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Keeping Up with COVID-19: The latest on mandatory vaccination, exemptions, testing, and more

Thursday, February 17, 2022, 12:30 p.m. – 2:00 p.m. ET

Speaker Biographies

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Moderators

Amy Bradbury

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Amy Bradbury is a partner at Wickwire Holm. She is a member of the firm's labour and employment and regulatory/administrative service areas. Amy has experience in all areas of labour and employment law, but she is particularly focused and skilled in workers' compensation, labour relations, pension and benefits, and judicial review. She also provides human resources advice and assists her clients in drafting workplace policies and in collective bargaining. Amy is also the past-Chair of the Nova Scotia Lawyers Assistance Program and is the Atlantic Canada representative on the Canadian Bar Association Well-Being Subcommittee.

Amy holds a B.Sc. (First Class Honours) from the University of New Brunswick (1989), an M.Sc. from Queen's University (1992), and an LL.B. from the Schulich School of Law at Dalhousie University (1995). She recently received the Osgoode Certificate in Pension Law from Osgoode Hall Law School. She was called to the New Brunswick Bar in 1996 and the Nova Scotia Bar in 2003.

Ken Stuebing

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Ken Stuebing is a partner at CaleyWray Lawyers in Toronto. He practises in all areas of labour law on behalf of trade unions and associations. His practice includes appearing before arbitrators, labour boards, and other administrative tribunals and providing advice on collective bargaining issues. Over the course of his career as a legal representative — first with Advocates for Injured Workers (a clinic of the Industrial Accident Victims' Group of Ontario) and now at CaleyWray — he has developed a special interest in Workplace Safety and Insurance Board claims and related issues.

Ken holds a J.D. from the University of Toronto. He was called to the Ontario Bar in 2005.

Speakers

Marcia Barry

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Marcia Barry has over 15 years' experience as union-side legal counsel. She recently joined the in-house legal team at the Ontario English Catholic Teachers' Association. Previously, she held in-house counsel positions with the Ontario Nurses' Association and the United Food and Commercial Workers Union Local 175. Her practice has involved representing unions and union members at labour arbitrations and before a variety of workplace boards and tribunals, including the Ontario Labour Relations Board, the Human Rights Tribunal of Ontario, and the Workplace Safety and Insurance Appeals Tribunal.

Daniel Leone

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Daniel Leone, Partner with Mathews, Dinsdale & Clark LLP, is an experienced legal advisor, collective bargaining spokesperson, and labour litigator who has been assisting employers in all areas of workplace law for over 20 years. He is repeatedly recognized as one of the leading labour relations lawyers in Canada by *Best Lawyers in Canada* and *The Canadian Legal Lexpert Directory*.

Dan represents employers in both the public and private sectors, including in education; long-term care; power generation and distribution; waste management; construction; manufacturing; engineering; food production; meat processing; transportation; retail; pharmaceutical; and information technology. He assists and represents employers on a broad array of matters, including grievance arbitrations; human rights complaints; employment standards complaints; unfair labour practice complaints; union organizing; applications for certification; unlawful strikes; merger, acquisition, sale, and restructuring of a business; and policy creation.

Dan has appeared as counsel in hundreds of hearings before rights and interest arbitrators, the Ontario Labour Relations Board, the Canada Industrial Relations Board, and the Human Rights Tribunal of Ontario.

Dan is an active member of both the Canadian and American Bar Associations and is on the Executive for both the Labour and Employment Law Section (Public Affairs Liaison) and Education Law Section (Vice-Chair) of the Ontario Bar Association. He is also the Co-Chair of Mathews, Dinsdale & Clark's Associates Committee and a regular speaker in the firm's webinar series.

Webinar – 2022 Winter Series

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See also: Emily La Mantia, "Ontario Arbitrator Upholds Rapid Testing Protocol," *Labour & Employment Law Insights*, Filion Wakely Thorup Angeletti LLP, June 30, 2021, online: https://filion.on.ca/insights/ontario-arbitrator-upholds-rapid-testing-protocol/ [*Editors' Note*: This article summarizes the decision in *EllisDon Construction Ltd. v. Labourers' International Union of North America, Local 183*, page 11.]

2. What factors have led arbitrators to uphold mandatory vaccination policies? Conversely, on what grounds have they found that such policies were unreasonable and unenforceable?

See also: *Chartwell Housing Reit (The Westmount, the Wynfield, the Woodhaven and the Waterford) v. Healthcare, Office and Professional Employees Union, Local 2220*, 2022 CanLII 6832 (ON LA), online: https://canlii.ca/t/jm6vx [*Editors' Note*: Arbitrator Gail Misra found that the automatic application of a provision in a mandatory vaccine policy that non-compliant long-term care home employees "may have their employment terminated" was unreasonable and inconsistent with the collective agreement.]

See also: Madison Stemmler, David Cassin, & Carl Cunningham, "Context Matters: Another Mandatory Vaccination Policy Upheld by an Ontario Arbitrator," *Blog*, Bennett Jones LLP, January 13, 2022, online: https://www.bennettjones.com/Blogs-Section/Context-Matters-Another-Mandatory-Vaccination-Policy-Upheld-by-an-Ontario-Arbitrator [*Editors' Note*: This article reviews the decision in *Bunge Hamilton Canada, Hamilton, Ontario v. United Food and Commercial Workers Canada, Local 175*, page 33.]

See also: Madison Stemmler, David Cassin, & Sara Parchello, "Challenging Mandatory Vaccination Policies In Ontario: Arbitrators Take A First Look And Reach Differing Conclusions," *Blog*, Bennett Jones LLP, November 22, 2021, online: https://www.bennettjones.com/Blogs-Section/Challenging-Mandatory-Vaccination-Policies-in-Ontario [*Editors' Note*: This article analyzes the decisions in *United Food and Commercial Workers Union, Canada Local 333 v. Paragon Protection Ltd.*, page 45; *Power Workers' Union v. Ontario Power Generation*, page 65; and *Power Workers' Union v. Electrical Safety Authority*, page 56.]

3. a) What information will employees be required to provide to establish that they qualify for an exemption on religious grounds or for a medical exemption?

- Excerpts from: *Unifor Local 333 v. Moore Packaging Corporation*, 2021 CanLII 117560 (ON LA), online: https://canlii.ca/t/jkl7m.....71
- *Pelletier v. 1226309 Alberta Ltd. o/a Community Natural Foods*, 2021 AHRC 192 (CanLII), online: https://canlii.ca/t/jklqm [*Editors' Note*: This decision, which involves a customer who challenged a store's mandatory masking policy arguing that he was "medically exempt" and that wearing a face mask infringed his religious beliefs, provides guidance on the assessment of exemptions and the information that would be required to support these exemptions.] 95
- "British Columbia Human Rights Tribunal dismisses complaint alleging COVID-19 mask requirement interfered with worker's religious beliefs," *The Worker v. The District Managers*, 2021 BCHRT 41 (CanLII), Lancaster's *Labour Law News*, eAlert No. 487 108

See also: Shaun Parker & Erika Romanow, "Responding to a request for vaccination exemption," *National Magazine*, The Canadian Bar Association, December 14, 2021, online: https://nationalmagazine.ca/en-ca/articles/the-practice/workplace/2021/responding-to-a-request-for-vaccination-exemption

See also: Shana Wolch, Danielle Douglas, & Joannie Fu, "AHRC decision provides guidance to employers on assessing disability and religious based exemption requests and takeaways for employer COVID-19 policies," *McCarthy Tétrault Employer Advisor*, McCarthy Tétrault LLP, December 4, 2021, online: https://www.mccarthy.ca/en/insights/blogs/canadian-employer-advisor/ahrc-decision-provides-guidance-employers-assessing-disability-and-religious-based-exemption-requests-and-takeaways-employer-covid-19-policies [*Editors' Note*: This article discusses the Alberta Human Rights Tribunal decision in *Pelletier v. 1226309 Alberta Ltd. o/a Community Natural Foods*, page 95.]

See also: Paula Trattner et al., "Exemptions from mandatory COVID-19 vaccination policies: key considerations for hospitals and healthcare organizations," *Canadian Legislation & Regulations*, Osler, Hoskin & Harcourt LLP, September 28, 2021, online: https://www.osler.com/en/resources/regulations/2021/exemptions-from-mandatory-covid-19-vaccination-policies-key-considerations-for-hospitals-and-health

b) Provincial human rights policy statements relating to vaccination mandates and exemptions

See: Jean Torrens & Aaron Marchadour, "Guidance from Alberta's Medical Authorities on Vaccination Exemptions," *Insights*, MLT Aikins LLP, September 27, 2021, online: https://www.mltaikins.com/labour-employment/guidance-from-albertas-medical-authorities-on-vaccination-exemptions/

See also: "Vaccine mandates and proof of vaccination," Alberta Human Rights Commission, revised October 8, 2021, online: https://albertahumanrights.ab.ca/covid/Pages/vaccines.aspx [*Editor's Note*: For a summary of this document, see Julie Ward & Jean Torrens, "No Vaccination Exemptions for Personal or Political Beliefs Says Alberta Human Rights Commission," *Insights*, MLT Aikins LLP, November 4, 2021, online: https://www.mltaikins.com/labour-employment/no-vaccination-exemptions-ab-human-rights-commission/.]

See also: "A human rights approach to proof of vaccination during the COVID-19 pandemic," *Policy Guidance*, British Columbia's Office of the Human Rights Commissioner, July 2021 (updated October 14, 2021), online: https://bchumanrights.ca/wp-content/uploads/COVID-19-vaccine-guidance-Oct.-2021-update.pdf

See also: "Human Rights and COVID-19 Vaccination Requirements," The Manitoba Human Rights Commission, online: https://manitobahumanrights.ca/v1/education-resources/resources/pubs/guidelines/guidelinecovidvaccine.pdf

See also: "OHRC policy statement on COVID-19 vaccine mandates and proof of vaccine certificates," Ontario Human Rights Commission, September 22, 2021, online: http://www.ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-vaccine-mandates-and-proof-vaccine-certificates

See also: "Medical Exemptions to COVID-19 Vaccination," Ontario Ministry of Health, January 12, 2022, online: https://health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/vaccine/medical_exemptions_to_vaccination.pdf [*Editors' Note*: This document advises medical professionals on the narrow grounds that would provide a medical justification for a vaccine exemption.]

See also: "COVID-19 Measures and Human Rights: Are Exemptions from Vaccination Protected Under the *Human Rights Act*?," New Brunswick Human Rights Commission, September 29, 2021, online: https://www2.gnb.ca/content/gnb/en/departments/nbhrc/news/news_release.2021.09.0674.html

See also: "COVID-19 and Human Rights – Best Practices," Newfoundland and Labrador Human Rights Commission, online: https://thinkhumanrights.ca/human-rights-and-covid-19-best-practices/

See also: "Vaccines, the Workplace and Other Public Spaces," Nova Scotia Human Rights Commission, revised October 8, 2021, online: https://humanrights.novascotia.ca/vaccines-workplace-and-other-public-spaces

4. How can employers demonstrate that a strict policy is necessary in their particular workplace and that a less onerous policy would not suffice to protect health and safety?

See page 33, Excerpts from: *Bunge Hamilton Canada, Hamilton, Ontario v. United Food and Commercial Workers Canada, Local 175*, 2022 CanLII 43 (ON LA), online: https://canlii.ca/t/jlk8l

See also: *Teamsters Local Union 847 v. Maple Leaf Sports and Entertainment*, 2022 CanLII 544 (ON LA), online: https://canlii.ca/t/jlpcn

See also: Patrick Groom, "Mandatory COVID-19 Vaccination Policy Upheld," McMillan LLP, January 12, 2022, online: https://mcmillan.ca/covid-19-resource-centre/mandatory-covid-19-vaccination-policy-upheld/ [*Editors' Note*: This article summarizes the decision in *Bunge Hamilton Canada, Hamilton, Ontario v. United Food and Commercial Workers Canada, Local 175*, page 33, and reviews the evolution of recent arbitration decisions on the enforceability of COVID-19 vaccination policies.]

5. When, if ever, should vaccination policies offer an alternative to vaccination, such as mandatory COVID-19 testing or the use of additional personal protective equipment? Who should bear the cost of these alternative measures? Are workers entitled to compensation for the time spent administering a test or reporting the results? What about when they're required to self-isolate but don't ultimately test positive for COVID-19?

