

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 5024

Heard in Calgary, April 9, 2024

Concerning

CANADIAN NATIONAL RAILWAY

And

**TEAMSTERS CANADA RAIL CONFERENCE
RAIL TRAFFIC CONTROLLERS**

DISPUTE:

Denial of Rail Traffic Controller D. Fink's religious exemption rights. RTC Fink has sincerely held religious beliefs which required exemption from the Covid vaccination mandate, however they were not granted an exemption from CN, and was instead placed on unpaid leave.

JOINT STATEMENT OF ISSUE:

The Ministerial Order dated October 29, 2021, required certain railways, including the Company, to implement a company-wide vaccination policy mandating every employee to be vaccinated unless subject to an exception (on medical or religious grounds). Transport Canada also issued guidance for the assessment of requests to be exempt from the requirement to be vaccinated against COVID-19, including on religious grounds. On or around November 13, 2021, CN introduced its Mandatory COVID-19 Employee Vaccination Policy – Canada, which defines a process for the consideration of religious accommodation requests.

Both the Ministerial Order and the Policy provided that non-exempt employees who have not received their first dose as of November 15, 2021, or were not fully vaccinated as of January 24, 2022, will be subject to leave without pay as the minimum sanction.

On or around September 17, 2021, the Grievor submitted a Religious Exception Request Form. The Grievor's request was denied and the Grievor was placed on an unpaid administrative leave, effective November 15, 2021.

On or around January 7, 2022, the Grievor was cleared to returned to work after submitting proof to the Company's Occupational Health and Safety team that they received their vaccination dose and were subject to testing requirements.

Union's Position:

The Union contends that due to their sincerely held religious beliefs, RTC Fink should have been granted an exemption to the COVID mandate.

RTC Fink did not request an exemption because their belief precluded vaccination, but rather with the aborted fetal cell usage. That belief does not have to be shared or in conformity

with a church, organization, leader or group - yet those beliefs are still valid and protected. CN chose to ignore all of this and denied RTC Fink her rights, causing significant financial harm.

The Union requests that RTC Fink be made whole for all losses with interest for the time they were forced onto unpaid leave until their return to work.

Company's Position:

The Company's Mandatory COVID-19 Employee Vaccination Policy – Canada was required under the Ministerial Order and was consistent with the same as well as the Transport Canada guidance and is otherwise reasonable in the context of a global pandemic.

The Grievor's request was carefully considered by the Company and denied on the basis that they failed to establish that they had a sincerely held religious belief which prevented them from receiving the COVID- 19 vaccine. The Grievor was placed on an unpaid administrative leave, effective November 15, 2021, which was not disciplinary in nature.

The Company disagrees with the Union's assertions and disputes the grievance. The Company maintains that the decision to deny the Grievor's request for religious exemption and to temporarily place the Grievor on an unpaid leave did not violate any legislation and reflects a reasonable exercise of management's rights.

FOR THE UNION:

(SGD.) J. Bailey

General Chairperson, RTC

FOR THE COMPANY:

(SGD.) R.K. Singh for J. Girard

Chief Human Resources Officer

There appeared on behalf of the Company:

S. Mathews	– Manager Labour Relations, Toronto
R. Singh	– Manager Labour Relations, Vancouver
S. Fusco	– Senior Manager, Edmonton

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
J. Bailey	– General Chairperson, RTC, Edmonton
J. Rushton	– Legislative Representative, Edmonton

AWARD OF THE ARBITRATOR

Background, Issue and Summary

- [1] The Grievor is employed as a Rail Traffic Controller.
- [2] In the Fall of 2021, the Grievor requested a religious exemption from the Company's requirement that she be vaccinated against COVID19 under the Company's policy¹ (the "Policy"). That exemption was denied.
- [3] The issue to be determined in this Grievance is whether the Grievor should have been granted that exemption.

¹ Developed in response to a requirement from the Government of Canada, as noted below.

- [4] For the reasons which follow, the Company failed to accommodate the Grievor's religious beliefs by exempting her from the need to be vaccinated for COVID19, and therefore discriminated against her.

Facts

- [5] The requirement that employees in the rail industry be vaccinated against COVID19 originated with Transport Canada, through Ministerial Order MO 21-7 (the "Order"), dated October 29, 2021. The Order directed Companies in the rail industry to develop a policy requiring vaccination, as a condition to continue to attend at the workplace, which the Company did (the "Policy"). It is not disputed the Order was issued to control the spread of COVID19 in federal industries. The Order also directed that employees were to be placed on administrative leave if they did not comply.
- [6] Two exemptions were allowed: on either medical or religious grounds.
- [7] The Company developed its Mandatory Covid-19 Employee Vaccination Policy-Canada (the "Policy"), which mirrored these requirements. There was a process for employees to apply for these limited exemptions. If these exemptions were established, the Company was subject to its legal obligations to accommodate those employees.
- [8] I am satisfied there were government communiques that indicated that the exemptions would be narrowly construed and would be difficult to receive.
- [9] However, there was a document titled "Guidance Material for Railway Companies" document provided by the Government of Canada. That Guidance stated:

A railway company must provide for accommodation measures, including COVID-19 testing every 72 hours, for operating employees who are exempted from providing proof of vaccination credential. Further guidance on accommodations can be found in "Section 4: General Requirements" of this document.²

- [10] In Section 4³, this document set out further detailed guidance, which included a link to a further document⁴. It was repeated that accommodated employees were to provide an

² At p. 12

³ Reproduced at Union Tab 11; at pp. 16, 17, 18.

