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**THE KING'S BENCH  
Winnipeg Centre**

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BETWEEN:

**KENTON HILDEBRAND**

Plaintiff

and

**CANADIAN NATIONAL RAILWAY COMPANY**

Defendant

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**STATEMENT OF CLAIM**

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TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a Manitoba lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *Kings's Bench Rules*, serve it on the plaintiff's lawyer or where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Manitoba.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGEMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

October 31, 2023  
Date

Issued B. Both  
Deputy Registrar

TO: CANADIAN NATIONAL RAILWAY COMPANY  
CN Headquarters  
Montreal (Headquarters)  
935 de La Gauchetiere Street West  
Montreal, Quebec H3B 2M9

**CLAIM**

1. The Plaintiff seeks the following remedies against the Defendant of this action:
  - a. A declaration that the Policy issued by the Defendant be declared inoperative due to a unilateral change in the employment contract.
  - b. Judgment against the Defendant for wrongful dismissal, for damages in a sum to be determined at the trial of this matter, or in such other amount as is determined by this Honourable Court, representing remuneration in lieu of notice in relation to the Plaintiff's entitlement to:
    - i. Individual Variable Pay;
    - ii. Recognition Award(s);
    - iii. Short Term Incentive Bonus;
    - iv. Employee Share Investment Plan;
    - v. Extended Benefits;
    - vi. Defined Benefit Pension Plan; and
    - vii. Anticipated bonus(es).
  - c. Judgment against the Defendant for general damages for bad faith and breach of contractual relations in the amount of \$100,000.00.
  - d. Judgment against the Defendant for aggravated, punitive and/or exemplary damages in an amount to be determined by this Honourable Court but not expected to exceed \$100,000.00.
  - e. Judgment against the Defendant for general damages for harassment in the amount of \$50,000.00.
  - f. The Plaintiff seeks all of his common law and or statutory entitlements;
  - g. Special damages incurred in relation to mitigation including seeking alternative employment, relocation and retraining expenses and other out-of-pocket expenses in an amount to be determined at trial;

- h. Prejudgment and post judgment interest pursuant to the *Manitoba Court of King's Bench Rules*;
- i. Costs of this action on a full indemnity basis including cost of all experts on a full fee basis plus any applicable taxes; and
- j. Such further and other relief as this Honourable Court may deem just and equitable in the circumstances.

The Plaintiff pleads and relies upon the following:

- a. *Manitoba Employment Standards Code*, CCSM c. E-110, specifically ss. 4(2), 5, 29(1), 29(2), 43, 44, 60.1, 61(1), 61(2), 76, 77(1), 77(2), 86(1), 88, 133(1), 135(1), 135(3), 139(1), 140(1), 140(2), and 141;
- b. *Canadian National Railway Company – Vaccination Mandatory Policy*; and
- c. Such other enactments and legislation as the Plaintiff may advise and this Honourable Court may consider given the circumstances.

## DEFINITIONS

- 2. The following definitions apply for the purposes of this Statement of Claim:
  - a. **"Partially Vaccinated"** means having received the first dose of a two-dose series of a Health Canada approved vaccine that provides protection against COVID-19.
  - b. **"Fully Vaccinated"** means having received the complete series of doses (or a single dose of the Janssen (Johnson & Johnson) COVID-19 vaccine) of a Health Canada approved vaccine that provides protection against COVID-19 and having allowed the time recommended by public health authorities to produce an immune response to COVID-19 elapse (14 days from receipt of a single-dose vaccine or of the second dose of a two-dose series). In time, being Fully Vaccinated may mean having received booster shots, when and as recommended by the applicable public health authorities.
  - c. **"Proof of Vaccination"** means providing the employer official documentation issued by the government or the non-governmental entity that is authorized to issue the evidence of COVID-19 vaccination in the jurisdiction in which the vaccine was administered (including a QR code, if issued by the applicable authorities) confirming receipt of the complete series of doses (or a single dose of the Janssen (Johnson & Johnson) COVID-19 vaccine) of a Health Canada approved vaccine that provides protection against COVID-19. In time, this may require providing proof of receipt of booster shots, when and as recommended by the applicable public health authorities.
  - d. **"Privacy"** means the fundamental right of individuals to create boundaries limiting access to their person, communications, or personal information, including but not limited to, medical and health records.