- *Canada Post Corporation v. Canadian Union of Postal Workers*, November 30, 2021, Arbitrator Kevin Burkett (unreported) (CA LA), online: https://lancasterhouse.com/pdf/decisions/CPC_and_CUPW.pdf 110
- *Hydro One Inc. v. Power Workers' Union*, November 22, 2021, Arbitrator John Stout (unreported) (ON LA), online: https://lancasterhouse.com/pdf/materials/HYDRO_ONE_and_PWU_HO-P-136_Nov_22_2021.pdf 118
- "Employee not entitled to compensation during quarantine, but employer cannot require that she draw from sick bank, arbitrator rules," *Canadian Union of Public Employees, Local 12.2 v. Municipality of Chatham-Kent*, 2021 CanLII 37778 (ON LA), Lancaster's *Labour Arbitration*, eAlert No. 309 125
- "Employer cannot require teachers to use sick leave when staying home with COVID-19-like symptoms, arbitration board rules," *Newfoundland and Labrador Teachers' Association v. Newfoundland and Labrador School Boards Association and Her Majesty the Queen in Right of Newfoundland and Labrador*, February 16, 2021, Chair David Buffett (unreported), Lancaster's *Education Employment Law*, eAlert No. 139 133
- Excerpts from: *Teal-Jones Group v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers' International Union, United Steelworkers, Local 1-1937* (Fothergill Grievance), [2021] B.C.C.A.A.A. No. 138 (QL) 140

- Excerpts from: *United Food and Commercial Workers, Local 1400 v. P&H Milling Group, a Division of Parrish & Heimbecker Ltd. Saskatoon* (Blatz Grievance), [2021] C.L.A.D. No. 14 (QL) 147
- *Toronto Terminals Railway West Division v. Unifor Local 101-R*, 2020 CanLII 99175 (ON LA), online: https://canlii.ca/t/jc4j9 152

See page 56, "In context-specific analysis, arbitrator rules that company's mandatory COVID-19 vaccination policy was unreasonable," *Power Workers' Union v. Electrical Safety Authority*, November 11, 2021, Arbitrator John Stout (unreported) (ON LA), and *Power Workers' Union v. Electrical Safety Authority*, 2022 CanLII 343 (ON LA), Lancaster's *Workplace Privacy Law*, eAlert No. 42

See page 33, Excerpts from: *Bunge Hamilton Canada, Hamilton, Ontario v. United Food and Commercial Workers Canada, Local 175*, 2022 CanLII 43 (ON LA), online: https://canlii.ca/t/jlk8l [*Editors' Note*: See paragraphs 33–34, in which Arbitrator Robert Herman distinguishes the *Electrical Safety Authority* decision and holds that given the facts of this case, the employer's mandatory vaccination policy was reasonable even though it did not provide a testing alternative.]

See also: Ian Campbell, Lennie Lejasisaks, & Rebecca Rossi, "The Rise (and Fall) of Injunctive Relief from Mandatory Vaccination Policies in Canada," *Labour, Employment & Humans Rights Law Bulletin* | *HR Space*, Fasken Martineau DuMoulin LLP, December 9, 2021, online: https://www.fasken.com/en/knowledge/2021/12/9-hr-space-rise-and-fall-injunctive-relief-mandatory-vaccination [*Editors' Note*: The article discusses the decision in *Canada Post Corporation v. Canadian Union of Postal Workers*, page 110.]

6. Are there measures that workplace parties should put in place to protect private information collected in connection with vaccination or testing policies?

See page 118, *Hydro One Inc. v. Power Workers' Union*, November 22, 2021, Arbitrator John Stout (unreported) (ON LA), online: https://lancasterhouse.com/pdf/materials/HYDRO_ONE_and_PWU_HO-P-136_Nov_22_2021.pdf

See page 17, *Unilever Canada Inc. v. United Food and Commercial Workers, Local 175*, April 25, 2021, Arbitrator Jules Bloch (unreported) (ON LA), online: https://kmlaw.ca/wp-content/uploads/2021/08/2021-04-25-Decision-Bloch-Unilever-Canada-and-UFCW-Loc-174.pdf

See also: Harminder (Harry) Mundi, "Quebec Arbitrator Upholds Vaccine Requirement Imposed By Customers," Koskie Minsky LLP, November 23, 2021, online: https://kmlaw.ca/quebec-arbitrator-upholds-vaccine-requirement-imposed-by-customers/ [*Editors' Note*: This article summarizes the arbitration decision in *Union des employés et employées de service, section locale 800 c. Services ménagers Roy ltée.*, 2021 CanLII 114756 (QC SAT), online: https://canlii.ca/t/jkfcm.]

See also: "Privacy Considerations During COVID-19," *Coronavirus (COVID-19) – Tips*, Canadian Centre for Occupational Health and Safety, updated June 30, 2021, online: https://www.ccohs.ca/covid19/privacy-considerations/

See also: Ronald J. Kruzeniski, "Advisory from the Office of the Information and Privacy Commissioner of Saskatchewan on questions regarding vaccines for organizations, employers and health trustees," Office of the Saskatchewan Information and Privacy Commissioner, updated March 3, 2021, online: https://oipc.sk.ca/assets/UPDATED_ipc-advisory-on-questions-regarding-vaccines-for-organizations-employers-and-health-trustees-1.pdf

See also: "A Framework for the Government of Canada to Assess Privacy-Impactful Initiatives in Response to COVID-19," Office of the Privacy Commissioner of Canada, April 2020, online: https://www.priv.gc.ca/en/privacy-topics/health-genetic-and-other-body-information/health-emergencies/fw_covid/

7. What is the union's obligation to advance grievances on behalf of employees who don't follow workplace testing and vaccination policies?

- *Rosanna Mustari, Kevin Francis, Terence Thomas, Rodney Nembhard, and Quincy Akande v. CUPE Local 79*, 2022 CanLII 2433 (ON LRB), online: https://canlii.ca/t/jlvk4.....156

See also: *Tiffany Bloomfield, Danielle Hurding, Mel Lewis, Lexi L. Bezzo, and Jaclyn Wagner v. Service Employees International Union*, 2022 CanLII 2453 (ON LRB), online: https://canlii.ca/t/jlvk7 [*Editors' Note*: In this decision, Ontario Labour Relations Board vice-chair Lindsay Lawrence dismissed an application brought by four personal support workers alleging that their union breached the duty of fair representation after they were placed on unpaid leave when they did not comply with the employer's vaccination policy.]

See also: *Tina Di Tommaso v. Ontario Secondary School Teachers' Federation*, 2021 CanLII 132009 (ON LRB), online: https://canlii.ca/t/jldz6

See also: *Ryan Sloan v. Ontario Secondary School Teachers' Federation*, 2021 CanLII 131991 (ON LRB), online: https://canlii.ca/t/jldz1

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IN THE MATTER OF AN ARBITRATION

BETWEEN

ELLISDON CONSTRUCTION LTD./
ELLISDON CORPORATION AND VERDI STRUCTURES INC.

(the "Employers")

and

LABOURERS' INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 183

(the "Union")

RAPID TESTING GRIEVANCE

SOLE ARBITRATOR: Robert W. Kitchen

APPEARANCES

For the Union

Ryan Newell on behalf of Labourers' International Union of North America, Local 183

For the Employers

Christopher F. Fiore and Erich Schafer on behalf of EllisDon Construction Ltd./EllisDon Corporation; and

Carl Peterson, Diane Laranja and Danny Parker on behalf of Verdi Structures Inc.

The Grievance was heard by way of written submissions on May 15 and 16, 2021.

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20. Testing is currently being performed at forty-seven (47) job sites (see list attached as **Tab 2**). The employees of twenty-four (24) different subcontractors have been tested.

(a) Members of other trade unions, including but not limited to,

(i) the Carpenters' Union
(ii) the International Brotherhood of Electrical Workers
(iii) the Plumbers Union
(iv) the Operators Union
(v) the Ironworkers Union
(vi) the Sheet Metal Workers Union
(vii) the Brick and Allied Trades Union
(viii) the Painters Union

have all been tested on the various sites without issue and to this date, a grievance has not been filed.

21. Some of these job sites are very large and have 500+ construction employees. All of the employees at these sites are being tested twice weekly. For example, such projects include:

(a) West Park Healthcare Centre (Hospital, Toronto)
(b) 81 Bay Street (Mixed-Use, Toronto)
(c) The Well (Commercial, Toronto)
(d) Michael Garron Hospital (Hospital, Toronto)
(e) New Toronto Courthouse

22. EllisDon uses the AP Test, which is a form of rapid point-of-care test that has been approved by Health Canada. The testing materials are distributed by the MOH.

***COVID-19 Guidance: Considerations for Rapid Antigen Point-of-Care Screening*, Ontario Ministry of Health, February 17, 2021 (Tab 3) at page 3.**

23. The AP Test is conducted on site on a twice-weekly basis, in accordance with MOH guidelines stating that for asymptomatic individuals in high prevalence areas (Yellow / Orange / Red / Grey), specimen collection and screening should be performed 2-3 times per week.

> ***COVID-19 Guidance: Considerations for Rapid Antigen Point-of-Care Screening*, Ontario Ministry of Health, February 17, 2021 (Tab 3) at page 4.**

24. Since November 20, 2020, the City of Toronto has been under Lockdown or a Stay-at-Home order, within the meaning of Ontario's *COVID-19 Response Framework*.

25. Each site is responsible for establishing its own process to ensure that workers have been screened. On days when screening is not being conducted, access to the site is gained by providing evidence of being signed up for the next screening day.

26. The AP Test is currently <u>*not*</u> administered through a nasopharyngeal swab. Rather, it is administered via a throat and bilateral lower nostril swab. This has been approved by the MOH as an acceptable alternative method of collecting specimens.

> ***COVID-19 Guidance: Considerations for Rapid Antigen Point-of-Care Screening*, Ontario Ministry of Health, February 17, 2021 (Tab 3) at page 4.**

27. The testing is administered by third party qualified healthcare professionals, who are instructed to administer the test in accordance with the manufacturer's instructions.

> **Panbio COVID-19 Antigen Rapid Testing: Onboarding Guide Version 2, March 5, 2021 (Tab 4).**

28. EllisDon has engaged three external nursing firms to administer the testing. These firms provide Registered Nurses or other healthcare professionals (typically 1 healthcare professional per 100 workers) who perform the testing, as well as one administrator for data entry.

29. Testing is performed on site and does not require shipping the specimen to a lab for processing.

30. Testing is only conducted on individuals who have already answered the questions on a standard-form screening questionnaire (**Tab 5**) and have had their temperature checked upon entering the site.

31. The AP Test takes approximately fifteen (15) minutes to yield results.

32. EllisDon has set up testing areas in accordance with MOH Guidelines:

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(a) Individuals being tested are physically distanced from others during the testing (aside from the healthcare professional administering the test).
(b) Swabbing is conducted in a manner such that it cannot be observed by anyone other than the healthcare professional administering the test.
(c) Testing results are read and recorded by healthcare professionals such that they cannot be observed by anyone other than the healthcare professional administering the test.
(d) Healthcare professionals sanitize before and after each test, and deep cleaning of the test site is conducted at regular intervals throughout the day.
(e) All biohazardous waste from the testing site is disposed of through a registered hazardous waste removal process.

33. No personal health card information is taken or stored during the testing.

34. Individuals undergoing the AP Test must provide their name, employer name, phone number, and email address for the purpose of notification in case of a positive result.

35. The information collected is only disclosed and used by healthcare professionals and EllisDon management personnel to communicate results to individuals that have received testing and local public health units.

36. Individuals can refuse to submit to the AP Test, but anyone refusing will be denied access to the worksite.

37. If a Verdi employee refuses to submit to the AP Test and is therefore denied access to the Project, Verdi will make best efforts to reassign that employee to a different site on which Verdi performs work, but if no such site is available, the refusing employee will be laid off.

38. If the AP Test is negative, the individual will return to work.

39. If the AP Test is positive, this is considered a preliminary (or presumptive) positive, as opposed to a diagnosis. A positive AP Test will result in the following:

(a) The testing team will communicate the results to the individual, as well as EllisDon's HSE Coordinator.
(b) The HSE Coordinator will notify the EllisDon Healthline and begin contact tracing.
(c) Any employees that have been in close contact with the COVID-positive employee will be required to self-isolate.
(d) The local public health unit will be notified of the rapid positive test.