⁴ This arbitrator attempted to follow that link, but that document is no longer available.

“acceptable proof of a COVID–19 test result every 72 hours”. It was also noted that “[a] railway company must have in place any other accommodation measures as set out in local public health guidance for the employees described in this section.

- [11] As does the jurisprudence, the Guidance noted that protection does “not apply to beliefs, convictions or practices that are secular, socially based or only conscientiously held; not does it protect false empirical beliefs about the development, the contents, effects, or purposes of the vaccines” (emphasis in original)⁵
- [12] The Company had advised its employees on September 8, 2021 that vaccination would be mandatory as of November 1, 2021. It created a Religious Exemption Committee, charged with evaluating requests for religious accommodation requests. This Committee was composed of three individuals from senior management. The Company noted in its submissions that the Committee reviewed each application to “ensure its sincerity” before granting an exemption.
- [13] Of the over one hundred seventy (170) exemption requests received on religious grounds, less than ten (10) exemptions were granted.
- [14] The Grievor made three requests for an exemption from the need to be vaccinated, on religious grounds. These requests were dated September 8, 2021, October 7, 2021 and November 3, 2021.
- [15] The first two times, the Grievor mentioned the connection between her belief in the sanctity of human life and the use of fetal cell lines in the development of the vaccine. Her request dated September 7, 2021 stated:
- As a follower of Christ, I strongly believe in the Biblical sanctity of human life and the prohibition from the shedding of innocent blood. Many Christians like myself understand this prohibition to include ingesting or benefitting from products derived from or tested using aborted fetal cell lines (no matter how near or remote to abortion), regardless of the perceived benefits or rationale. To do so would be an abominable sin to God.
- [16] The Company denied the Grievor’s request, as it determined she had “failed to establish that you have a faith–based practice or belief that precludes vaccination”.

⁵ At p. 17

[17] This Grievance against that decision was filed by the Union, and had reached Step 2 by October 19, 2021.

[18] The Grievor contacted the Company on October 7, 2021 and asked for a reconsideration of this decision. She gave further detail for how her religious belief precluded her from being vaccinated. She stated:

All of the currently produced available COVID–19 vaccines are produced by, derived from, manufactured with, tested on, developed with, or otherwise connected to aborted fetal cell lines. Because all of the currently available COVID–19 vaccines are developed and produced from, tested with, researched on, or otherwise connected with the aborted fetal cell line HEK–293, my sincerely held religious beliefs demand that I abstain from accepting or injection to any of these products into my body, regardless of the perceived benefits or rationales.

God forms children in the womb and knows them prior to their birth, and that because of this, life is sacred from the moment of conception to natural death....God requires that I not be part of such an act. I will not indirectly or directly be in any way associated with abortion. In short, to require me to inject a substance into my body that has any association (no matter how near or remote) to abortion is a sin against my Creator, my Lord, and my Saviour.

[19] On October 22, 2021, the Company responded by stating that it had reviewed the facts submitted but “[b]ased on the facts that you have submitted, the company has taken a final position that your request is not approved. Therefore, you are required to comply with CNs Policy to be fully vaccinated by November 15, 2021”.

[20] That same day, the Grievor responded and noted that the sincerity of her belief was a question of fact, and that her belief “need not be required by official religious dogma nor need it be in conformity with the position of religious officials”, referring to the Supreme Court of Canada jurisprudence⁶; and that the Company was to judge the sincerity of the belief, not its validity.

[21] The Company responded on October 26, 2021 with information on the basis of the Company’s requirements; that CN mandates vaccination as a condition of employment; that employees can always choose not to be vaccinated, “on the understanding that their privilege to work for CN will then be suspended or terminated” and encouraging her to

⁶ In *Amselem*, *infra*.

consult the FAQ's on CN's webpage, which were linked. The Grievor responded that same day to indicate she had consulted the FAQ's. She again reiterated she had a "bona fide and sincere religious belief which is preventing me from being vaccinated. She then question whether CN was offering religious exemptions.

- [22] In her third request, dated November 3, 2021, the Grievor provided a sworn Affidavit, recent results of her covid antibody test "to determine my level of God given natural immunity from a previous infection in early May 2021"); and two published articles identifying that "all vaccines indeed used aborted fetal stem cells in the testing phase". She also attached a scientific study which she stated showed "... the details of this actual testing phase from what are referred to as the "mRNA vaccines"⁷, where it specifically identifies the use of HEK-293 cells throughout."
- [23] In the Affidavit itself, the Grievor raised again her belief in the sanctity of human life, and the prohibition against shedding innocent blood, including that life began at conception. She noted that since all vaccines were derived from or tested using aborted fetal cell lines, she could not accept the vaccine into her body. She noted as a second reason the strength of her "God-given immunity" and her trust in it. She noted as a third reason that followers of Christ were not to accept the "mark of the beast" referred to in the book of Revelation; and that her belief was that COVID-19 and its corresponding "passports" were the foundations of this mark. It was her belief the Bible warns of this mark and that as a Christian she must not accept it.
- [24] The Grievor's information stated that HEK-293 cells were involved in the "post production" process of the Pfizer and Moderna vaccines (the mRNA vaccines), and originated with abortions. These articles confirmed that 'cells grown in a laboratory based on aborted fetal cells collected generations ago – were used in testing during research and development of the mRNA vaccine'.⁸ It was noted the fetal cell lines used descended from "cells taken from abortions in the 1970s and 1980s". The author described the "description of ongoing modern fetal tissue harvesting to create vaccines" as "dishonest sensationalism".