- e. **"Informed Consent"** means the ability to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion, with sufficient knowledge and comprehension of the elements of the subject matter involved as to enable the individual to make an understanding and enlightened decision.
- f. **"Policy"** refers to the Mandatory Vaccination Policy requiring employees of the Canadian National Railway Company ("**CN Employees**") to be Fully Vaccinated by January 24, 2022.

#### A. THE PARTIES

- 3. The Plaintiff, Kenton Hildebrand ("**Hildebrand**") is a 53 year-old individual who resides at or near Winnipeg, in the Province of Manitoba.
- 4. The Defendant, Canadian National Railway Company ("**CN**" or the "**Company**"), is incorporated pursuant to the laws of Canada, and is headquartered in Montreal, Quebec. CN is North America's only transcontinental rail network, anchored by multiple port connections on three coast lines. CN transports consumer goods, automobiles, grain, forest products, industrial products and other commodities. CN is a federally regulated industry and subject to the Transport Ministry's authority.

#### B. THE POLICY

- 5. The Plaintiff opposed the Policy requirement to reveal medical records and private health information, namely his COVID-19 status.
- 6. The Policy required that all CN Employees be fully vaccinated before January 24, 2022, and that they receive their first dose of vaccine before November 15, 2021, where a 2-dose series vaccine was administered.
- 7. The Policy applied to all CN employees, regardless of position, job function, status, or work location, as well as to all applicants for employment with CN including CN's contractors, consultants, agents and suppliers, and anyone who accessed CN properties in Canada.
- 8. The Policy provided for limited exemptions, and "[a]n employee claiming an exemption from the vaccination requirement on the basis of a medical condition, religious belief, or other ground recognized by Transport Canada must apply for an exemption in accordance with the Vaccination Mandate Exemption Procedure." The Plaintiff applied for an exemption that was ignored. Asking for an exemption discriminates, as that individual is forced to disclose medical conditions or religious beliefs, which are both deeply personal information.
- 9. The Policy discriminated against an identifiable group of Canadians (those who had not received a COVID-19 vaccine) and did not provide exemptions for those who had natural immunity to COVID-19 or those with conscientious objections, or for those working remotely or with little to no contact with other colleagues.
- 10. At Section E of the Policy, it discriminated by mandating that all employees attest to their medical status regarding the COVID-19 vaccine and required those who refused to provide Proof of COVID-19 vaccination be put on leave without pay and threatened with loss of employment.

11. As a CN Employee, the Plaintiff was subject to the Policy, which required that he be Fully Vaccinated against COVID-19 as defined above and that he disclose his vaccination status to CN by way of an attestation in the form provided by CN.

12. Section E of the Policy, "Vaccination Requirements and Timeline", stated that "after 24 January 2022, employees who are not Fully Vaccinated, have not provided Proof of Full COVID-19 Vaccination to CN and have not obtained an exemption based on medical contraindications or sincerely-held religious beliefs will be placed on an unpaid leave of absence and/or subject to such other administrative or disciplinary measures as may be deemed appropriate by CN in the circumstances, up to and including termination of employment."

13. The Policy required an attestation of a medical record.

14. The Policy also required that employees provide Proof of Vaccination when requested by a designated CN representation as "failure to produce the proof on demand is a violation" of the Policy.

15. The Policy required employees to be Fully Vaccinated by 24 January 2022, which meant that employees "must have completed a full course of vaccination no later than 9 January 2022."

16. The Policy stated that all employees not on leave and unless an employee had an approved exemption, "must, no later than 24 January 2022, provide an attestation in the form provided by CN confirming that the employee is Fully Vaccinated."