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(e) The individual that has tested positive must receive a follow-up, confirmatory, lab-based polymerase chain reaction ("PCR") test.
(f) The individual is required to attend a COVID-19 Assessment Centre within 24 hours to get tested.
(g) The individual is prohibited from accessing the job site, pending the outcome of the PCR test. They must advise their employer of the result and self-isolate until results of the PCR lab test are available.

40. During the time spent testing and the 15-minute period between testing and the receipt of results, employees continue to receive their regular pay. If an employee needs to take time off to obtain a confirmatory PCR test, it is up to the individual subcontractors to decide whether the employee will be paid.

41. When EllisDon direct hires have received positive rapid test results, they have not been paid for the time spent obtaining a PCR test unless it turns out that the on-site test was a false positive. When Verdi employees have received positive rapid tests at other sites, they have not been paid for the time spent obtaining a PCR test.

42. Employees who receive a positive PCR test and who are therefore required to self-isolate are compensated in accordance with Ontario's recent paid sick leave legislation (Bill 284), but are otherwise placed on an unpaid leave of absence.

43. Requests for accommodation on the basis of human rights concern are addressed on a case-by-case basis.

EllisDon's Additional Health Measures

44. In addition to the Policy, EllisDon has implemented a number of other health measures related to COVID-19 at the worksites where testing is being conducted. These measures include:

(a) Individuals attending the sites must answer a standard-form screening questionnaire (attached as **Tab 5**);
(b) The provision of handwashing facilities and hand sanitizer;
(c) Appropriate Personal Protective Equipment, including masks;
(d) Non-essential visitors and guests are not permitted on job sites;
(e) Scheduling work and start times to avoid overcrowding at site entry points and at the work face, such that 6 foot / 2 meter social distancing is maintained as much as possible;
(f) Tracking and monitoring of EllisDon employees who have reported illness, cold or flu-like symptoms, are in self-isolation, or have tested positive for COVID-19, and requiring subcontractors to do the same for their employees;
(g) Enhanced cleaning and disinfection program, which includes:

(i) Wiping down door handles, railings, and workstations

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with disinfectant twice a day;

(ii) Cleaning all restrooms twice a day, or more frequently as required;

(iii) Maintaining a cleaning log for each job site.

(h) Individuals attending at the affected sites must have their temperature taken by a health professional prior to accessing the job site.

45. These measures have been described in EllisDon's "COVID-19 Health and Safety Policy" (attached as **Tab 6**).

46. Any individuals that are identified as symptomatic during screening protocols will be referred to public health for testing through the health care system.

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IN THE MATTER OF A GRIEVANCE DATED APRIL 16, 2021

B E T W E E N:

UNILEVER CANADA INC.

– and –

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 175

ARBITRATOR JULES B. BLOCH

Appearances:

Counsel for the Employer: Brett Christen

Counsel for the Union: Georgina Watts

This matter was heard by teleconference on April 24, 2021.

Decision

1. The Employer owns and operates a plant in the town of Simcoe, Ontario where it manufacturers ice cream, water ice products and novelty desserts. The hourly paid employees in the plant are represented by the United Food and Commercial Workers. From September to January, there are approximately 278 full-time employees in the plant. However, starting in January each year, the Employer hires seasonal employees to supplement the regular workforce with the result that the employee complement in the plant recently increased to approximately 310 employees.

2. Since the start of the COVID-19 pandemic, the Employer has had comprehensive masking and social distancing measures in place at the plant as well as other measures to reduce the transmission of the virus within the facility. On April 18, 2021, the Employer announced that, starting April 19, 2021, it would be introducing mandatory COVID-19 testing for all employees working at the plant, including the members of the bargaining unit. Due to rising case numbers in the community the Employer had no opportunity to roll out the testing program with much advance notice. This didn't allow for detailed discussion with the Union with respect to the terms of the program being introduced. The Union was given a few days advance notice of the employer's intention to introduce mandatory testing. Some employees raised concerns regarding the implementation of the COVID-19 testing policy and the Union filed a grievance dated April 16, 2021 alleging that the policy was unreasonable and a breach of the collective agreement and/or Ontario Human Rights Code. The employer denied the grievance.

3. The parties filed extensive briefs. The hearing was held on April 24, 2021. The only evidence tendered is found in the submissions submitted by the parties. At the end of the hearing, I reserved my decision. In arriving at my decision, I have reviewed the evidence, jurisprudence, and submissions that the parties have submitted. I will refer only to the facts and arguments that are necessary in making my decision.

4. The employer's announcement of mandatory testing, entitled "Mandatory Testing at Simcoe", commences "Due to increase in the number of cases in Haldimand-Norfolk County, we are moving forward with **mandatory** testing." (original emphasis). The document then provides detailed information concerning the testing to be conducted and the testing process.

5. At the time of the policy's introduction, and the writing of this award, Ontario is experiencing a "third wave" of the COVID-19 pandemic. The town of Simcoe is in Haldimand-Norfolk County which is dealing with rapid community spread of the virus occasioned by the third wave. Since the onset of COVID some employees who work at the plant have tested positive for COVID-19 because of this increased community spread (there is no evidence that these employees contracted the virus in the workplace).

6. The COVID testing is conducted on-site by Workplace Medical Corp, a third-party contractor. The test is a rapid antigen test which involves taking a swab from the employee's nose. The test is conducted once a week at the end of the employee's shift and is conducted in a manner which ensures the privacy of the employee's health information including the destruction of the testing swab in the employee's presence following the administration of the test. No sample is retained, no further testing is conducted upon such sample and no DNA or other material recorded from the sample. The sample collected is used to test for COVID-19 and for no other purpose and then disposed of in front of the employee.

7. The nasal swab is less invasive and less uncomfortable than the nasal swab test used in the PCR COVID-19 test and the rapid antigen test provides results within approximately two hours of the

test being taken. Any employee that tests positive will be notified of the result when the test results are obtained. Employees who refuse to undergo the mandatory testing are not permitted to work and are placed on unpaid leave of absence. Such employees are not subject to discipline nor are such absences counted against the employee in the Employer's Attendance Management program.

8. Employees who test positive are reported to Public Health, as required, and sent home to isolate pending further COVID-19 testing. If confirmed as positive, such employees are placed on sick leave, in accordance with the sick leave provisions of the collective agreement. If the rapid test turns out to be a false positive, the employee is returned to work and paid for time spent away from work. Similarly, if an employee is held out of work due to concerns regarding exposure that employee will be paid for time spent away from work.

9. If an employee has a demonstrated medical condition that impacts their ability to undergo nasal swab testing, accommodation will be provided through the provision of an alternate form of testing. Several employees initially refused to undergo the mandatory testing because of an objection to the wording of the consent form that they were asked to sign prior to the testing taking place. The Employer and the Union have reached substantial agreement on the amendment to the consent and issues concerning the consent form have largely been resolved by the parties. I remain seized to deal with any remaining consent issues between the parties.

10. I understand that there are outstanding grievances in respect of the consent form. The parties have asked that I retain jurisdiction to deal with all issues relating to the consent form including jurisdiction over any grievances that have been filed or will be filed in relation to the consent form.

11. On the first two days of testing, two positive test results were obtained.

12. Notwithstanding that the policy does not attract direct disciplinary consequences for an employee who refuses the test, the parties agree that I have jurisdiction to hear and determine the grievance and that the proper test to be applied is that contained in the well-known KVP decision. The parties also agree that all elements of the KVP test are met save and except the parties seek a determination with respect to the reasonableness of the policy.

13. The parties referred me to the following authorities: Lumber & Sawmill Workers' Union, Local 2537, v KVP Co. (1965), 16 L.A.C. 73 2 IWA-Canada v. Weyerhaeuser Co 2004 CarswellBC 2040, [2004] B.C.C.A.A.A. No. 164, 78 C.L.A.S. 316 3 Peace Country Health v. U.N.A. 2007 CarswellAlts 2612, [2007] A.G.A.A. Mp/ 17, 89 C.L.A.S. 107 4 Imperial Oil Limited and Communications, Energy & Paperworkers Union of Canada, Local 900, (M. G. Picher) 2008 CanLII 6874 (ON SCDC) 5 Federated Cooperatives Ltd. v. Teamsters, Local 987 2010 CarswellAlta 1087, [2010] A.W.L.D. 3129, [2010] L.V.I. 3896-1, 101 C.L.A.S. 399, 194 L.A.C. (4 th) 326 6 Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd. [2013] 2 S.C.R. 7 Sault Area Hospital and Ontario Hospital Assn. (Vaccinate or Mask), Re 2015 CarswellOnt 13915, [2015] O.L.A.A. No. 339124 C.L.A.S. 224, 262 L.A.C. (4 th) 1 8 Participating Nursing Homes and Ontario Nurses' Association, 2020 CanLII 3663 (ON LA); 9 Royal Group Inc. v. Carpenters' District council of Ontario, United Brotherhood of Carpenters and Joiners of America 2020 CanLII 39899 (ON LA); 10 United Steelworkers Local 2251 v. Algoma Steel Inc., 2020 CanLII 48250 (ON LA); UFCW and Maplewood Nursing Home 2020, CanLii 104942 (ON LRB); Caressant Care Nursing & Retirement Homes and CLAC, 2002 CanLII 100531 (Randall).

14. Having regard to the submissions of the parties and the authorities submitted, I find the Employer's policy to be reasonable in all the circumstances and hereby remain seized of any issues, on the agreement of the parties, arising from the implementation of this award or any further issue arising from the Employer's mandatory testing policy. In finding the policy to be reasonable, I have had regard to the following factors:

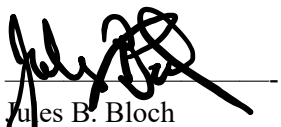
    a. There are many employees in the facility many of whom work on one or more of the Employer's production lines. The employees work in a food manufacturing facility which is governed by a variety of food safety regulations designed to ensure the safety of the food manufactured.

    b. Several employees have contracted the virus in a relatively short period of time. Although there is no evidence of transmission within the facility, given the rise of the COVID-19 variants in Ontario and in this community, it seems prudent to err on the side of caution and ensure that the Employer is permitted to take reasonable steps to reduce the risk of COVID transmission in the workplace. I find the testing policy, introduced by the Employer to be one such reasonable step.

    c. In balancing the interests of employees who are opposed to the mandatory testing and the well documented benefits of a testing program in preventing the spread of COVID in the workplace to other employees, and because several employees have tested positive, I view the policy to be a reasonable attempt to protect the health and safety of employees in the plant.

15. Both parties also requested that I expeditiously issue my decision without the need for detailed reasons which I have done. For the foregoing reasons, the grievance is hereby dismissed. I remain seized of any issues, on the agreement of the parties, arising from the implementation interpretation and application of this award or the Employer's mandatory testing policy.

Dated in Victoria, BC this 25th day of April 2021.



Jules B. Bloch
Arbitrator.

Dismissal of employee for failure to follow unclear COVID-19 directives excessive, arbitrator rules

A B.C. arbitrator held that dismissal was excessive after an employee was fired for insubordination for allegedly failing to follow a directive from his employer to self-isolate and call the public health authority to get a COVID-19 test when he developed diarrhea after eating some bad chicken wings and was sent home from the worksite. Determining that the arbitrator found that the employer had not issued a clear directive to self-isolate and that the grievor's taking an online self-assessment, which indicated that a test was not necessary, was in substantial compliance with the employer's ambiguous instructions. The arbitrator also held that the directive would have been unlawful given that the grievor was not experiencing any COVID-related symptoms. However, finding that the grievor had lied during the investigation and "surreptitiously" recorded an employer meeting, the arbitrator substituted the dismissal with a five-day suspension.

The Facts:

After an employee was dismissed for insubordination for failing to follow his employer's COVID-19 directive, the union filed a grievance.

The grievor, Jeremy Arnot, began employment in June 2019 as a senior technician with Terrapure Environmental, which conducted industrial cleaning of equipment and spills. In late November 2020, the employer dispatched Arnot to the Crofton Mill, which required the workers to stay at a hotel outside Ladysmith, B.C., and shuttle to the worksite each day by van.