⁷ Manufactured by Pfizer and Moderna; as distinct from the vaccines developed by Johnson & Johnson and AstraZeneca.

⁸ Union Tab 12; Article by J. Lawler, M.D. dated August 18, 2021

- [25] The Company filed information that while fetal cell lines *were* used to make the Johnson & Johnson vaccine and the AstraZeneca vaccine, the vaccines themselves do not *contain* fetal cells or tissues, and that “[f]etal cell lines were not used to make the Moderna ... and Pfizer ...mRNA vaccines”. This information also stated “[h]owever the cell lines were used in the very early stages of research and development”⁹.
- [26] The Grievor was placed on an unpaid administrative leave of absence on November 16, 2021, not having attested her vaccination status to the Company.
- [27] On November 30, 2022, the Grievor was informed that due to her failure to comply with the Order, she would be terminated, effective January 11, 2022. She was provided an ROE which had noted that she was being “dismissed”. The Grievor understood this characterization to mean she would not qualify for Employment Insurance benefits.
- [28] As was the case in **AH815**, at this hearing, there was only an oral reference by the Company that this characterization of “dismissal” on the ROE was a requirement of Service Canada – and not the Company – for any individuals who refused to be vaccinated.
- [29] On January 7, 2022, the Grievor submitted proof of her vaccination against COVID19 to the Company and was cleared to return to work the same day.
- [30] On January 10, 2022, the Company wrote to the Grievor to indicate her termination date was being deferred, due to legal challenges to the Order.
- [31] On June 17, 2022, the Order was repealed.
- [32] On July 5, 2022, the Quebec Superior Court upheld the Order as constitutionally valid¹⁰.
- [33] The Union provided certain details at the hearing regarding the Grievor’s faith that were not available to the Company at the time of the requests for exemption. I am convinced by the position of the Company that this information should not be considered, as it the information available to the Company in the Fall of 2021 that must be assessed in

⁹ ImmunizeBC FAQ Sheet

¹⁰ *Metallos v. Procureur general du Canada* 2022 QCCS 2455 (CanLII); while only the French version of this decision was provided to this unilingual arbitrator, neither party disputed this conclusion.

determining if the Company failed to accommodate the Grievor. Paragraphs 16 and 18 of the Union's submissions have therefore not been considered in arriving at this conclusion.

Arguments

- [34] The Union argued the requirements of the Supreme Court of Canada's leading decision in *Syndicat Northcrest v. Amselem*¹¹ were met, as the Grievor established she had a religion; that there is a nexus between her refusal to be vaccinated and her religion; and that she was sincere in her belief that her religion prevents her from getting vaccinated.
- [35] It argued the Grievor opposed consuming the vaccines on the basis they were developed using aborted fetal tissue; and because she had concerns the vaccine could be the mark of the beast, spoken about in the Bible. It argued that her concern with the use of fetal cell tissue and the mark of the beast are clearly derived from her Christian beliefs.
- [36] It was the Union's position the Grievor considered that abortion is a sin against God, because a moment a child is created in the womb, it is a human being; and that abortion is a violation of God's teaching; contrary to the Bible and unethical. Regarding end times, her beliefs are detailed and as set out in her third request.
- [37] It argued the Grievor's belief was a sincere and deeply held religious belief which warrants protection under the Collective Agreement and the *Canadian Human Rights Act*¹². and that the standard set by the Supreme Court for assessing sincerity of belief was that the claim was "honest and not an artifice", which standard was met¹³; that her subsequent vaccination to keep her job did not alter the sincerity of her belief at the relevant time, as *Amselem* recognized that court must tolerate a change in beliefs; and that the denial of the Grievor's exemption was "unjustified, discriminatory, and contrary to the established arbitral standard of review.
- [38] It argued its arguments are supported by several arbitral authorities: *Public Health Sudbury & Districts v. ONA*¹⁴; *Wilfrid Laurier University and UFCW*¹⁵; *City of Toronto v.*

¹¹ 2004 2 SCR 551 ("*Amselem*")

¹² RSC 1985, c. H-6 ("*CHRA*")

¹³ *Amselem*, at para. 71

¹⁴ 2022 CanLII 48440 (ONLA)

¹⁵ 2022 CanLII 120317 (ONLA)

CUPE Local 79 (DeCastro); ¹⁶ *City of Toronto v. CUPE Local 79 (Mounsey)*¹⁷; *Nova Scotia Nurses' Union v. IWK Health Centre* ¹⁸.

