

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

WANH PORTER

Plaintiff

- and -

NORTH YORK GENERAL HOSPITAL

Defendant

STATEMENT OF DEFENCE

1. The Defendant, North York General Hospital (hereinafter “NYGH”), expressly denies all of the allegations contained in the Statement of Claim, unless otherwise explicitly admitted below, and denies that the Plaintiff (“Porter”) is entitled to the relief claimed in paragraph 1 of the Statement of Claim.

Overview

2. Porter is a former employee of NYGH. Porter’s employment was terminated for cause on November 30, 2021 for failure to comply with NYGH’s COVID-19 Immunization Policy (the “Immunization Policy”), which required vaccination against COVID-19 for all staff, physicians, other credentialed staff, learners, volunteers, and contract staff, including Porter.

3. Porter is not entitled to wrongful dismissal damages. Compliance with the Immunization Policy was a term of Porter’s employment. By refusing to comply with a reasonable and essential term of employment, Porter irreparably damaged the parties’ relationship. Thus, NYGH had cause to terminate Porter’s employment.

4. Porter is also not entitled to the extracontractual damages she is seeking on account of a breach of the *Human Rights Code* (“Code”), or for punitive, aggravated, or moral damages. The decision to terminate Porter’s employment was in no way rooted in a *Code* protected ground, nor was Porter entitled to accommodation on the basis of a *Code* protected ground. In the alternative, vaccination against COVID-19 was a *bona fide* occupational requirement and to accommodate Porter would amount to undue hardship. Moreover, NYGH did not act in bad faith or in a reprehensible manner during the accommodation process, at the time of Porter’s termination, or otherwise.

5. Accordingly, NYGH’s position in this claim is that the action ought to be dismissed with costs against Porter.

Porter’s Employment with NYGH

6. Porter was employed with NYGH for approximately eighteen years, from January 5, 2004 until her employment was terminated on November 30, 2021.

7. At all material times Porter was employed as a Part Time Regular Occupational Therapist (“OT”) in the Neonatal Intensive Care Unit. In this role, Porter was entrusted with the care of the most vulnerable, often immunocompromised newborn babies, who could not themselves be vaccinated against COVID-19. In the Neonatal Intensive Care unit, the OT provides developmental motor assessment of infants, provides intervention strategies for families, and provides referrals to appropriate community programs.

8. Porter’s duties include assessment of, intervention for, and discharge planning for newborns and premature/immunocompromised infants presenting with medical, physical, feeding and/or developmental problems.

9. In her role, Porter was entitled to the following compensation:

- (a) an hourly wage of \$44.46, less deductions required by law;
- (b) participation in a group benefits plan, in accordance with the prescribed terms and conditions of the plan; and

- (c) participation in the Healthcare of Ontario Pension Plan (“HOOPP”), in accordance with the prescribed terms and conditions of the plan.

10. Porter’s employment was subject to a number of express and implied terms of employment, including that:

- (a) Porter would comply with NYGH’s policies and procedures, including its mandatory Immunization Policy, as amended from time to time;
- (b) the employment relationship would be governed by the rights and obligations contained within the *Employment Standards Act, 2000* (“ESA”) and the *Occupational Health and Safety Act* (“OHSA”), as amended from time to time; and
- (c) NYGH could terminate Porter’s employment for cause, without the requirement to provide notice or pay in lieu thereof.

Impacts of COVID-19

11. Since the onset of the COVID-19 virus, NYGH has focused its operations on combating the spread of the virus, while at the same time ensuring continued and timely support for patients in need of acute and specialized complex care. NYGH has also continuously enhanced its commitment to addressing and improving the safety and well-being of its employees.

12. As a result of the pandemic, NYGH had to take a number of urgent and necessary steps to support its operations and the broader healthcare system, including but not limited to, calibrating hospital operations in response to Ministry of Health directives and regional actions to provide access to Intensive Care Unit beds, transferring patients to other partner hospitals, significantly increasing laboratory resources for COVID-19 testing, and sending employees to long-term care homes and retirement homes that were experiencing COVID-19 outbreaks to provide support.