On November 25, 2020, Arnot ordered chicken wings from a local restaurant, following which he became ill and developed diarrhea.The next day, at the beginning of his shift at the worksite, he reported his diarrhea to the field supervisor, who told Arnot to get some rest and had another employee drive him back to the hotel. A few hours after returning to the hotel, Arnot decided to proceed with lunch plans he had made with a friend in Nanaimo, and he left his hotel to be picked up at a gas station across the road from the hotel. At this time, Arnot claimed that he saw Larry Fedor, a co-worker whom Arnot had accused of bullying him in the past. Arnot claimed that Fedor followed him across the parking lot berating him, to which Arnot responded by stating that he was not going to speak to Fedor.

Shortly thereafter, an operation supervisor, Chris Bowen, texted Arnot and asked Arnot to call him, which Arnot did within minutes, explaining that he had diarrhea from eating bad chicken wings the night before and did not have COVID-19. Arnot claimed that Bowen then said he would call Arnot back and let him know how to proceed, as Bowen needed to get clarification from the operations manager, Jason Kannegiesser. Within a few minutes, Bowen texted Arnot stating that he was not to leave his hotel room and was required to call 811 to get a COVID-19 test as soon as possible. However, Arnot claimed that he did not see this text at the time.

Upon his return to the hotel after lunch, Arnot claimed that he did call 811 but was unable to get through, so he instead went online and completed the B.C. Centre for Disease Control's COVID-19 self-assessment tool, which provided a result that stated, "You don't appear to have symptoms of COVID-19." Later that day, Bowen texted Arnot advising him that people had reported that he had left the hotel and reminding him to self-isolate, call 811, and "stay away" from other employees. He was also advised that he was suspended from the worksite until he could produce a negative COVID-19 test.

Over the next 24 hours, the employer made several attempts to contact Arnot without success, including leaving a message stating that the police would be called if he did not reply. Around noon on November 27, Bowen sent Arnot a final text message stating that he had not followed the employer's protocol and advising that the employer would no longer pay for his hotel, and he was responsible for finding his own way home. At some point that afternoon, Arnot had a telephone meeting with Kannegiesser, which Arnot surreptitiously recorded. That same day, Fedor provided a written statement claiming that he had had a conversation with Arnot when he saw Arnot in the parking lot on November 26, during which Arnot claimed that he was not going to follow COVID-19 protocols and was going to lunch with a friend in Nanaimo instead.

On December 4, 2020, Arnot attended a meeting to discuss the incident, during which he admitted that he had lied to Kannegiesser during the phone meeting about having gone for a COVID-19 test but leaving because the line had been too long. Following the meeting, Arnot was suspended pending an internal investigation.

On December 9, 2020, Arnot's employment was terminated. The termination letter stated, in part, "After completing a thorough incident investigation we have determined that you were willfully insubordinate by failing to follow direct instruction and, by your own admission, were untruthful when confronted about your actions to two separate members of management."

On December 15, 2020, the union filed a grievance alleging that the termination decision had been made in bad faith and without just cause.

The employer had established a pandemic response policy, which identified symptoms of COVID-19 as including "a runny nose, headache, cough, sore throat, fever, and a general

feeling of being unwell." However, the employer had not published the policy or trained employees on the policy or about COVID-19.

At the hearing, Kannegiesser testified that, when employees reported that they were ill, the employer required that they self-isolate for 14 days or produce a negative COVID-19 test result, although he was unsure whether this requirement was consistent with the employer's written policy. As well, Bowen testified that he had called Arnot five or more times on November 26 and that Arnot had not responded.

The Arguments:

The union submitted that the employer did not have just cause for dismissing Arnot. It argued that the employer's pandemic policy was unreasonable and had not been clearly communicated to employees and that an employee could not be disciplined for failing to get a COVID-19 test. It further maintained that there was no insubordination as management had provided no clear directive and no explanation as to why Arnot was required to self-isolate given his symptoms. The union also alleged that the internal investigation was biased and based on erroneous information. Alternatively, if insubordination were found, the union submitted that "significant mitigating factors" existed, including that Arnot had apologized for any misconduct during the telephone meeting with Kannegiesser, had admitted to lying about the test during the investigation meeting, and had raised mental health issues at both of these interviews, which the employer had dismissed as deflection.

The employer argued that requiring Arnot to self-isolate and contact the health authorities about testing was reasonable in the circumstances, and his failure to do so amounted to insubordination. It submitted that Arnot had "compounded his insubordination by lying during the course of the investigation and at the hearing." At the hearing, the employer advanced a further claim of breach of trust after discovering that Arnot had made a surreptitious recording.

The Decision:

Arbitrator Paul Love partially allowed the grievance, reducing the dismissal to a five-day suspension.

Before embarking on a legal analysis, Love noted that credibility was an important issue in the matter before him, and he applied the test set out in *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), which requires that "the truth of the story of a witness … must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." Love held that Fedor was not credible or reliable and found that he had fabricated the statement about having a conversation with Arnot. Moreover, Love held that Bowen's evidence that he had made numerous calls to

Arnot was not supported by the phone records, finding that Bowen had contacted Arnot only twice on November 26 and that Arnot had responded to the first call. Love also declined to find that Arnot had lied about calling 811 and found that Arnot had done so and had completed the self-assessment screening test, which advised that he was not required to get a COVID-19 test or self-isolate. Love determined that Arnot had failed to respond to the employer's attempts to contact him for mental health reasons, including anxiety, learning disabilities, and attention deficit hyperactivity disorder (ADHD), opining that it appeared that Arnot "was simply 'turtling' in his room to avoid having contact with the employer at a time when he was having difficulties dealing with the multiple inputs." Finally, Love emphasized that he was not bound by the conclusions of the internal investigation and noted that the investigation had been based on several erroneous "assumptions," including how many times Bowen had called Arnot, as well as a lack of awareness of both Fedor's animosity toward Arnot and what Love identified as "the bullying behavio[u]r" of Kannegiesser toward Arnot during the recorded telephone call on November 27, in which Kannegiesser's tone was "aggressive" and "threatening" and "far surpassed what was necessary in the circumstances to discuss the grievor's lack of contact with the employer."

Thus, emphasizing that the employer "is required to prove its case on a balance of probabilities based on the evidence tendered at the hearing," Love set out to consider each of the employer's grounds of termination based on the test for assessing discipline set out in *Wm. Scott & Co Ltd.*, [1976] B.C.L.R.B.D. No. 98 (QL), which asks, "1. Has the employee given just and reasonable cause for some form of discipline? 2. Was the dismissal decision an excessive response in all of the circumstances of the case? 3. If the discharge was excessive, what alternative measure should be substituted as just and equitable?"

Turning first to the allegation of insubordination, Love noted the existence of cases in which employees have been dismissed for failing to follow COVID-19 protocols, but he opined that "this is not a case of the grievor returning to work in an attempt to circumvent COVID[-19] safety restrictions," as Arnot did not have any symptoms while at work and had done a self-assessment to confirm that he had no symptoms. Moreover, Love agreed that the employer's pandemic policy was unreasonable as it did not meet the criteria for unilaterally introduced employer rules as set out in *Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co.*, [1965] O.L.A.A. No. 2 (QL) (Robinson), and thus could not be applied to Arnot at the time. Specifically, he noted that the collective agreement required that employer rules be in writing, whereas the employer's rule in this case was an "oral rule"; that this rule had not been brought to Arnot's attention prior to his dismissal; and that "there was no nexus or connection between [Arnot's circumstances] and any primary COVID[-19] symptoms." Although accepting that the pandemic was an extraordinary circumstance, Love emphasized that "the long[-]standing principles about employer[-]introduced rules is not suspended because of the pandemic." Also determining that

the employer had not proven that the rule was known and consistently enforced, Love held that the employer's conduct with respect to the policy failed "almost every element of the *KVP* test."

Next, Love set out the legal test for insubordination as requiring the employer to prove the following elements:

1. there must be a clear order understood by the grievor;
2. the order must have been given by a person in authority; and,
3. the order must have been disobeyed.

Love first questioned the reasonableness of the request, stating that while he "accept[ed] that the employer has a duty to protect other workers, … there should be some connection between the symptoms reported and the employer's decision-making about whether a test is required. The trigger for a test should not be employer whim, but should be grounded in the facts apparent to the employer." He also found that the employer had not followed its own rule when it told Arnot to go home and rest without any further instructions only to change this advice later:

> [Arnot] should not be held accountable as insubordinate when the employer did not have its act together, violated its own protocol by not asking for a test when they sent [him] back to the hotel and did not ask for a test until a time when [he] was already out of his hotel room and on his way to lunch. …
>
> [U]nlike some employers, this employer did not publish a COVID[-19] policy or train its employees about COVID[-19]. … In this case, it simply is now relying on "command and control" to penalize [Arnot] in circumstances where there was no connection between the reported symptoms and COVID[-19]. … [W]orkplaces in Canada are typically not command and control environments.

Thus, based on the evidence, Love held that the employer had not established that Arnot was insubordinate by failing to self-isolate. Further, noting that the grievor had not had lunch with another employee but with a friend, Love expressed uncertainty as to whether the employer was able to regulate contact with non-employees: "An order to self-isolate and not contact other employees may be a legitimate use of the employer's power. An order not to have contact with others, including members of the public, may be less understandable to the employee." He also held that Arnot was not insubordinate for failing to obtain a COVID-19 test, observing that it was unclear whether the directive was to call 811 or to obtain a test; given this ambiguity, Love found that Arnot's calling 811 and doing a self-assessment were in "substantial compliance" with the order. Moreover, noting that to establish insubordination, the employer's order must be lawful,

Love held that the order was not lawful in this case, as diarrhea was not a recognized COVID-19 symptom, and the employer was aware that the chicken wings had caused his diarrhea.

Finally, with regard to Arnot's failure to stay in contact with the employer on November 26 and 27, Love noted that no workplace rule existed regulating communication during off-site assignments, and Arnot had been excused from work at the time. He also noted that Arnot had responded to the initial communication by Bowen and that the subsequent failures were attributable to his mental health issues, which he had raised with the employer during the subsequent investigation, along with an apology, but "no one [had] bothered to explore that issue in any detail." Love held, "It might be insolent not to communicate with an employer, but insolence is a separate employment offence and it is not one that the employer identified in its termination letter."

Having determined that the employer had not established insubordination, Love noted that he had already rejected most of the employer's allegations of dishonesty in his findings, but Arnot had admitted to lying about attempting to obtain a COVID-19 test, which warranted some discipline. He also held that the surreptitious recording justified discipline, noting that an employer "can rely on 'after discovered' cause" when it became aware of the misconduct only after dismissal. Love observed that the "making of a recording, at work, without the consent of the other party(ies) in attendance … can have a chilling effect on labour relations, leading to less open and transparent relationships." However, Love held that dismissal was excessive for these two proven instances of misconduct. Although characterizing both offences as "serious" misconduct, Love found no evidence that Arnot could not be trusted at work as the dishonesty did not relate to his job performance, nor had he attempted to circumvent any COVID-19 rules or placed anyone at risk. Love also considered there to be several mitigating factors, including that the lie was not premeditated; that prior to making the recording, Arnot had been subjected to bullying by Fedor, who was friendly with management, and had received a threat that the police were going to be called, putting Arnot in a "defensive" state of mind; that Arnot had mental health issues, which were compounded by Kannegiesser's bullying; that Arnot had acknowledged that his conduct was not blameless and admitted to lying; that dismissal would pose significant hardship given that Arnot lived in a remote community and most of his work experience was in the field of industrial cleaning; and that the employer had failed to employ progressive discipline. Accordingly, Love held that Arnot's conduct merited only a five-day suspension.

In the result, remarking that "[t]he offences proven, while serious, are less serious than the main misconduct on which the employer relied[,] which was insubordination," Arbitrator Love upheld the grievance and reduced the dismissal to a five-day suspension for dishonesty in the investigation and surreptitious recording.

Comment:

As noted in the instant case and by Mitchnick and Etherington in Lancaster's *Leading Cases on Arbitration Online*, to establish that an employee has been insubordinate, the employer must prove the existence of a clear order that the grievor understood and prove that the grievor had disobeyed the order. Finding that the employer's directives were not made clear in this case and, further, that any such order would have been unreasonable and unlawful in the circumstances, the arbitrator in the instant case held that the employer had not established insubordination: "Just because there is an ongoing pandemic, does not mean that an employer has the right to make a demand for a COVID[-19] test for any symptom experienced by [an] employee." He further noted, "There are special considerations which relate to obtaining and disclosing medical information, and an employer cannot simply order an employee, on pain of termination arising from insubordination, to provide the results of a medical assessment."