- [39] For its part, the Employer argued the issues in the Grievor were whether the Grievor was unjustly placed on an unpaid leave of absence (“LOA”) and whether it discriminated against the Grievor. It argued it did neither.
- [40] It argued that placing the Grievor on an unpaid LOA was not disciplinary as essential components of discipline are the employer’s intention and a Grievor’s culpable behaviour: *UNA v. AHS (Forbes)*¹⁹. It urged that non-disciplinary leaves frequently arise in the workplace: *CPC v. CUPW (Godwin)*²⁰. It argued it was not the Company’s intent to punish the Grievor but that the Grievor’s non-vaccinated status rendered her incapable of performing the essential duties of her job safely, due to the Ministerial Order: *Participating Nursing Homes v. ONA (COVID19 – Sick Pay)*²¹. It noted it was bound to comply with the Order and there is therefore no entitlement to payment: *USW, Local 5319 and Securitas Transport Aviation Security Ltd.*²² It argued that paid leaves could incentivize employees to refuse vaccination and remain home with full compensation, which cannot be what the legislature intended: *Nova Scotia Union of Public & Private Employees, Local 13 and Halifax Regional Municipality*²³. It argued the Order confirmed that leave without pay was the minimum sanction and that it did only what it was legally compelled to do and invited the Grievor to return to work: **AH823**. The Company noted that in **AH815**, the Arbitrator found the Company had acted reasonably in placing unvaccinated employees on unpaid leave; and the Grievor was not significantly prejudiced because she was given a full and fair opportunity to present her reasons. The Company noted the Grievor worked in a closed office with over 100 other employees in a safety critical role and that having an unvaccinated employee in that group could have catastrophic consequences for the whole rail system. It argued that accommodating an unvaccinated employee would not

¹⁶ Unreported (ONLA)

¹⁷ Unreported (ONLA)

¹⁸ 2022 CanLII 57410

¹⁹2020 CanLII 24764

²⁰ 1992 CarswellNat 844

²¹ 2020 CanLII 36663.

²² 2022 CanLII 17888

²³ 2022 CanLII 129860

have been possible, and the result would have been the same, which is the Grievor would have been placed on an unpaid leave.

[41] It also argued that it was a reasonable exercise of management rights to place the Grievor on administrative leave, and that as that consequence was imposed by law, *KVP Co. v. Lumber & Sawmill Workers Union, Local 2537*²⁴ requiring that the Policy be considered against the *KVP Test* was not engaged; even if it were engaged, the test would be easily satisfied as unpaid leave was not inconsistent with the Collective Agreement, several authorities have confirmed the reasonableness of similar or identical provisions included in mandatory vaccination policies, including in this industry: *CN v. USW, Local 2004 (COVID Vaccination Policy Grievances)*²⁵ and *Re CUPE, Local 1866 and WorkSafe New Brunswick (Smith)*²⁶; that the requirements of the Policy are clear and unequivocal and that the “unpaid leave rule” was consistently enforced against employees who failed to receive the vaccine or an exemption by November 15, 2021.

[42] The Company also argued it did not discriminate against the Grievor, as she failed to establish she had a sincerely held belief with a nexus to a religion that prevented her from being vaccinated against COVID19 and that the Company’s duty to accommodate was not engaged. It argued that being of Christian faith alone does not relieve an employee from the requirements of the Policy. It argued the Committee appropriately evaluated the Grievor’s request in good faith, referring to the Ministerial Order and the Guidance Material for Railway Companies. In its submissions, the Company stated:

Through the multiple requests submitted by the Grievor, she listed distinct responses, citing different verses from the Bible, however she failed to identify any aspect of her beliefs that directly prohibited vaccination. Furthermore, she provided no information for how she incorporated her purported religious beliefs in her day-to-day life and what other practices she had that would convince the committee that her beliefs were rooted in her religious beliefs, that such beliefs prevented vaccination and that they were sincerely held²⁷.

²⁴ 1995 CanLII 1009

²⁵ Unreported

²⁶ 2023 CanLII 1

²⁷ At para. 74

- [43] The Company relied on the decision of the Alberta Human Rights Tribunal in *Pelletier v. 1226309 Alberta Ltd.*²⁸ regarding sufficiency of information, where that Tribunal stated there must be an “objective basis to establish that the belief is a tenet of a religious faith (whether or not it is widely adopted by others of the faith), and that it is a fundamental or important part of expressing that faith”²⁹, arguing the Grievor also did not meet this burden of proof noted in *Amselem*.³⁰
- [44] It argued that while the Grievor mentioned “fetal cell lines” in the development of the vaccine, there was “no information before CN to indicate that these beliefs were “objectively or subjectively obligatory or customary” in any religion or otherwise met the test in *Amselem*. It argued the Grievor’s beliefs were “no more than a veiled personal preference” which was not protected, and that she chose to ignore the research on the use of fetal cell lines. It argued the Arbitrator in *Halifax Regional Municipality* did not accept there was a link between that grievor’s beliefs and her refusal to be vaccinated against COVID–19.
- [45] While the Company acknowledged arbitrators have upheld religious objections based on the use of aborted fetal cell lines in the development of the vaccine, those cases recognized a nexus between the individuals’ religious beliefs against abortion and the refusal to receive the COVID–19 vaccine: *Public Health Sudbury & Districts and ONA*. The Company pointed to the Grievor’s submission of her test results regarding her own immunity as a secular factor relied on by the Grievor, which does not support the findings that meant she could not take the vaccination: *Nova Scotia Nurses’ Union v. IWK Health Centre*. It argued she did not identify any theological objections or prove she belongs to any Christian denomination which has a theological objection to vaccination and her basis cannot be accepted at face value. It noted she failed to identify the Church she belonged to or any specific teachings or dictates against vaccination. It argued that her reference to the “mark of the beast” was “piling on” in a “frail attempt” to further support her exemption request. It argued her information is based on scientific allegations rather than sound evidence: **AH815** and that she did not demonstrate a sincerely held belief through

²⁸ 2021 AHRC 192 (HRT)

²⁹ At para. 36.