13. Due to the nature of the operations and the critical services being provided, NYGH, like other hospitals, experienced increases in COVID-19 cases among its employees and staff. Notably, on November 10, 2021, the Ontario Hospital Association News Bulletin reported that, as of November, there had been approximately 24,772 cases of COVID-19 among Ontario's health sector workers. Furthermore, according to data compiled by Public Health Ontario, between February 16, 2020 and June 12, 2021, approximately 568 COVID-19 outbreaks originated from within hospitals.

Directive #6 and NYGH's Vaccination Policy

14. The COVID-19 pandemic had and continues to have dramatic effects on the operational needs and requirements of NYGH. It has been the most significant health crisis affecting NYGH in decades and there has been no greater or comparable threat to employee health and safety than the COVID-19 pandemic during the period of Porter's employment.

15. At all material times during the COVID-19 pandemic, NYGH has taken every reasonable precaution to protect the health and safety of all staff, volunteers, and patients, including through the use of COVID-19 vaccinations where possible.

16. On April 24, 2021, NYGH sent an email to all hospital staff strongly recommending that all employees who work regularly at hospital sites receive the COVID-19 vaccination unless it was medically contraindicated.

17. In the same email, NYGH advised that it would be introducing a COVID-19 Immunization Policy which required all employees, physicians, learners, and volunteers who were eligible to receive the COVID-19 vaccine to take one of three possible steps no later than May 31, 2021. Those steps were:

- (a) Receive the required doses of the COVID-19 vaccine and provide proof thereof;
- (b) Submit a medical certificate from a qualified specialist confirming that the vaccine is medically contraindicated; or

- (c) If COVID-19 vaccine is declined (and no certificate confirming medical contraindication is provided), take an e-learning module about the COVID-19 vaccines.

18. On August, 17, 2021, the Chief Medical Officer of Health (the “**CMOH**”) issued Directive #6 for Public Hospitals (**Directive #6**) pursuant to the CMOH’s powers under s. 77.7 of the *Health Protection and Promotion Act* R.S.O. 1990, c. H.7 (the “**HPPA**”). Under s. 77.7(3) of the *HPPA*, NYGH has an obligation to comply with a directive issued by the CMOH.

19. Directive #6 required that NYGH take steps to establish and implement a COVID-19 vaccination policy applicable to its employees, staff, contractors, volunteers, and students by September 7, 2021.

20. Directive #6 instructed that NYGH was to establish a COVID-19 vaccination policy that ensured that any of its employees, staff, contractors, volunteers, and students provide: a) proof of full vaccination; b) proof of a medical reason for not being vaccinated and regular antigen testing; or c) proof of completion of an education session and regular antigen testing. Directive #6 permitted NYGH to forego the education training option at its own discretion.

21. The CMOH’s basis for issuing Directive #6 included the following:

- (a) Many health care workers in higher risk settings remained unvaccinated, posing risks to patients and health care system capacity;
- (b) Vaccines provide the best protection against COVID-19;
- (c) The immediate risk to patients within hospitals and home and community care settings who are more vulnerable and medically complex than the general population, and therefore more susceptible to infection and severe outcomes from COVID-19; and

- (d) The prevalence of the Delta variant of concern globally and within Ontario, which had increased transmissibility and disease severity as compared with previous COVID-19 strains.

22. On or around September 1, 2021, NYGH advised that it was amending the Immunization Policy, applicable to all NYGH staff, staff, physicians, other credentialed staff, learners, volunteers and contract staff. For employees and credentialed staff, including Porter, the amended Immunization Policy provided:

- (a) As a condition of active employment, all employees were required to be fully vaccinated against COVID-19 by October 29, 2021, subject to approved exemptions for human rights or medical reasons.
- (b) All individuals who did not comply with the requirement to be fully vaccinated, subject to approved exemptions for human rights and medical reasons, were required to complete a educational COVID Immunization Module.
- (c) As of September 8, individuals who did not comply with the requirement to be fully vaccinated, including those with approved human rights and medical exemptions, were required to complete mandatory antigen testing.
- (d) Effective October 15th, 2021 unvaccinated, non-exempt employees were considered non-complaint with the Immunization Policy and subject to disciplinary action up to and including termination of employment.
- (e) As of October 29, 2021 unvaccinated staff without an approved exemption would be placed on a disciplinary unpaid leave of absence effective October 30, 2021 and be subject to disciplinary measures up to and including termination of employment for cause.