However, as noted by the arbitrator in the case under review, cases exist in which an employee's dismissal for COVID-related disobedience has been upheld at arbitration. In this regard, he cited *Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 183 v. Aecon Industrial (Aegon Construction Group Inc.)*, 2020 CanLII 91950 (ON LA), reviewed in Lancaster's *Health and Safety/Workers' Compensation Law*, June 10, 2021, eAlert No. 253, in which Arbitrator Joseph Carrier dismissed a grievance brought by a labourer who was fired after he returned to work despite being told to stay home until he was contacted by the company nurse after exhibiting possible COVID-19 symptoms. Carrier determined that the employee's decision to attend work, as well as his failure to be candid in his responses to a COVID-19 screening questionnaire, compromised workplace safety and amounted to serious misconduct, and constituted a culminating incident that followed two previous safety violations, warranting dismissal.

Similarly, in *IAM, District 140 v. Garda Security Screening Inc.* (*Shoker Grievance*), [2020] O.L.A.A. No. 162 (QL), also cited in the case under review, an employee returned to work while awaiting her COVID-19 test results despite guidelines from the employer to the contrary. Arbitrator Brian Keller upheld the employee's dismissal, finding that her actions represented a clear violation of the employer's guidelines and stating that the employee's behaviour had put "countless others at risk of illness or death."

See also: *Teamsters Québec, local 1999 c. Exceldor Coopérative, usine de St-Bruno-de-Montarville*, 2020 CanLII 102415 (QC SAT), reviewed in Lancaster's *Health and Safety/Workers' Compensation Law*, July 23, 2021, eAlert No. 255, in which Arbitrator Jean-François La Forge upheld the dismissal of an employee who failed to disclose that her husband was displaying symptoms of COVID-19 during a daily health screening and attended work, finding that her

actions breached her obligation to answer the health screening questions honestly, which exposed her colleagues to risk and justified dismissal; *Canadian Union of Public Employees, Local 407 v. Board of Education of School District No. 39 (Vancouver)*, 2021 CanLII 43175 (BC LA), reviewed in Lancaster's *Discharge and Discipline*, November 17, 2021, eAlert No. 289, also decided by Arbitrator Love, in which he upheld a 10-day suspension of an employee who deliberately coughed into a co-worker's vehicle just days after he returned from sick leave due to a suspected case of COVID-19, finding that although the grievor intended the incident to be a "practical joke," his "extraordinarily reckless" conduct constituted a deliberate and serious violation of the employer's COVID-19 safety protocols and was deserving of discipline; and *Canadian Union of Public Employees Local 5180 v. Trillium Health Partners*, 2021 CanLII 127 (ON LA), reported in Lancaster's *Discharge and Discipline*, November 17, 2021, eAlert No. 289, in which Arbitrator Norm Jesin upheld a five-day suspension issued by a hospital for releasing a video of a surreptitiously recorded meeting with the employer over COVID-19 concerns at the hospital, which suggested that the hospital was not taking proper precautions. Jesin found that the employee's recording had been used to "paint a misleading and inaccurate picture of the hospital's approach to COVID[-19] and was thereby designed to embarrass the hospital and to undercut its authority." However, he held that dismissal for breaching the employer's COVID-19 policy against social gatherings in the hospital and sharing of food was excessive. While holding that the grievor's actions exhibited a pattern of disrespecting the employer's authority, he reduced the dismissal to a suspension for time served and ordered reinstatement without compensation.

Case Name: *International Union of Painters and Allied Trades, District Council 138 v. Terrapure Environmental (Envirosystems Incorporated)*

Jurisdiction: British Columbia

Proceeding: Grievance Arbitration

Arbitrator: Paul Love

Date: July 7, 2021

Citation: 2021 CanLII 72624 (BC LA)

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Arbitrator upholds mandatory COVID-19 testing policy for retirement home employees

Dismissing a group grievance, an Ontario arbitrator upheld as reasonable an employer's unilateral imposition of bi-weekly mandatory COVID-19 testing via nasal swab of all employees at a retirement home. The arbitrator held that, in weighing the intrusiveness of the test on employee privacy against the employer's goal of preventing the spread of COVID-19 in the home, the policy was reasonable, particularly in light of the seriousness of a potential outbreak given the vulnerability of the residents.

The Facts:

After the employer unilaterally imposed a mandatory COVID-19 testing policy on the employees of a retirement home, the union filed a group grievance.

In March 2020, in response to the COVID-19 pandemic, Caressant Care Nursing and Retirement Homes Limited, which operated a retirement home in Woodstock, Ontario, implemented a personal protective equipment (PPE) policy requiring all staff to wear masks and to change their clothes and shoes at the beginning and end of their shifts. On June 17, 2020, based on a Ministry for Seniors and Accessibility recommendation, the home's employees were advised that mandatory bi-weekly COVID-19 testing would be conducted, and proof of the test would need to be provided to management. The employer subsequently advised its employees that COVID-19 testing was a directive from Ontario Health.

The COVID-19 testing was conducted by nasal swab. An employee who refused to be tested would be held out of service until such testing was undertaken. Staff who participated in the testing were paid for one hour of work, and parking fees were waived at the hospital. The employer also established a case-by-case medical accommodation provision and allowed employees to use third-party testing.

On July 8, 2020, the union, which represented the 60-member staff at the home, filed a group grievance challenging the reasonableness of the policy.

The Arguments:

The union argued that the policy was an unreasonable exercise of the employer's management rights, contrary to the collective agreement and thus the requirement of reasonableness in *KVP Co. v. Lumber & Sawmill Workers' Union, Local 2537*, [1965] O.L.A.A. No. 2 (QL). Relying on the Supreme Court of Canada's decision in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 (CanLII) (reported in Lancaster's *Labour Arbitration*, July 31, 2013, eAlert No. 174), the union submitted that requiring a nasal swab every two weeks was an unjustified intrusion on employee privacy and that the policy was unnecessary with respect to asymptomatic employees because other mitigation strategies had been successful in preventing a COVID-19 outbreak. The union further argued that the policy was "both unfair and incoherent" because the home's residents were not being tested, and the policy could not accomplish its intended purpose because a negative test would merely indicate that the employee did not have COVID-19 at the moment of testing without detecting infection between tests.

The employer's arguments are not set out in the decision.

The Decision:

Arbitrator Dana Randall dismissed the grievance, ruling that the employer's policy was reasonable.

Randall first held that the consequence of being held out of service for an employee's failure to participate in the testing was disciplinary; therefore, the policy was to be assessed using the *KVP* analysis, which was subsequently endorsed by the Supreme Court of Canada in *Irving Pulp* and required that the policy be reasonable and consistent with the collective agreement, including the requirement that management rights be exercised reasonably.

Although accepting that the union's reliance on *Irving Pulp*, which dealt with the random-testing aspect of an employer policy on alcohol and drug use in the workplace, was a "reasonable starting point," Randall also emphasized that the considerations at play were different here, as controlling an infection differed from monitoring for intoxicants. Moreover, while accepting that the intrusiveness of the testing in each case was "arguably comparable," he held that the fact that COVID-19 was a novel virus that was "highly infectious and often deadly for the elderly, especially those who live in contained environments," tilted the balance toward the employer's interests in testing.

Randall also rejected the union's assertion that a reasonable policy would require testing only of symptomatic employees. In this regard, Randall referenced U.S. expert Dr. Anthony Fauci's

statement that testing only symptomatic individuals results in missing "a very large contingent of the spread of the infection in the community."

Randall acknowledged that the policy was "not perfect and not a panacea" and had some "innate shortcomings," because the employer was not testing residents and a negative test was of "limited value" to the individual employee. However, he upheld the policy as reasonable. Noting that he "strongly disagree[d]" with the union's characterization of testing as "a limited surveillance tool," he stated the following:

> [W]hen one weighs the intrusiveness of the test[,] a swab up your nose every fourteen days, against the problem to be addressed[,] preventing the spread of COVID in the Home[,] the policy is a reasonable one. While the Home had not had an outbreak, … given the seriousness of an outbreak, waiting to act until that happens … is not a reasonable option. …
>
> A negative test may be of limited value to the individual employee tested but it is of high value to the Home; and a positive test is of immense value to both the employee and the Home. A positive test leads to identification, isolation, contact tracing and the whole panoply of tools used in combatting the spread of the virus. Arguably, the only way the testing could be improved is to increase its frequency, but that is not a proposal likely to have legs in the bargaining unit.

In the result, Arbitrator Randall upheld the policy as reasonable and dismissed the union's grievance.

Comment:

As noted by the arbitrator in the instant case, *KVP* is the seminal decision on the approach to analyzing the validity of rules that have been created and implemented unilaterally by the employer. Subsequently endorsed by the Supreme Court of Canada in *Irving Pulp* in relation to alcohol testing in the workplace, *KVP* mandates a balancing of the employer's stated purpose against the intrusion on workers' privacy rights. In the instant case, Randall distinguished that decision. While stating plainly that "[c]ertainly, having a swab stuck up your nose represents [an intrusion on employees' privacy and a breach of their dignity] and certainly more so than merely undergoing a [breathalyzer] test," Randall ultimately held that the underlying purposes of the testing could be differentiated:

> While the union's reliance on drug and alcohol testing cases is a reasonable starting point for the analysis — weighing the privacy breach against the goals of the policy — clearly controlling COVID infection is not the same as monitoring the workplace for intoxicants and I so find. They are different in kind. Intoxicants are not infectious. COVID

> testing reveals only one piece of information: the employee's COVID status. Being intoxicated is culpable conduct; testing positive is not.
>
> But, most importantly, while the privacy intrusion is arguably comparable, … the factors to be taken into account in order to determine the weight to be given to the need for COVID testing as compared with drug and alcohol testing … [are] not. COVID is novel, thus its name. Public health authorities are still learning about its symptoms, its transmission and its long-term effects.

Thus, the arbitrator determined that the outcome of the balancing exercise favoured the employer in the circumstances of the workplace and in the context of a highly infectious disease.

Additionally, employers have a positive legal obligation to screen for COVID-19 in certain areas of the country. For instance, in Ontario, the province implemented specific guidelines in September 2020 pursuant to Regulation 264/20 under the *Emergency Management and Civil Protection Act*, which places the onus on Ontario employers to implement specific screening procedures in the workplace. As well, on April 9, 2021, the Quebec Minister of Health and Social Services issued an order requiring certain categories of front-line workers to either present proof of vaccination or have no fewer than three screening tests per week and provide the results to the employer. Employees who refuse must be reassigned to duties within their job title in another area where possible, and those who cannot be reassigned will receive no remuneration.

The instant decision is the first in which a mandatory COVID-19 testing policy was challenged by a union. Its outcome was fact specific, because it was set in a retirement home with vulnerable residents. Whether a similar policy will be upheld in other environments remains to be seen.

Case Name: *Christian Labour Association of Canada v. Caressant Care Nursing & Retirement Homes*

Jurisdiction: Ontario

Proceeding: Grievance Arbitration

Arbitrator: Dana Randall

Date: December 9, 2020

Citation: 2020 CanLII 100531 (ON LA)

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IN THE MATTER OF AN ARBITRATION

BETWEEN:

BUNGE HAMILTON CANADA, HAMILTON, ONTARIO

(the "Employer")

-AND-

UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 175

(the "Unions")

2022 CanLII 43 (ON LA)

AND IN THE MATTER OF A POLICY GRIEVANCE OBJECTING TO A MANDATORY VACCINE POLICY

ARBITRATOR **ROBERT J. HERMAN**

APPEARANCES

FOR THE UNION **MATTHEW JAGODITS**
NAVIDAD TALBOT
DENNIS PACKHAM
ROB SCHROCK

FOR THE EMPLOYER **PATRICK GROOM**
MICHELLE GAFFNEY
RENE LEMAY
RODNEY ADKINSON
SYLVIA SWEENEY
STEPHANIE LAMPE

A ZOOM VIDEOCONFERENCE HEARING IN THIS MATTER WAS HELD ON DECEMBER 13, 2021

• • •

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Decision

14. An employer can generally issue policies affecting employees, provided they are not inconsistent with the collective agreement provisions and as long as they are reasonable. Employees have to comply with such policies or can face negative consequences, which can include discipline; see, for example, *Lumber & Sawmill Workers' Union , Local 2537, and KVP Co. (1965)*(above). In assessing whether a policy is reasonable, context and the circumstances in play at the time are critical.