³⁰ At para. 56.

her submissions. It noted the fact the Grievor ended up getting vaccinated demonstrates the exemption was rooted in the science of the vaccine rather than the religion or her belief and that her belief was not sincerely held; her actions were a matter of choice based on incorrect knowledge of the science that vaccines were made from fetal cells, which has been disputed; and the Grievor was disingenuously attempting to use religion to justify her personal preferences and that the Company was not obliged to accommodate her.

- [46] In Reply, the Union argued that the Company's suspension was "clearly disciplinary"; that the Company checked off "dismissal" on the ROE, which denied the Grievor any Employment Insurance benefits; that even if not disciplinary, the Company had an obligation to accommodate the Grievor, which resulted in a violation of her human rights; that the Grievor identified her religious opposition to vaccines, noting she believed in the "sanctity of human life" and could not ingest products connected to "fetal cell lines", as that would be contrary to her faith and conscience because she opposes the sin of abortion; that employers must accept in good faith and at face value an employee's description of their creed as noted by Human Rights Tribunals: *Cole v. CHRC and Bell Canada*³¹; that the Company provided no evidence it could not accommodate the Grievor; that she provided proof of COVID antibodies and her willingness to mask, test daily and practice social distancing; that she provided exclusively human rights objections to the vaccine; that her beliefs are not "veiled personal health preferences and scientific allegations" as argued by the Company; that the Grievor did not once raise a secular objection and that even had she done so, that does not undermine the rights association with a creed-based objection; that the Company's Policy must comply with the *CHRA*; that it was not in the Company's purview to scrutinize the validity of the Grievor's religious beliefs; that *Amselem* states that the test for sincerity is not a high bar³²; that the Company took an "inexplicably narrow" interpretation of the Grievor's beliefs; that an individual need not belong to a particular denomination; and the fact the Grievor was eventually vaccinated does not undermine her beliefs.

³¹ 2007 CHRT 7

³² Applied in *407 ETR Concession Co Limited v. National Automobile, Aerospace, Transportation and General Workers' Union of Canada, CAW – Canada, Local 414* 2007 CanLII 1857.

[47] In Reply, the Employer argued paragraphs 16 and 18 should not be considered as providing new information not available to the Employer; that the mark of the beast did not appear until the third submission and was not the basis of the Grievor's original request; that the Code used on the ROE was directed by Service Canada for this issue; that the Grievor should have challenged Service Canada on that issue and not the Company; there was no attempt by the Union to engage in any discussions regarding accommodation; the Grievor's concerns resulted from her belief there were fetal cell tissues in the vaccines, which there were not; the Union's cases can be distinguished; and the Company's duty was to review the information available to it.

Analysis & Decision

[48] Between them, the parties provided seventy-one (71) exhibits and authorities in support of their positions. While all exhibits – and every authority – was carefully considered, considering the expedited nature of this process, it is impossible to summarize all of this information or address every authority.

[49] Several aspects of this case can be addressed in brief.

[50] In this expedited process, the jurisdiction of an arbitrator is limited to those issues the parties themselves identify in their Joint Statement of Issue.³³ The parties in this case have identified a relatively narrow issue to be resolved: whether the Grievor should have been granted the exemption from COVID19 which she requested, on religious grounds.

[51] While the Company presented argument on whether the Grievor had been “disciplined” or not by being placed on leave, there is no issue raised in the JSI of whether the administrative leave was disciplinary or not. Had that question been placed into issue, both **CROA 4867** (Yingst Bartel) and **AH815** (Clarke) would be found to apply: “COVID19 Leave” is not disciplinary but administrative. Neither arbitrator had the benefit of the other's analysis in reaching that same conclusion.

[52] The JSI likewise does not raise issue of the Company's decision to “check off” that the Grievor was dismissed on her record of employment, instead of that she was placed on

³³ By what is referred to by this Office as “the CROA Agreement”, section 14

a leave. If there had been such an issue raised, Arbitrator Clarke has already resolved that issue in **AH815**.

[53] Neither is this a situation where the *KVP* analysis is appropriately applied. As explained in **CROA 4867**, this is not a case where an employer has unilaterally developed a Policy which must pass the rigours of that test to be reasonable. In this case, the Company was required – by force of law – to adopt a mandatory vaccination Policy. It is reasonable – and required – for the Company to have adopted the Policy, in this case.

The General Law of Accommodation

[54] The issue that *was* raised in this case is whether the Grievor failed to accommodate the Grievor’s religious beliefs in not granting her an exemption, and it is that issue that will be considered and decided.

[55] The protected ground of “religious beliefs” arises from both the collective agreement and the *Canadian Human Rights Act*. Freedom of religion is also a protected right under the *Canadian Charter of Rights and Freedoms* (the “*Charter*”). While it was not argued by the Union that the *Charter* applied to these issues, the test for what constitutes “religious beliefs” under human rights legislation – and collective agreement arbitration – owes its development to *Charter* litigation. In *Huang v. 1233065 Ontario Inc.* the Ontario Human Rights Tribunal recognized that it was a “well-established principle” that the *Code* and the *Charter* “share common objectives and must be interpreted in light of one another” (at para. 28).