- (f) All staff placed on unpaid leave, including Porter, were given the option to continue to contribute to pension and benefits and receive benefits from their benefits plans.
- (g) Effective November 30, 2021, all employees who were not fully vaccinated with a COVID-19 vaccine or who were not being provided with an accommodation under the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 (“*Code*”) (including a medical exemption) would be terminated for cause.

23. NYGH’s Immunization Policy was consistent with Directive #6 and was developed as a reasonable and necessary measure to ensure the health and safety of its employees, credentialed staff, contracted staff, learners and volunteers, visitors, and patients.

24. Since the release of Directive #6, NYGH repeatedly and consistently encouraged its employees and staff to be vaccinated for their own safety and the safety of their families, patients, and communities.

25. For example, in August, September and October of 2021, NYGH issued numerous communications to all NYGH staff, physicians, learners, and volunteers, detailing the requirements under the Immunization Policy, the reasons for which NYGH amended the Immunization Policy, the requirements respecting mandatory COVID-19 testing for those not yet fully vaccinated, and offering support and resources to assist individuals in making the choice whether to get vaccinated against COVID-19.

Porter’s Unsubstantiated Request to be Exempted from the Policy

26. On September 16, 2021, Porter submitted a request to be exempted from the application of NYGH’s amended Immunization Policy on the basis of creed (“the Exemption Request”).

27. NYGH carefully reviewed Porter's exemption request and found that the Exemption Request did not substantiate a requirement for accommodation under a *Code*-protected ground.

28. In spite of the fact that Porter's request was not substantiated, NYGH did not deny the request. Rather, on September 22, 2021, NYGH wrote to Porter to request additional information to substantiate her Exemption Request. In particular, NYGH requested:

- (a) A letter from Porter's faith leader to confirm Porter's participation in her church; and
- (b) Further explanation regarding Porter's religious beliefs and their connection with her refusal to take the COVID-19 vaccine.

29. On September 22, 2021, counsel for Porter responded to this request for information, stating that Porter would not provide any additional information in order to substantiate the Exemption Request.

30. On or around October 20, 2021, counsel for NYGH and counsel for Porter communicated regarding the Exemption Request. Counsel for NYGH inquired as to whether Porter would be providing further information to substantiate the Exemption Request. Porter's counsel confirmed that Porter would not be providing additional information requested to substantiate grounds for accommodation under the *Code*.

31. NYGH denies that it did not consider Porter's request in the absence of the additional information requested. NYGH carefully considered Porter's request on the basis of the information provided and found that it did not substantiate a basis for accommodation under the *Code*.

32. As a result, on October 29, 2021, NYGH wrote to Porter to inform her that her Exemption Request had been denied because, based on the documentation provided, her request did not meet the criteria for a creed based accommodation under the *Code*.

Porter's Refusal to Comply with the Immunization Policy

33. On October 29, 2021, NYGH advised Porter that, because she had no valid exemption to mandatory vaccination under the amended Immunization Policy, she would be required to comply with the amended Immunization Policy by receiving her first dose of vaccine by November 8, 2021, and receiving her second dose by December 6, 2021.

34. NYGH stated that it remained Porter's individual choice whether or not to be vaccinated against COVID-19; however, NYGH informed Porter that if she did not submit proof of vaccination by November 8, 2021 she would be placed on an unpaid leave of absence effective November 9, 2021.

35. NYGH also informed Porter that if she remained non-compliant with the amended Immunization Policy she would remain on an unpaid leave of absence until November 30, 2021, at which time NYGH would terminate her employment for cause in relation to her wilful misconduct, refusal to comply with the amended Immunization Policy and willful neglect of duty.