15. The continued presence of COVID-19 presents a serious risk and danger to the health and welfare of the public, to the economy and the education system, and to everyone's ability to fully enjoy life. Public health and safety measures have not as yet been able to fully control the spread of the virus or its potentially terrible ramifications, and while data about the recently discovered Omicron variant remains limited at this point, the emergence of Omicron may increase the challenges COVID-19 presents for us

all.

16. On November 2, 2021, HOPA notified all parties that leased land from it and/or have operations located on HOPA properties of its new vaccine policy, the HOPA Policy, and that it was issuing the new policy because of new Transport Canada requirements. HOPA advised that "**all employees of companies located at the port are required to be vaccinated**" on or before January 24, 2022, and that "**HOPA contractors and tenants operating on HOPA property**" must attest that their employees are fully vaccinated against COVID-19 by that date. If employees do not attest that they are fully vaccinated by January 24, 2022, the HOPA Policy states, then they "will not be permitted on HOPA property until such time as they can attest that they are Fully Vaccinated". The only exception in the HOPA Policy was for employees who qualified for a medical exemption.

17. The primary operation of Bunge's business in Hamilton takes place at the North Property, a facility located on lands leased from HOPA, and Bunge's lease with HOPA requires that it follow all HOPA policies and procedures. The adjacent facility, the South Property, is not leased from HOPA. The Employer asserts that the HOPA Policy applies to both facilities, as Bunge is a company "located at the port" and is a "tenant" on HOPA property.

18. It appears clear that HOPA intended that the HOPA Policy apply to both the North and South Properties, but what is less clear on the material before me is whether HOPA has control over property not leased from it, or whether HOPA has any

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jurisdiction over the South Property. However, because of the findings below, it is unnecessary to decide this issue, and I have accordingly assumed, for purposes of this decision, that the HOPA Policy does not apply to the South Property, and that it does not, therefore, require Bunge to apply its terms to employees who enter upon that property.

19. The two properties are located directly across the street from each other, and are integrated in terms of the company operations. The Employer's administrative offices are located on the North Property, as is its facility for receiving and processing product. The edible oils processed on the North Property are then moved across the street to the South Property, where they are further processed, and/or stored, and then shipped out from that facility. The work force usually working at the North Property is significantly larger in numbers, and employees are regularly scheduled to perform jobs located on one location or the other. Employees may also have to go between the two locations; for example, when performing overtime work and when they are reassigned to the other location as deemed necessary by the Employer. The majority of training for all employees (except for Ammonia-related training), regardless of which location they ordinarily work at, takes place at the North Property. Training can regularly take some time, in many cases lasting from 8 to 12 weeks, both for new employees and existing employees posting into new positions. Were the Employer to move all unvaccinated employees to work exclusively at the South Property, its operation would have to be changed in some material respects, such as no longer being able to reassign employees between locations, and it would incur significant additional operating costs, since

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unvaccinated employees could not enter the North Property after January 24, 2022. It would also likely have to establish an additional, separate training infrastructure that operated solely out of the South Property, in order to train employees located at that property.

20. Further, transfers of unvaccinated employees to the South Property would likely require consequential transfer of vaccinated employees to the North Property, as any intermingling of employees between sites would place all employees at greater risk of infection from COVID-19, and to the extent any South Property unvaccinated employees entered the North Property, would be in breach of the HOPA Policy. In effect, treating the two facilities as distinct and geographically separate parts of the business would preclude interaction of employees between sites and would impede the existing integration of operation between the two sites. Transfers of employees to either location, in order to maintain the North Property for vaccinated employees and the South Property for unvaccinated employees, would also appear to be in breach of Collective Agreement provisions concerning job postings, transfers, and seniority rights.

21. Even assuming that the HOPA Policy does not require that it be applied to the South Property, given the significant disruption to the ability of the Employer to conduct its business if different vaccine policies or practices applied to the two locations, it is reasonable for the Vaccine Policy to apply to all employees regardless of their work location.

22. With respect to the attestation component of the Vaccine Policy, the HOPA

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Policy requires that employees attest as to their fully vaccinated status by January 24, 2022, or they will be barred from entry on HOPA property until such time as they can attest that they are fully vaccinated. In turn, the company's Vaccine Policy stipulates that all employees to whom the policy applies must provide proof of fully vaccinated status to the Facility Manager by January 24, 2022, and must fill out a HOPA attestation form to be submitted to HOPA. The HOPA attestation form asks employees to attest to whether they have been fully vaccinated, or whether they have been unable to obtain a vaccination due to a medical contraindication. The only other information requested of employees is information that identifies the employee and that provides contact information, and a question asking whether the employee has a Port Security Access Card. Exceptions to the requirement to be fully vaccinated in the company's Vaccine Policy are not limited to medical reasons, and also include exceptions for religious grounds or reasons of creed, with requests for such exemptions to be considered on an individual basis.

23. For a number of reasons, I find that the requirement to disclose vaccine status is reasonable.

24. First, it is not clear that *PHIPA* would prevent the disclosure of an individual's vaccination status in the circumstances at hand. The specific section of that Act referred to by the Union, section 19, deals with the withdrawal of consent to the disclosure or collection of personal health information, and not the initial disclosure of such information. How *PHIPA* would apply in the circumstances is not clear. Second, the Vaccine Policy was introduced because the HOPA Policy required that

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company employees attest to their vaccine status and the Employer is bound to comply with that Policy. In this respect, see, for example, *York BRT Services LLP and ATU, Local 113 (Suttar)*(Herman)(cited above). Third, management can generally establish rules that require the production of employees' medical information if necessary in order to protect the health and welfare of other employees, which would be the case here. Similar information is sometimes required of individuals in many contexts, such as crossing borders, taking flights, entering restaurants, arenas, or concert halls. It is not unusual for disclosure of such information to be necessary for the protection of the health of members of the public. Vaccinated employees working at the two facilities, and others who enter those facilities from time to time, are entitled to be aware of whether unvaccinated persons are working on site and within their vicinity. Similar conclusions were reached in the *Paragon Award* and the *ESA Award* (cited above). Fourth, the intrusion upon an individual's privacy with respect to the disclosure of personal health information is relatively minimal. Employees are only being asked to reveal their vaccine status, and nothing more concerning their personal health. Indeed, the Vaccine Policy expressly advises employees not to disclose other medical information. Fifth, since I find the requirement to be fully vaccinated in order to enter upon either property reasonable, as discussed below, employees will in any event likely be aware of which employees are vaccinated shortly after January 24, 2022, since after that date, only vaccinated employees will be allowed on site. Sixth, the Vaccine Policy provides a reasonable period of time for employees to attest to their status, for they are given from November 10, 2021 until January 24, 2022 to do so. Seventh, the information is only disclosed to the Facility Manager and then to HOPA. The

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attestation information will be stored in a secured and confidential manner, and only disclosed where required by or permitted by law, and internally only on a "need to know" basis.

25. Any privacy rights in this context are considerably outweighed by the minimal intrusion on such rights and the enormous public health and safety interests at issue. In the result, I am satisfied that the attestation requirement in the Vaccine Policy is reasonable.

26. I turn now to consider whether the requirement to be fully vaccinated (i.e. one dose of a single dose vaccine or two doses of a two-dose vaccine) by January 24, 2022 or to be put on unpaid leave is reasonable.

27. The Vaccine Policy requires all employees to be fully vaccinated, and to provide proof of that status, by January 24, 2022, or they "will not be allowed on site and put on unpaid leave pending a final determination of their employment status (up to and including termination of employment)". The Vaccine Policy does not stipulate that employees who do not meet these requirements by January 24, 2022 will be suspended (i.e. receive a disciplinary suspension) or will be terminated, only that a final determination will subsequently be made as to their employment status, and that may include discipline or termination. The Vaccine Policy issued by Bunge complies with the requirements of the HOPA Policy, although it also provides for additional exemptions to the mandatory vaccination requirement for reasons of religious belief or creed.

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28. The HOPA Policy required that the Employer ensure that employees working at its North Property be fully vaccinated, and for reasons set out previously, it was reasonable for the Vaccine Policy to be made applicable to all employees, regardless of which property was their customary location for working. If the Employer had not implemented the HOPA Policy through its own Vaccine Policy, it does not appear that the Employer would be able to properly operate its business out of the North and South Properties. In these circumstances, and given the public safety and health risks unvaccinated persons create for both vaccinated and unvaccinated persons who come in contact with them, the Vaccine Policy issued by the Employer is reasonable in its requirement that a condition of working at either facility and coming on site after January 24, 2022 is that employees have to be fully vaccinated, and if they are not, they will be placed on unpaid leave.

29. The Union argues that there have been no cases of transmission in the workplace since the Old Policy was issued and therefore no need for the new Vaccine Policy. However, the HOPA Policy requires attestation and full vaccination status, employees cannot work remotely, and operationally the Employer could not function properly without compliance with the HOPA Policy. The nature of COVID-19 and the risks of exposure and the potential consequences of becoming infected, particularly for unvaccinated persons, are significant, and this remains true even if no employee working at either location has become infected through workplace transmission since the issuance of the Old Policy. The lack of recent confirmed cases does not render unreasonable what is otherwise a reasonable policy.

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30. With respect to the references in the Vaccine Policy to discipline and termination, as the Vaccine Policy states, at this stage discipline or termination are only possibilities. It is reasonable, if not required, for an employer to put employees on notice of potential consequences of non-compliance with a rule or policy, and the Vaccine Policy does this. When or if discipline is meted out or an employee is discharged, a grievance can be filed. Any resulting arbitration would provide opportunity to consider whether the Employer can establish just cause for the suspension or termination, as the case may be, and that determination is likely to involve consideration of the circumstances at hand at the time of the suspension or termination, circumstances that cannot be known at the present time.

31. It is therefore reasonable for the Vaccine Policy to include a statement that employees who are not fully vaccinated by January 24, 2022 "will not be allowed on the site and put on unpaid leave pending a final determination on their employment status (up to and including termination of employment)".

32. With respect to concerns that certain answers to the FAQ's issued by the company suggest that discipline or termination will necessarily be the consequence for non-compliance with the Vaccine Policy (cf. paragraph 7 above), the FAQ's are not part of the Vaccine Policy, and to the extent the FAQ responses suggest that a non-complying employee will automatically be disciplined or terminated, those responses are inconsistent with the Vaccine Policy, and cannot stand.

33. The Union argues that testing is a reasonable alternative to unpaid leaves,

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suspensions, or terminations. The issue before me, however, is not whether testing or other alternatives exist that would be reasonable components of a COVID-19 policy, but whether the Vaccine Policy issued by the Employer is reasonable. While the absence of a testing alternative is relevant to consideration of this issue, for the reasons expressed above I am satisfied that the Vaccine Policy is reasonable without a testing requirement or a testing alternative. Here, using testing as an alternative to a mandatory vaccination requirement would put the Employer in breach of its lease obligations with HOPA, and therefore render the continued operation of its business potentially unfeasible, since it would then be barred from access to the North Property. In any event, there is no evidence before me that suggests a testing alternative would provide sufficient protection for employees and others entering upon either property.

34. A vaccine policy similar in some respects was considered in the *ESA Award*. In that decision, the arbitrator concluded that at some point in the future a vaccine policy might be reasonable where it placed non-compliant employees on unpaid leaves, but it was unreasonable at the time in doing so and in stating that they might be subject to discipline, up to and including discharge. In that case, however, the prohibitions by some third-party site owners against unvaccinated employees coming on their properties were limited in impact and did not appear to create significant problems for the operation of the business. That case accordingly arose in a context meaningfully different than the present context. As well, in concluding that unpaid leave, and possible discipline and termination, were not appropriate employer responses to non-compliance, the arbitrator expressly noted that the continued failure to be vaccinated

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might result in consequences at a later date that would include being placed on unpaid leave. Here, however, it is not premature to require that employees be fully vaccinated in order to come on site. The arbitrator also concluded that the absence of a testing alternative in the policy before him rendered that policy unreasonable, but here, a testing alternative without also putting employees on unpaid leave as of January 25, 2022 would not meet the requirements of the HOPA Policy, would place the Employer in breach of its lease obligations with HOPA, and would jeopardize its ability to properly function. For all these reasons, the *ESA Award* is distinguishable.