[56] There are two leading decisions from the Supreme Court of Canada that must be analyzed in concert. The first is *Moore v. British Columbia (Ministry of Education)*³⁴ which established the *prima facie* test for discrimination. The *Moore* test applies to all protected grounds under human rights legislation. Under this test, an individual must satisfy three elements to establish *prima facie* discrimination:

- a. That they have a characteristic protected from discrimination under the Code;

³⁴ 2012 SCC 61

- b. That they experienced an adverse impact with respect to the service;
and
- c. That the protected characteristic was a factor in the adverse impact
(at para. 33)

[57] When an individual satisfies all three requirements, a *prima facie* case of discrimination is established. The onus then shifts to the respondent.

[58] As noted by the Alberta Court of Appeal in *UNA v. AHS (“Daigle”)* if the “offending rule is rationally connected to the performance of the job...the employer is not required to justify it but rather to show that he has taken such reasonable steps toward accommodation of the employee’s position as are open to [it] without undue hardship”³⁵. If the conduct cannot be justified, discrimination is found to have occurred³⁶ (at para. 33, *Moore*).

[59] To satisfy the first step of the *prima facie* test in *Moore*, it must be determined whether a belief or practice constitutes a “religious belief”—this is because if a practice or belief does not qualify as a “religious belief”, the first step of the *prima facie* test in *Moore* is not satisfied, as there is no “characteristic protected from discrimination”.

[60] This first inquiry of whether a religious belief in fact exists is therefore a “test within a test”. Not all practices and beliefs that are found to be “religious” in nature in the jurisprudence have been subject to protection; there is a “threshold” for protection to be triggered.

[61] While in the past several years there has been a flurry of cases from arbitrators across the country on this issue relating to COVID–19 vaccination, the starting point for determining whether a belief is a religious belief subject to protection is the test developed by the Supreme Court of Canada in *Syndicat Northcrest v. Amselem*.

The Test from Amselem

[62] At issue in *Amselem* was the ability of an Orthodox Jewish resident to temporarily erect a Succah on his balcony to allow him to observe the Jewish religious festival of Succot. This was accepted by the Court to be a biblically mandated commandment for Jewish people, so there was no question that Jews were “obligated” to dwell in these succahs as

³⁵ 2021 ABCA 194, at para. 63; quoting the Supreme Court of Canada’s comments.

³⁶ *Moore*, at para. 33.

part of their observance of the Jewish faith. The Court found that Mr. Amselem's religious beliefs were subject to protection. Of import to this case is the test that was set out by the Supreme Court for freedom of religion to be triggered and protected, and its discussion of the test elements.

[63] There are two broad aspects to the *Amselem* test and three sub-requirements. The two primary elements – and at least one of the “sub-elements” noted below, must be satisfied for freedom of religion to be “triggered”. The elements were described by the Court as follows:

Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show that the court that he or she has a [i] practice or belief, having a [ii] nexus with religion, which [iii] calls for a particular line of conduct, either by being [a] objectively or [b] subjectively obligatory or customary, or [c] by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and [iv] he or she is sincere in his or her belief. “Only then will freedom of religion be triggered.”³⁷

[64] The Court did not ascribe any particular special meaning to the word “nexus”.

[65] According to the Merriam Webster Online Dictionary, the word “nexus” means a “connection or link.” The word “nexus” and “connection” will be used interchangeably.

[66] Under the first element of the *Amselem Test*, an individual must establish a “link” or “connection” between the practice or belief they espouse (in this case resistance to accepting a vaccination developed with fetal cell lines) and religion. This connection between the two is a key and important aspect of the *Amselem Test*. It is also one of the central issues between these parties.

[67] After the nexus or connection is found, it must be determined what line of conduct is “called for” in that religion, regarding that connected practice or belief. The Court in *Amselem* reinforced that – while an individual need not be “mainstream” in their beliefs – and while their beliefs need not be shared widely by others within that religion – to

³⁷ *Amselem*, para. 56 (brackets separating the elements added).

trigger protection as a “religious belief”, an individual *must* establish there is a “nexus” between that practice or belief and a “religion”³⁸.

[68] This is also described in *Amselem* as determining if a practice or belief is “experientially religious in nature”. To be “experiential in nature”, the Court noted a belief can be:

- (a) objectively required by the religion being professed; **or**
- (b) subjectively believed by that individual to be required by the religion professed; **or**,
- (c) the practice “engenders a personal, subjective connection to the divine or the subject or object of his or her spiritual faith”.

[69] I accept that to establish this element of the *Amselem Test*, a person is not required “to prove that his or her religious practices are supported by any mandatory doctrine of faith”. The Court found that would be “dubious, unwarranted and unduly restrictive”³⁹. The Court noted that decision-makers enter a “forbidden domain” when they try to define the “very concept of religious “obligation”, as “it is not within the expertise and purview of secular courts to adjudicate questions of religious doctrine”⁴⁰.

[70] The last element relates to whether that belief is “sincerely held”.