36. Porter did not submit proof of vaccination by November 8, 2021. She was therefore placed on unpaid leave in accordance with NYGH's October 29, 2021 letter to Porter and with the amended Immunization Policy.

37. While on unpaid leave, Porter was given the option to continue to contribute to pension and benefits and receive benefits under the applicable benefits plans.

38. NYGH sent Porter an additional letter on November 23, 2021 to offer resources and support regarding the choice of whether to get vaccinated against COVID-19, and to remind her that her employment with NYGH would be terminated for cause on November 30, 2021 if she did not submit proof of vaccination by that date.

39. While on unpaid leave, Porter maintained her decision not be vaccinated for COVID-19 in accordance with the amended Immunization Policy.

40. In accordance with NYGH's various letters to Porter and with the amended Immunization Policy, NYGH therefore terminated Porter's employment effective November 30, 2021.

NYGH Worked Proactively to Fill Porter's Position

41. NYGH admits the allegation at paragraph 48 of the Statement of Claim, that it started the recruitment and interview process prior to November 30, 2021, when Porter's employment was terminated. NYGH posted the role on November 5, 2021, after it determined that Porter's request for accommodation under the *Code* was not substantiated and after it communicated the fact that the request was not substantiated to Porter.

42. NYGH began the recruitment process as early as possible, and before the decision was formally made to terminate Porter's employment for her failure to comply with the amended Immunization Policy, because Porter had made clear she had no intention to become vaccinated, and NYGH was aware that the COVID-19 pandemic would make it difficult to fill the position. NYGH's priority is patient care. Maintaining adequate staffing levels in the Neonatal Intensive Care Unit is essential for the health and safety of vulnerable patients.

43. NYGH did not succeed in filling the position until January 17, 2022, more than two and a half months after Porter was terminated.

44. NYGH specifically denies the allegation at paragraph 49 of the Statement of Claim that its decision to begin the recruitment process before the decision was formally made to terminate Porter's employment was made in bad faith. NYGH also denies that it intentionally delayed responding to Porter's request for religious accommodation. NYGH pleads that at all times it was honest, fair, and acted in good faith in its dealings with Porter.

NYGH's Legal Position

Cause for Termination

45. NYGH pleads that it had cause to terminate Porter's employment. Accordingly, no damages are owing.

46. NYGH has legal obligations to ensure the safety of its employees and its staff, including ensuring the safety of its employees from the COVID-19 pandemic. These legal obligations include taking every reasonable precaution to ensure the safety of NYGH's employees, as per the *Occupational Health and Safety Act*.

47. The Immunization Policy was implemented pursuant to NYGH's legal obligations.

48. The revisions to the Immunization Policy were reasonable in the circumstances.

49. NYGH denies that it failed to adhere to the Immunization Policy and that it had a duty under the Immunization Policy to accommodate Porter.

50. Porter knowingly and wilfully refused to abide by the Immunization Policy, making her unavailable to perform the essential duties of her job.

51. Porter's failure to comply with the Immunization Policy at a time when NYGH's operation was (and still is) suffering the impacts of COVID-19, despite numerous emails and reminders of the appropriate deadlines, undermined an essential term of employment and thus, compromised the employment relationship.

52. Furthermore, the amendment of the Immunization Policy to include mandatory vaccination against COVID-19 was not unforeseen given the release of Directive #6 as early as August 2021, NYGH's repeated announcements and encouragements regarding vaccination against COVID-19, and the fact that the Immunization Policy allows amendments.

53. For the reasons above, NYGH pleads that it had cause to terminate Porter's employment. Porter's conduct, by wilfully and deliberately making herself unable to perform the essential duties of his job by refusing COVID-19 vaccination, furthermore amounted to wilful misconduct.

54. In the alternative, if NYGH did not have cause (which is denied), the damages claimed by Porter for wrongful dismissal are too remote, excessive and not recoverable at law.

55. Further, if Porter has suffered any loss as a result of the termination of her employment, which is not admitted but denied, this loss is the result of her failure to take prompt and reasonable steps to mitigate her damages adequately, or at all. In the alternative, if Porter has obtained alternate income since the termination of her employment, those earnings must be deducted from any loss allegedly sustained, such loss being denied in any event.

