handwritten signature in black ink, appearing to read "C. Ross J.", with a long vertical stroke extending downwards from the end of the signature.

C. Ross J.