35. In the result, I conclude that the Vaccine Policy is a reasonable policy in the circumstances, and is a reasonable exercise of management's right to issue workplace policies. The grievance is accordingly dismissed.

Dated at Toronto this 4th day of January, 2022

Robert J. Herman - Arbitrator

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IN THE MATTER OF AN ARBITRATION

B E T W E E N:

UNITED FOOD AND COMMERCIAL WORKERS UNION, CANADA LOCAL 333 ("Union")

-and-

PARAGON PROTECTION LTD. ("Company")

(The Company and the Union collectively "the Parties")

ARBITRATOR:	**F.R. VON VEH, Q.C.**
FOR THE UNION:	**MARK GERNON, Representative, Labour Relations** **PAUL BEDI, Business Agent** **ALFREDO LEPARULO, Representative**
FOR THE COMPANY:	**SIMONE OSTROWSKI, Counsel** **CHRIS SULLIVAN, Director, Human Resources.**
LOCATION OF HEARING:	**TORONTO, ONTARIO**
DATE OF HEARING:	**OCTOBER 8, 2021**
SUBJECT MATTER:	**COVID-19 VACCINATION POLICY**
DATE OF AWARD	**NOVEMBER 9, 2021**
GRIEVANCE:	**POLICY GRIEVANCE dated September 13, 2021**

AWARD

The Union filed a policy grievance on September 13, 2021.

"RE: Paragon Covid-19 Vaccination policy

RE: Policy Grievance Article 4 – "Management Rights" and Article 24 – "Health and Safety"

The United Food and Commercial Workers' Union Local 333 ("Local 333") is by copy of the letter filing a grievance with Paragon Security ("Employer") for violating the collective agreement, Article 4 – "Management Rights" and Article 24 – "Health and Safety".

Further, Local 333 asserts the Employer and its policy violates the (Ontario) Human rights Code.

Local 333 has been made aware the Employer issued a notice to its employees (date unknown) advising the implementation of a new Employer policy ordering employees to be fully vaccinated by October 31, 2021.

Local 333 deems such policy to violate the collective agreement and is unreasonable.

Further, Local 333 deems the policy is in contravention of Article 24.

As remedy Local 333 demands the Employer immediately:

- *Rescind the new policy; and*
- *Comply with the terms of the collective agreement*

Should the Employer not remedy this matter forthwith, to the satisfaction of Local 333, Local 333 shall advance this grievance to arbitration and will seek the arbitrator issue a declaration the Employer has breached the collective

agreement; the Employer has breached the (Ontario) Labour Relations Act, 1995; and any other remedy an arbitrator deems appropriate.

Please immediately contact Mr. Paul Bedi, UFCW Local 333 Business Agent to discuss and remedy this grievance."

On September 20, 2021, the Company replied in relation to the Policy Grievance dated September 13, 2021.

"RE: Response to Policy Grievance Article 4 and Article 24

This letter is in response to the policy grievance filed on September 13, 2021, alleging breaches of the Ontario Human Rights Code and Article 4 ('Management Rights') and Article 24 ('Health and Safety') of the collective agreement.

The majority of Paragon Security clients have implemented their own mandatory vaccination policies for all staff on site, this includes all contract employees (including site security staff). Those clients who have not yet implemented these policies have indicated to the company that mandatory vaccination policies are forthcoming. This has left the company no other option than to introduce the mandatory vaccination policy on September 3, 2021.

Additionally, many employees have raised concerns about working with other site security team members who have not been vaccinated.

Paragon Security contends that the company had no choice other than to implement this policy as an operational necessity to properly service our clients. Additionally, the policy was also necessary to maintain a safe and healthy work environment for our employees, clients and their staff, and the public we serve.

The company denies it breached the Ontario Human Rights Code as an exemption policy was developed and there is a form available to accommodate requests on a Creed/Religious and Health basis.

The company is open to further discussions and/or actions to reach a remedy for the grievance."

...

(x)-The Company sent out a communication to its employees concerning the COVID-19 Vaccination Policy.

"As you know, the health and safety of Paragon's workforce is its number one priority. Since the beginning of the Covid-19 pandemic, Paragon has put various measures in place to maintain a safe workplace for our workers, the company's clients and their staff, as well as members of the public. Particularly given the current and higher transmissibility of the Delta variant, we want to ensure that we can continue to keep our workplace safe and minimize the risk of spreading the virus.

At the same time, more and more of Paragon's clients have required exclusively vaccinated security personnel, effective early September, and in some instances will not allow anyone on their sites who has not been fully vaccinated. At the same time, as most of you also know, the Ontario government is in the process of putting measures in place to prohibit unvaccinated citizens from engaging in many civic activities; in this regard it has followed the lead of many other jurisdictions across Canada and internationally. Put simply, full vaccination has quickly become a societal expectation and Paragon plans to adhere to this mandate.

For this reason, we have implemented a new policy that is designed to ensure Paragon employees are ***fully vaccinated against the Covid-19 virus by October 31st, 2021.*** *It is the company's expectation that every member of our staff will take this obligation extremely seriously, up to the highest levels of management. Please review the policy very carefully and contact a member of the HR team if you have any questions.*

You will receive during the week of September 06th, a declaration form to be complete confirming your vaccination status. We expect to receive a completed form from every one of our employees, and we will be following up with anyone who has not done so as we approach the deadlines set out within the policy. Though we hope it will not be necessary, there will be serious consequences for anyone who has failed to comply with the policy's requirements.

You can access our Vaccination Policy on the following link: https://paragonsecurity.ca/notifications/"

...

...

II-COMPANY WITNESS

The Company's only witness was Chris Sullivan, Director of Human Resources for the last seven years. He oversees the Human Resources Department, issues of employee discipline, union related matters, and the implementation of new policies affecting employees of the Company.

The witness reviewed what was filed as Exhibit 5 – a list of Company client sites subject to vaccination policy. Two prominent examples of such sites in Toronto are: Brookfield-the Exchange Tower and Brookfield-First Canadian Place.

The clients listed on Exhibit 5 represent clients that have implement their own vaccination policies for their employees and contractors –such as security guards of the Company. These employees and contractors must be "*fully vaccinated*" in order to "*work or remain working*" at such Company sites.

The witness testified that the Company's vaccination policy was created "*out of necessity due to our clients implementing their own vaccination policy which requires our employees, working on their properties to be fully vaccinated*"

"*Also, concerns have been raised by our employees about co-workers and Company employees not being vaccinated. Our employees felt they were vulnerable due to health concerns or age who had concerns working in close proximity and sharing equipment with colleagues who were not vaccinated.*"

The witness testified that "*We are a client customer facing business.*" Part of the service provided by the Company is to screen others to make sure they are vaccinated in order to "*gain entry to our client's premises.*"

In conclusion, the witness testified, "*We have taken a reasonable approach to protect our employees, our clients and their guests, and the general public we interact with.*"

The witness was not cross-examined.

...

...

V-OBSERVATIONS AND FINDINGS

1- Throughout the instant proceedings, the word "pandemic" was frequently used. This word must be properly defined.

From the Mirriam-Webster Dictionary

Pandemic: an outbreak of a disease that occurs over a wide geographic area (such as multiple countries or continents) and typically affect a significant proportion of the population: a pandemic outbreak of a disease.

From the Oxford Concise English Dictionary – ninth edition

Pandemic: adj – (of a disease) prevalent over a whole country or the world: n-an outbreak of such a disease.

2- Paragon Protection Ltd ("the Company") employs approximately 4400 security guards in Ontario. Such security guards are represented by the United Food and Commercial Workers Union, Canada, Local 333 ("the Union").

The Company has approximately 450 client sites in Ontario. As of October 4, 2021, the majority of these clients have implemented their own vaccination policies for their employees and contractors such as security guards of this Company. Such employees and contractors (security guards) must be fully vaccinated in order to work or remain working at such sites.

3- The Company 'introduced' its COVID-19 Vaccination Policy on September 3, 2021, which is appended to this Award as Schedule "A".

I find the Company's COVID-19 Vaccination Policy to be reasonable, enforceable, and compliant with the Ontario Human Rights Code and the Occupational Health and Safety Act of Ontario.

4- As part of the Company's COVID-19 Vaccination Policy, it introduced its COVID-19 Vaccination Exemption Policy, which is appended to this Award as Schedule "B".

I find the Company's COVID-19 Vaccination Exemption Policy, to be reasonable, enforceable, and compliant with the Ontario Human Rights Code.

I recommend a change to the Exemption Policy, affecting the third bullet on Page 1. Many persons do not have a family physician. Accordingly, I suggest the opening line of the third bullet read – *"Health requests must include certified medical documentation from a physician, immunologist, or allergist confirming....."*

Also, in bullets 5, 6 and 7, the bottom of page 2 and on page 3 of the Exemption Policy, the word "Physician" should be replaced by *"Physician, immunologist or allergist."*

5- I have reviewed reference to portions of the Ontario Human Rights Commission policy statement on COVID-19 as set out on pages 6 and 7 of this Award.

I find that the Company's Vaccination Policy and Vaccination Exemption Policy strike a balance in order to respect the rights of employees who have not, or do not wish to be vaccinated, while respecting a safe workplace for "Staff" as

defined in the Vaccination Policy, the Company's clients, and members of the public with whom the Company's security guards interact.

I further find that pursuant to the provisions of the Occupational Health and Safety Act, ("the Act") the Company has an obligation and responsibility to protect the health and safety of its employees. In this regard, I specifically refer to Section 25(2) (h) of the Act, which provides that an employer must take *"every precaution reasonable in the circumstances for protection of its worker."* The Company, by introducing its Vaccination Policy and Vaccination Exemption Policy has taken *"every precaution reasonable"* to satisfy its obligations and responsibility.

6- I find that receiving the COVID-19 vaccine is voluntary. However, the issue of employees choosing not to be vaccinated on the basis of *'personal preferences'* must be carefully considered. In that regard, I refer to considerations of the Ontario Human Rights Commission as set out on pages 6 and 7 of this Award.

There is a wealth of scientific information available on the pandemic and COVID-19. I find that personal subjective perceptions of employees to be exempted from vaccinations cannot override and displace available scientific considerations.

My findings in this regard in no way negate *bona fide* requests for COVID-19 Vaccination Exemption Requests pursuant to the Exemption Request Form set out in Schedule B.

7- I refer to Article 24.05 set out on Page 5 of this Award. This Article has been in effect since December 20, 2015.

I find it remarkable that such perceptive vaccination and inoculation provisions were agreed to by the Parties at least five (5) years before the arrival of the pandemic which is currently surrounding the world.

I find that the substantive and mandatory principles of Article 24.05 *("...the employee must agree to receive such vaccinations or inoculations")* which are agreed to by the Parties, have been correctly incorporated into the Company's COVID-19 Vaccination Policy.

8- I have reviewed the submissions of the Parties relating to the Health Care Consent Act, 1996, and find that the provisions of that Act are not applicable to the matters being adjudicated in the instant proceedings.

9- I have reviewed the position of the Parties relating to the KVP CO. v. Lumber and Sawmill Workers' Union Award as addressed on Pages 14 and 17 of this Award.

I find that the Company, in unilaterally introducing its COVID-19 Vaccination Policy, promulgated *"reasonable rules and regulations to be observed by the employees"* pursuant to the provision of Article 4.01 (b).

10- I have reviewed the position of the Parties relating to the 2018 Award re St. Michael's Hospital as addressed on pages 14, 15 and 17 of this Award.

I find that the St. Michael's Hospital Award dealt with an annual influenza vaccine and the wearing of masks. I further find that the said Award most certainly did not deal with pandemic conditions which currently exist.

I find there is a distinct difference between the influenza related considerations addressed in the St. Michael's Hospital Award and the current pandemic and COVID-19. In this regard, I refer to and rely on the comparison of key features of influenza and COVID-19 set out on page 11 of this Award.