17. CN's Covid-19 Vaccination Mandate Exemption Procedure ("Exemption Procedure") recognized natural immunity for 90 days if an employee received a positive COVID-19 test. However, the Policy overall did not allow proof of natural immunity as an appropriate alternative to the COVID-19 vaccination for those who did not consent to the vaccination.

18. For an interim period between 15 November 2021 and 24 January 2022, the Policy allowed for testing as an alternative to employees being Fully Vaccinated. The employee was responsible to source the appropriate tests, have a test performed every 72 hours, and pay for the costs. However, the Policy did not allow COVID-19 testing as an appropriate alternative to the COVID-19 vaccination for those who did not consent to the vaccination and required employees to be Fully Vaccinated by 24 January 2022, or risk violation of the Policy.

19. The Policy indicated that mandatory COVID-19 testing was a satisfactory means of maintaining the health and safety of employees in the workplace. The Policy discriminated against those who did not consent to the vaccination or who did not consent to providing their vaccination record to their employer, effectively forcing such individuals to consent to a medical treatment they could not accept or risk losing their employment.

20. Non-union employees were placed on unpaid leave effective 15 November 2021. The Plaintiff was directly impacted by such enforcement of the Policy.

### **C. THE VACCINES**

21. Five vaccines are currently authorized in Canada to treat symptoms of COVID-19: AstraZeneca, Moderna, Pfizer, Novavax, and Johnson & Johnson. All COVID-19 vaccines are still undergoing clinical trials until 2023 or later. None of these prevent the infection or

transmission of COVID-19, or any of its variants. Nor has a complete list of the ingredients of any of these vaccines been published.

22. These vaccines are experimental. Long-term effects have not yet been sufficiently studied and there is emerging evidence of significant risks. These vaccines have not undergone the same stringent scientific approval process by Health Canada as have previous vaccines and medications. The vaccines could cause other side effects that remain unknown at this time due to their relatively recent development. No one can be certain about the long-term effects of a vaccine that has not been in existence for the long term and has not been studied over a span of years.

23. The COVID-19 vaccines recommended by Canadian public health authorities, are also known to cause severe adverse effects and injuries for some individuals. Health Canada has warned about various serious reactions from the COVID-19 vaccinations. Recent data directly from Pfizer shows cases of serious reactions including myocarditis, pericarditis, Bell's Palsy, thrombosis, immune thrombocytopenia, venous thromboembolism, acute myocardial infarction, cardiac sarcoidosis, anaphylaxis, and even syphilis.

24. Vaccinated and unvaccinated Canadians can be infected with and transmit COVID-19. The CEO of Pfizer has publicly acknowledged that vaccines do not provide immunity to COVID-19 or its known variants. They merely claim to provide some "benefits" or "protection" that in certain circumstances at best lessens severity of symptoms or potentially reduces the risk of hospitalization.

25. The "benefits" or "protection" of the vaccines vary depending on numerous factors that are still being observed and studied, including any underlying health conditions, the individual's age, and when the vaccine was administered in relation to any variant of concern.

26. The recent and continued release of Post Authorization Adverse Events Reports, by the US Food and Drug Administration ("FDA") regarding the Pfizer COVID-19 vaccine, indicate that adverse reactions and side-effects, up to and including death, are not only more severe, but more frequent than anticipated based on initial data released to the public. The FDA's own documentation reports that during the Reporting Interval alone, 1,223 deaths were reported with 9,400 cases having an unknown outcome.

27. The draconian steps taken by the Company to enforce its Policy as well as the Policy itself are incongruent with its claims of promoting safety and wellbeing.

#### **D. THE EMPLOYMENT**

28. The Plaintiff was an Account Manager within the Bulk Business Unit and worked faithfully and honourably for CN for a period of 22.5 years. At all material times, Hildebrand performed his duties ethically, diligently, and effectively, and was a competent, hard-working, and valuable employee. Hildebrand consistently received superior performance reviews followed by regular promotions, salary increases, and annual bonuses.