56. Any amounts earned by Porter, including government wage subsidies and other income earned or received, ought to be off-set against any damages owing over any reasonable notice period.

No Extracontractual Damages

57. NYGH denies that it breached the *Code* and denies that it discriminated against Porter in any way. Neither the amended Immunization Policy nor the application of that Immunization Policy to Porter amounts to discrimination. NYGH puts Porter to strict proof of her allegation.

58. Pursuant to a statement regarding COVID-19 vaccinations by the Ontario Human Rights Commission (the "OHRC") on September 22, 2021, mandating and requiring proof of vaccination to protect people at work is permissible under the *Code*, as long as there are protections and accommodations for those "who are unable to be vaccinated for *Code*-related reasons".

59. NYGH denies that it had a duty to accommodate Porter for a creed-based exemption to the Immunization Policy and denies that it breached the *Code* or its own Immunization Policy because of a failure to accommodate Porter. NYGH pleads that Porter failed to substantiate a *Code*-related reason for her failure to comply with the amended Immunization Policy by the relevant deadline, and that no such *Code*-related reason has been substantiated in the litigation. Accordingly, Porter does not have any entitlement to damages under the *Code*.

60. Pursuant to a statement regarding COVID-19 vaccinations by the Ontario Human Rights Commission (the "OHRC") on September 22, 2021, the OHRC's position is "that a person who chooses not to be vaccinated based on personal preference does not have the right to accommodation under the Code". The OHRC further notes that a "[w]hile the Code prohibits discrimination based on creed, personal preferences or singular beliefs do not amount to a creed for the purposes of the *Code*".

61. In the alternative, NYGH pleads that mandatory vaccination is a *bone fide* occupational requirement and that permitting Porter to perform her job unvaccinated would amount to undue hardship on the basis that it would significantly compromise the health and safety of the patients under Porter's care in the Neonatal Intensive Care Unit.

Moral and Punitive Damages

62. NYGH denies that anything in its conduct or treatment of Porter gives rise to a claim for, or an entitlement to, bad faith, moral, punitive or aggravated damages as sought in the Statement of Claim.

63. NYGH denies that its actions caused mental distress, anxiety or stress to Porter and puts her to the strict proof thereof.

Request for Dismissal of Action

64. NYGH asks that this action be dismissed with costs.

May 24, 2022

**HICKS MORLEY HAMILTON
STEWART STORIE LLP**
77 King Street West, 39th Floor
Box 371, TD Centre
Toronto ON M5K 1K8

Elisha C. Jamieson-Davies (LSO No.: 52865N)
Tel: 416.864.7344 Fax: 416.362.9680
E-mail: elisha-jamieson-davies@hicksmorley.com

A. Gabrielle Lemoine
Tel: 416.864.7530 Fax: 416.362.9680
LSO No.: 77381V
E-mail: gabrielle-lemoine@hicksmorley.com

Lawyers for the Defendant

TO: **JAMES S. M. KITCHEN**
203-304 Main Street S
Suite 224
Airdrie AB T4B 3C3

Tel: 403.667.8575 Fax:
E-mail: james@jasmklaw.ca

Lawyer for the Plaintiff

WANH PORTER

-and-
(Plaintiff)

NORTH YORK GENERAL HOSPITAL

(Defendant)

Court File No.: CV-22-00679996-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

STATEMENT OF DEFENCE

**HICKS MORLEY HAMILTON
STEWART STORIE LLP**

77 King Street West, 39th Floor
Box 371, TD Centre
Toronto ON M5K 1K8

Elisha C. Jamieson-Davies (LSO No.: 52865N)
Tel: 416.864.7344 Fax: 416.362.9680
E-mail: elisha-jamieson-davies@hicksmorley.com

A. Gabrielle Lemoine
Tel: 416.864.7530 Fax: 416.362.9680
LSO No.: 77381V
E-mail: gabrielle-lemoine@hicksmorley.com

Lawyers for the Defendant

Email for party served:
James S. M. Kitchen: james@jsmklaw.ca