[71] While the Court did not find it was necessary to require “proof of the established practices of a religion to gauge the sincerity of belief”⁴¹, the Court did outline what it described as the limited and “minimal” role for an adjudicator in assessing “sincerity of belief”. It noted that inquiry was to be “as limited as possible”. The Court adopted a scholarly opinion that: “...given the widening understanding of what constitutes religion in our society, the very rights ostensibly protected by the free exercise clause might well be jeopardized by any but the most minimal inquiry into sincerity”. The Court continued by outlining three elements that should be considered to determine sincerity:

Indeed, the court’s role in assessing sincerity is intended only to ensure that a presently asserted religious belief is [a] in good faith, [b] neither fictitious nor capricious, and [c] that it is not an artifice. Otherwise, nothing

³⁸ At paras. 68 and 69.

³⁹ At para. 67.

⁴⁰ At para. 67.

⁴¹ At para. 54 (emphasis added).

short of a religious inquisition would be required to decipher the innermost beliefs of human beings.⁴²

[72] Whether an individual employee has met the requirements of the *Amselem* test will be a question of fact and therefore of evidence.

[73] No jurisprudence was offered to this Arbitrator where any Court has determined how the elements of the *Amselem* test apply in the context of COVID19 vaccination. The treatment that has been given to this issue has come from arbitrators, among whom there is no *stare decisis*.

Application of the Amselem Test

[74] As was noted in **AH815**, it can be difficult determining issues relating to duty to accommodate in this expedited process, where oral evidence is rare and cases are plead in a short amount of time. Although I echo that concern, I am charged with making the factual determinations necessary for determining the issues before me, and in this case there are two factual issues that must be addressed.

[75] First, the Company has argued the Grievor did not want to take the vaccination based on her incorrect scientific knowledge that the vaccines *contained* fetal cell tissue, and they did not. It argued this incorrect scientific knowledge fueled her decisions, which were then based on personal preferences and her own incorrect review of the research.

[76] This is in fact an incorrect representation of the Grievor's reasoning.

[77] As noted in her first submission, the Grievor was not objecting to vaccination because the vaccines *contained* fetal tissue or cells, but because fetal cell lines were *used* in the research and development of the vaccines, which – on the Company's own evidence – was in fact the case. I am satisfied from a review of the evidence filed, that the mRNA vaccinations *did* use fetal cell lines in the development of its vaccines and the Grievor was therefore proceeding based on *correct* scientific knowledge.

[78] Second, while the Union argued the Grievor “never” offered any secular reason for her belief, that is not correct either. In her third request, the Grievor relied on the “natural

⁴² *Amselem*, at para. 52.

immunity” of her God–Given immune system, which she argued was significant. This is a secular reason for not being vaccinated.

[79] Turning to the *Amselem* test, the first question is whether the Grievor has established a “nexus” or “link” between her religious belief and her resistance to vaccination. In my view, she has done so.

[80] I cannot agree with the Company’s argument that there is no connection between the Grievor’s resistance against vaccination and her religious beliefs. It is not “vaccinations” in general that are at issue in this case; it is a resistance to vaccines which were developed using fetal cell lines that is the issue.

[81] I am satisfied the Grievor drew the necessary “map” to provide the link between a) the use of fetal cell lines in the development of the vaccines, and b) her religious belief in the sanctity of life and the prohibition against shedding innocent blood, such that there is a “nexus” – or “sight line” between her religious belief and the use of a vaccination developed using fetal cell lines, as required by the *Amselem* test:

- a. The Grievor stated she believed in the sanctity of human life as noted in the Bible;
- b. The Bible prohibits the shedding of innocent blood;
- c. That prohibition includes ingesting or benefiting from products which are “derived from or tested using aborted fetal cell lines (no matter how near or remote to abortion), regardless of the perceived benefits or rationale”.

[82] The Company also argued the Grievor did not establish any theological objections “to vaccinations” or that she was a member of a church or any or that the denomination had a theological objection to vaccination. With respect, that is not the test. The test allows for *either* an objective obligation; a subjective understanding of an obligation; **or** that the practice “engenders a personal, subjective connection to the divine or the subject or object of his or her spiritual faith”. The Supreme Court elaborated on the reasoning for these options:

Furthermore, in my opinion, any incorporation of distinctions between “obligation” and “custom” or, as made by the respondent and the courts below, between “objective obligation” and “subjective obligation or belief” within the framework of a religious freedom analysis is dubious,

unwarranted and unduly restrictive. In my view, when courts undertake the task of analysing religious doctrine in order to determine the truth or falsity of a contentious matter of religious law, or when courts attempt to define the very concept of religious “obligation”, as has been suggested in the courts below, they enter forbidden domain. It is not within the expertise and purview of secular courts to adjudicate questions of religious doctrine.⁴³

[83] From a careful review of all evidence, I am satisfied that to be inoculated with a vaccination developed through the use of fetal cell lines would have impacted this Grievor’s personal connection to the divine (the third option, above), which was explained by her in her various requests. As she noted, she would be required to sin to do so, which she established was a significant and personal issue for her. To take that step would be an “abominable sin to God” for the Grievor.

[84] The next question surrounds the sincerity of the Grievor’s belief.