29. The key terms of the Plaintiff's employment contract included that:

- a. His employment was indeterminate;

- b. his base annual salary was \$ 119,804.00;
  - c. He was entitled to six (6) weeks annual vacation;
  - d. He was entitled to share in CN's extended benefits program;
  - e. He was enrolled in CN's Defined Benefit Pension Plan;
  - f. He was entitled to participate in ownership of CN through the Employee Share Investment Plan (ESIP); and
  - g. He was entitled to reasonable notice or pay in lieu of reasonable notice for termination without cause.
30. The Plaintiff's duties and responsibilities were both extensive and various, including:
- a. Managing one of CN's largest customer accounts (60,000 carloads annually~\$250M);
  - b. Customer relations;
  - c. Logistics assistance;
  - d. Contract negotiation and management; and
  - e. Market analysis.

#### **E. The Wrongful Dismissal**

31. The bulk of the Company's Code of Ethics (the "**Code**") concerns financial, legal, and regulatory matters. CN claims to have a zero tolerance for discrimination, harassment and violence, and endeavours that all employees be treated with integrity, trust, and respect.
32. The Code was supplemented in October 2021 with its Company-wide Vaccination Policy. Violation of the Policy comes with disciplinary action up to and including termination of employment.
33. The Policy did not provide for rapid antigen testing as a clear alternative. Many facilities and employers adopted testing policies whereby both vaccinated and unvaccinated individuals were regularly tested for COVID-19. This accommodation for testing was based upon scientific recognition that vaccinated and unvaccinated individuals contract COVID-19 and potentially transmit the virus. In any case, the risk of infection, let alone serious illness or death, was vanishingly low for all but a statistically miniscule segment of the elderly population, almost none of whom were part of the Canadian workforce.
34. Without notice, on 15 November 2021, CN advised the Plaintiff by email that he was being placed on unpaid leave of absence. This constitutes a constructive dismissal in law. There was no contract of employment which permitted lay-offs and the Plaintiff had never been laid off previously. There was no term of the employment contract which permitted an involuntary unpaid leave of absence or suspension without pay.
35. Accommodations may be limited by undue hardship or denied because the activity is a *bona fide* requirement. Where taking part in an activity can be shown to be a *bona fide*



requirement, employers are required to accommodate to the point of undue hardship (for instance, by assigning an employee an alternative assignment or method of compliance). The Plaintiff worked effectively from home from March 2020 to November 2021. The accommodation to work from home was not afforded to the Plaintiff, though the Plaintiff's vaccinated direct colleagues continued working exclusively from home even following CN's rescindment of the Policy.

36. The Policy created a hostile and toxic work environment at CN. The testing unless vaccinated requirement effectively revealed personal vaccination status, causing employees to experience harassment in the workplace due solely to their vaccination status. No viable options were offered.
37. Hildebrand says that, even if successfully established by the employer, which is not admitted, but expressly denied, one act of insubordination is not sufficient to give rise to just cause for dismissal.
38. Hildebrand opposed the blanket Policy requirement to reveal his medical records and says that the Policy discriminated by mandating that all employees attest to their medical status regarding the COVID-19 vaccine. Those who did not were put on leave without pay and threatened with termination. This discriminates against an identifiable group based upon medical records.
39. Hildebrand did not attest to his vaccination status. The Plaintiff claims wrongful dismissal from CN, effective 15 November 2021 for refusal to vaccinate under CN's Vaccination Policy. He was dismissed without just cause, without notice, and without pay in lieu of notice.

#### **F. DAMAGES FOR WRONGFUL DISMISSAL**

40. Hildebrand was terminated on a without-cause basis and is entitled to pay in lieu of common law reasonable notice, in addition to any statutory minimum entitlements found in provincial legislation. Pursuant to standard contractual principles, Hildebrand is entitled to be restored to the position he would have been in if he had continued to remain employed with the Company for the balance of the notice period. This clearly includes the base salary, benefits, vacation pay and other entitlements that would have accrued during the applicable notice period.
41. At the time of his dismissal, Hildebrand was 51 years old and had been employed with CN for 22.5 years. His specialized skillset, training, and experience in what is otherwise a very niche market is not easily transferable to other employers or positions in different market segments. Specialized skills and experience that are not broadly transferable have been consistently regarded by the courts as a factor in awarding a higher notice period.
42. The Plaintiff claims entitlement to notice of 33-45 months or payment in lieu thereof.
43. The Policy and resulting actions by CN unilaterally changed the terms of employment, revoked employment and privileges, causing its employees to take a leave of absence or quit.

44. Upon acceptance of his offer of employment with the CN, the Plaintiff did not agree to any condition of employment involving compulsory vaccinations. The Policy is causing severe hardship and irreparable harm to CN employees, including Hildebrand.
45. The Plaintiff says that CN is legally obliged to respect the autonomy and dignity of its employees, and the confidentiality of their medical information, even after the employees have died; CN is obliged not to use medical knowledge to violate the human rights and civil liberties of its employees, even under threat from government authority. These duties have not been demonstrated in the application of the Policy.

#### **G. HARASSMENT**

46. The Plaintiff pleads that the Defendant engaged in repeated communications, threats and other harassing behaviour during the implementation of the Policy, enforcement of the Policy and the ultimate termination of the Plaintiff's employment. The Defendant knew or ought to have known that these communications and behaviours were unwelcome. The Defendant knew or ought to have known that these communications and behaviours had immediate and ongoing deleterious consequences for the Plaintiff and the Plaintiff's family. This harassment by the Defendant caused the Plaintiff's dignity to be impugned, caused the Plaintiff to fear for his safety, and caused the Plaintiff significant emotional distress. The harassment of the Plaintiff by the Defendant caused the Plaintiff serious harm.

#### **H. GENERAL AND MORAL DAMAGES FOR BAD FAITH**

47. Hildebrand suffered significant mental anguish as a result of the rapidly evolving employment situation. He was left without funds to meet his basic needs, including the purchase of food, clothing, and shelter for himself and his family.
48. Hildebrand claims punitive damages for the prejudice suffered by him as a result of the implementation of the Policy, which is discriminatory. Hildebrand reserves his right to amend the amounts claimed for punitive damages to account for future economic losses, including but not limited to loss of income due to suspension or dismissal as a result of his refusal to comply with the Policy.
49. In addition to damages for pay in lieu of notice, CN is liable for further aggravated and punitive damages stemming from the unduly insensitive manner in which it carried out the termination. This action against Hildebrand is particularly egregious given that the quality of Hildebrand's work had been exemplary.
50. At all material times, the Company had an equitable duty to treat Hildebrand with good faith, both during the course of his employment and at the date of his termination.
51. Hildebrand has suffered measurable damages, including mental distress, anxiety, and in particular, injury to dignity and self-respect. Hildebrand is therefore entitled to seek significant damages due to the manner in which CN terminated his employment.
52. There is no scientific data to support the conclusion that the COVID-19 vaccines had any impact upon reducing the spread of the virus.
53. There are many reasonable and practical alternatives to mandatory vaccination that would have been more effective at controlling the spread of the virus among the Company's

employees, all of which are far less prejudicial than summary termination of loyal employees exercising their human right and civil liberty to refuse vaccination.

54. The collection of vaccine status is not confidential. When an employee is placed on unpaid leave, their status is immediately apparent.
55. As a result of these breaches, Hildebrand has suffered the following damages:
- a. Severe and permanent psychological, physical, and emotional trauma;
  - b. Loss of employment opportunities;
  - c. Loss of sleep;
  - d. Loss of trust in others;
  - e. Loss of self-confidence;
  - f. Loss of income;
  - g. Loss of opportunity for future income; and
  - h. Other such damages as will be proven at the trial of this action.
56. CN actively, knowingly, and willfully harmed Hildbrand. CN's conduct was high-handed and improper.

October 31, 2023

Date of issue

**GREY WOWK SPENCER LLP**

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