[85] While I recognize that the Government of Canada was telegraphing that exceptions would be narrowly construed and difficult to obtain, the Government’s position does not relieve the Company of its obligation to follow the *Amselem* test regarding its assessment of this third question, which was to be made on a very minimal and limited basis. The Company only had to determine if the Grievor’s request was made in good faith, not fictitious or capricious, and was not an artifice.

[86] Given the limitations noted by the Supreme Court of Canada regarding an inquiry into sincerity of belief, I cannot agree with the Company – or the Grievor for that matter – that it was up to the Company to delve with any depth into the sincerity of the Grievor’s belief. It was not. Adjudicators – and employers – were cautioned by the Supreme Court against delving deeply into an individual’s belief system, and this caution must be respected.

[87] I agree the amount of secular material which is offered *can* impact whether the Grievor’s belief is determined to be made in good faith or capricious, as it impacts what the ‘essence’ of the claim *is*. For example, if a grievor states they are a Christian, but they provide extensive information on extraneous concerns, such as the right to control what is in their body; or their concerns the vaccines alter their DNA, or that they must not bow

⁴³ *Amselem*, at para. 67 (emphasis added).

to coercion, then it could be questioned whether their claim is being made in “good faith” or if it is just an artifice for other personal and/or political views. The greater the amount of that type of information presented, the less sincerely a belief may be religious and the more likely it is to be secular.

[88] However, to reach that conclusion, that information would need to be more extensive than that provided in this case.

[89] The Grievor only noted one secular element regarding her natural immune system, and it was in her *third* request. The Grievor was consistent across all three requests that her primary issue with receiving the vaccination stemmed from its use of fetal cell lines in research and development. She was able to support that use with scientific evidence – also known by the Company – and noted its connection to her Christian faith clearly, as well as her Christian background, and the basis for her belief.

[90] Neither do I consider the Grievor has otherwise demonstrated lack of sincerity. The Grievor’s ultimate vaccination in January of 2022 when faced with losing her employment does not result in her initial request not being sincerely held. The Supreme Court in *Amselem* noted that beliefs can change. It is also the case that this choice was not made until the Grievor was threatened with loss of her employment and her income, given how the Employer completed the ROE, whatever the background for that decision. The fact that beliefs must be compromised in some cases does not result in those beliefs lacking sincerity in the first instance. The fact that the Grievor had to make a very difficult decision to compromise her faith or lose her employment resulted from the Company’s failure to properly accommodate her, and not from questionable sincerity.

[91] In this case, it is not necessary to even consider the ‘mark of the beast’ claims. I have considered the Grievor met the requirements of the *Amselem* test with her reliance on the use of fetal cell lines and has established a *prima facie* requirement for accommodation from vaccination for COVID–19 on the grounds of religious belief.

[92] The finding in this case is broadly consistent with several arbitral decisions, which have also seen a “sight line” between claims of resistance to vaccination and the use of fetal cell lines. It is not necessary to quote from those decisions, which all make their determinations based on the *Amselem* test and the particular evidence in each case.

[93] Having triggered the duty to accommodate, the burden shifts to the Company to establish it took all necessary steps to accommodate the Grievor to the point of undue hardship.

Has the Company Established Undue Hardship?

[94] The Company argued the same result would have occurred even had an exemption been found, as it was not feasible to have the Grievor in the workplace unvaccinated; the point of undue hardship would have been reached; and the Grievor would have been placed on an unpaid leave.

[95] The burden to establish undue hardship rests with the Company. I cannot agree that burden has been met, in this case.

[96] Undue hardship is an issue that must be determined with evidence. The evidence which does exist demonstrates the Order contemplated that there *could* be exceptions to mandatory vaccination on religious grounds for Railway Companies. The Guidance clearly states that for those employees to whom exceptions applied – such as the Grievor – the Company was required to “provide for accommodation measures” and more specifically “...the railway company must verify that the employee provides an acceptable proof of a COVID–19 test result every 72 hours”.

[97] For the Government of Canada – who authored the Order and imposed the mandatory vaccination requirement - it was feasible to have those individuals return to the workplace, under a rigorous testing regime.

[98] The evidence in this case is that the Grievor offered to comply with whatever requirements the Company placed in front of her – whether masking, social distancing or testing prior to each shift. The Company did not provide any evidence why continual testing of the Grievor could not have been successful, beyond the fact the Grievor worked with 100 other employees. That bare statement does not establish undue hardship.

[99] Given the lack of evidence, the Company has not satisfied its burden to establish that accommodating the Grievor would have resulted in undue hardship.

Conclusion

[100] For the foregoing reasons, the Grievor has established a *prima facie* need for accommodation on religious grounds, for an exemption from vaccination for COVID19.

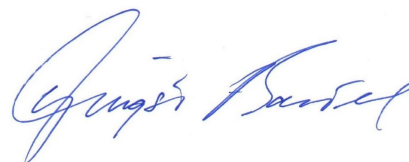
[101] The Company has not met its burden to establish it accommodated the Grievor to the point of undue hardship.

[102] The Grievance is allowed.

[103] The Grievor is entitled to be made whole for all losses. If the parties cannot agree on remedy, the parties are to bring that issue before a session of CROA over which this Arbitrator presides, as a stand alone issue.

I reserve jurisdiction to correct any errors and address any omissions, to give this Award its intended effect.

May 17, 2024



**CHERYL YINGST BARTEL
ARBITRATOR**