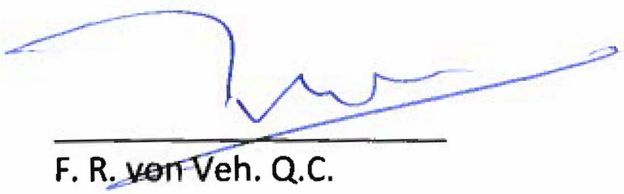
11- I find that the Union has not established a violation of Articles 4 and 24, as alleged in the Policy Grievance dated September 13, 2021.

ORDER

1-Based on the evidence before me, and the Observations and Findings set out above, the Policy Grievance dated September 13, 2021 is hereby dismissed.

2-I remain seized to assist the Parties on any issues relating to the application and interpretation of this Award.

Dated at Toronto, Ontario this 9th day of November 2021.



F. R. von Veh. Q.C.
Arbitrator

In context-specific analysis, arbitrator rules that company's mandatory COVID-19 vaccination policy was unreasonable

Allowing a grievance, an Ontario arbitrator held that an employer's mandatory COVID-19 vaccination policy, which required all employees to provide proof of full vaccination status or face potential disciplinary consequences, up to and including discharge, was unreasonable. Emphasizing that his decision was confined to the situation at this particular workplace, in which most employees had been vaccinated and many could work remotely, the arbitrator held that the employer had not provided evidence of a significant risk of health and safety issues in the workplace or interference with the employer's operations. Accordingly, the arbitrator held that the employer's existing voluntary testing regime was adequate to address any risks at the time, noting that the policy could be revisited if a health and safety problem subsequently arose or if the number of unvaccinated employees created problems for the employer's operations that could not be addressed in any other reasonable way.

The Facts:

When an employer unilaterally imposed a mandatory COVID-19 vaccination policy on its employees, the union filed a grievance.

The Electrical Safety Authority (ESA), the government agency responsible for electrical safety in Ontario, employed approximately 420 staff, including inspectors who might be required to visit third-party sites. In responding to the COVID-19 pandemic, the ESA issued guidelines to its employees and personal protective equipment (PPE), including N95 masks, to its inspectors. On September 3, 2021, the employer announced that it would implement a voluntary vaccination disclosure and testing (VVD/T) policy that allowed employees who did not voluntarily disclose their vaccination status to participate in an educational session and be tested on a regular basis.

However, on October 5, 2021, the ESA unilaterally introduced a policy that required all employees to provide proof of full vaccination status by December 22, 2021, or face potential disciplinary consequences, up to and including discharge. The policy also permitted the employer to place employees who failed to comply on unpaid leaves.

The Power Workers' Union filed a grievance alleging that the employer's unilateral introduction of the mandatory vaccination policy was an unreasonable exercise of management rights, contrary to the collective agreement.

As of the date of arbitration, the employer had not had a COVID-19 outbreak in its workplace. Since the beginning of the pandemic in March 2020, only seven of its 420 employees had contracted COVID-19, and only two of those infections might have been work-related. In addition, 88.4 percent of ESA employees had been vaccinated; over 90 percent of operations employees, which included inspectors, had been vaccinated; and only 14 employees had chosen not to disclose their vaccination status. As well, there had only been one instance in which an inspector was denied entry into premises due to vaccination status, which was resolved with the attendance of another, vaccinated inspector, and a second instance of a complaint about an inspector who, when the homeowner requested proof of vaccination or a negative test, responded with a threat to send a letter and "shut off the power." The employer also cited concerns about being able to have inspectors visit sites in which mandatory vaccination policies existed, including hospitals, long-term care homes, personal homes, and federal and provincial buildings. Finally, regarding the office staff, the employer submitted that it had a right to designate an employee's work location; that it planned to recall employees to in-person worksites in January 2022; and that some staff had indicated that they did not want to work in close proximity to unvaccinated employees.

The Arguments:

The union argued that the mandatory vaccination policy was an unreasonable exercise of management rights that violated the collective agreement as well as employees' privacy rights and right to bodily integrity. It maintained that, in the absence of a legislative mandate or specific language in the collective agreement, an employer was not permitted to require vaccination.

The employer submitted that its policy was a reasonable exercise of management rights that fulfilled its legal obligation to take every reasonable precaution to protect its workers and the public. In support of its argument, the employer relied on the operational and safety concerns due to the fact that some of its employees were required to visit third-party premises, which had their own vaccination policies in place, as a regular part of their job functions and that some were required to travel.

The Decision:

Arbitrator John Stout allowed the grievance, directing the employer to amend the policy to "make it clear that employees shall not be disciplined or discharged for failing to get vaccinated" and ordering the employer to provide a testing option to employees who had not been vaccinated.

Stout began by noting that the case was "not about the merits of being vaccinated or the effectiveness of COVID-19 vaccines" and should not be "seen as any form of vindication for those who chose, without a legal exemption under the Ontario *Human Rights Code*, not to get vaccinated." Instead, this case was about "management's right, as provided for under the Collective Agreement, to unilaterally introduce a rule or policy that all employees must disclose their vaccination status and any employee who does not disclose their status or who is not vaccinated places their employment in jeopardy."

Noting that nothing in the collective agreement specifically addressed the issue of vaccination and that at the time of the arbitration, there was no legislative requirement that ESA employees be vaccinated, Stout held that the proper approach was that set out in *Lumber & Sawmill Workers' Union, Local 253 v. KVP Co.*, [1965] O.L.A.A. No. 2 (QL) (Robinson), for assessing unilaterally imposed employer rules or policies affecting employee privacy, including that they must not be inconsistent with the collective agreement or unreasonable. In this regard, he noted that the *KVP* test uses a "balancing of interests" approach, in which the employer's operational interests, including those related to health and safety, are balanced against employees' privacy interests. Moreover, he emphasized that, under his approach, "[c]ontext is extremely import[ant] when assessing the reasonableness of a workplace rule or policy that may infringe upon an individual employee's rights"; thus, where the risk to health and safety is greater, "an employer may encroach upon individual employee rights with a carefully tailored rule or policy." He held the following:

> In workplace settings where the risks are high and there are vulnerable populations (people who are sick or the elderly or children who cannot be vaccinated), then mandatory vaccination policies may not only be reasonable but may also be necessary and required to protect those vulnerable populations.
>
> However, in other workplace settings where employees can work remotely and there is no specific problem or significant risk related to an outbreak, infections, or significant interference with the employer's operations, then a reasonable less intrusive alternative, such as the ESA's voluntary vaccination disclosure and testing policy (VVD/T policy) employed prior to October 5, 2021, may be adequate to address the risks.

Applying this approach to the policy before him, Stout determined that the ESA had provided no justification for why it had changed the policy in October when it had previously considered the VVD/T policy to be adequate, and he opined that the testing regime in place remained a "reasonable tool to utilize in protecting a workplace." He also noted that the ESA had provided no evidence to indicate that third-party vaccination policies might create difficulties for its operations:

> [The ESA provided] no analysis of any workplace dangers or hazards associated with the ESA's concerns. [It also provided] no analysis [of] any substantial interference with the ESA's business. [There is] no evidence that these concerns have manifested themselves in any actual problems in the workplace that cannot be reasonably addressed under a policy that provides for a combined vaccination or testing regime or other reasonable means. At this point the ESA has legitimate concerns, but those concerns do not at this point justify imposing a mandatory vaccination regime with threats of discipline or discharge.

In this regard, Stout noted that many of the employees continued to work remotely and had a right to do so under the collective agreement, that many third-party vaccination policies also provided for testing as an alternative, and that the union had agreed that travel could be assigned only to those who were fully vaccinated. He also found that, at the time of arbitration, there was no evidence that third-party vaccination requirements had interfered with the ESA's operation, but he noted that if such issues did arise, then the ESA might be entitled to place employees on administrative leave until they were vaccinated. Thus, although acknowledging that "[m]andating that all employees be vaccinated provides an obvious and simple answer to address [the employer's] concerns," Stout observed that "mandating vaccinations is not the only reasonable response at this time and in these circumstances":

> It would appear that in early September the ESA was satisfied with the VVD/T Policy, but later had second thoughts. There does not appear to be any event, issues or concerns brought to the [joint health and safety committee] for review and recommendations. … [I]t appears that the ESA has jumped to a hasty conclusion without turning [its] mind to the validity of the concerns and analyzing if the concerns will manifest themselves in serious workplace problems that cannot be addressed by a policy that combines vaccination with a testing alternative. … [T]he ESA has acted prematurely and without considering the individual rights of employees. As a result, … certain aspects of the current Vaccine Policy are unreasonable. …
>
> [D]isciplining or discharging an employee for failing to be vaccinated, when it is not a requirement of being hired and where there is a reasonable alternative, is unjust. Employees do not park their individual rights at the door when they accept employment. While an employer has the right to manage [its] business, in the absence of a specific statutory authority or specific provision in the collective agreement, an employer cannot [dismiss] an employee for breach of a rule unless it meets the *KVP* test and [is] found to be a reasonable exercise of management rights.

Moreover, with respect to disclosure of vaccination status, Stout noted that this disclosure could occur only with the employee's consent and that it must be kept confidential, although he stated

that "one must be aware in a world where you are either fully vaccinated against COVID-19 or you are not, then it may not be possible to fully protect an employee from inadvertent disclosure." He also held that it was reasonable to provide employees with the option of granting the ESA the right to disclose vaccination status to third parties in order to access their premises, emphasizing that "any consent granted must be clear, knowledgeable and with the ability to be withdrawn…."

However, he went on to conclude that under the VVD/T policy, the employer had the right to require employees to disclose their vaccination status, calling "[t]he requirement to disclose vaccination status … reasonably necessary to ensuring a safe and healthy workplace." Stout opined that discipline up to the point of discharge may be an appropriate penalty for employees who refused to disclose their vaccination status:

> If an employee does not voluntarily disclose their vaccination status, then it is reasonable … to deny them entry to the workplace and subject them to a testing regime. Moreover, if a testing regime is found not to provide sufficient protection in the workplace or is not offered at a work site, and in some cases that may well be the case, then it may be reasonable to deny entry to the workplace or work site of any person, including employees, who has not confirmed that they are vaccinated. Employees who are not vaccinated may be deemed unfit to perform work and they may be placed on an administrative leave, subject to their right to claim any benefit provided for under the collective agreement and file a grievance challenging the reasonableness of the employer's decision.
>
> If an employee is unable to perform any work for a substantial period of time or if they are being unreasonable in complying with any reasonable alternative, then an employer may have just cause to impose discipline, up to and including termination. However, each case must be individually assessed to determine whether or not the employee's conduct is such that their behaviour is sufficiently egregious or undermines the obligations and faith inherent to the employment relationship, see *McKinley v. BC Tel*, [2001] S.C.R. 161.

Also noting that the ESA was planning on having its employees return to the workplace in the near future, Stout determined that it should discuss its concerns with the joint health and safety committee (JHSC), adding that "if a health and safety problem arises in the workplace or if the number of unvaccinated employees creates real problems for the ESA's business that cannot be addressed in any other reasonable way, then the ESA may need to take other measures, including placing unvaccinated employees on administrative leave," in which case the union could bring back any objections on an expedited basis.

In the result, repeating that "this award should not be taken as a vindication for those who choose, without a legal exemption, not to get vaccinated" and opining that "[t]hose individuals are … misguided and acting against their own and society's best interests" and "should not construe this award as a victory," Arbitrator Stout allowed the grievance and issued a number of orders, including directing the employer to amend the mandatory vaccination policy to make it clear that employees would not be disciplined or discharged for failing to get vaccinated and to provide a testing option to those who had not been vaccinated; ordering that the ESA could revise the policy "at some point in the future" to provide for an unpaid administrative leave for unvaccinated employees if operational or safety concerns could not be adequately addressed by the VVD/T policy; ordering that the policy could require employees to confirm their vaccination status as long as this information was kept confidential and was disclosed only with consent; and directing the ESA to provide the JHSC with a copy of the revised policy and give the JHSC reasonable time to review it and raise any concerns.

Comment:

As noted by the arbitrator in the instant case, *KVP* is the seminal decision on the approach to the validity of rules that have been created and implemented unilaterally by the employer. Subsequently endorsed by the Supreme Court of Canada in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 (CanLII), in relation to alcohol testing in the workplace, *KVP* mandates a balancing of the employer's stated purpose against the intrusion on workers' privacy rights. That careful balancing approach weighed heavily in the instant case. Emphasizing that his decision was addressing the current situation at the workplace and could change if the risks to health or to the employer's operations became more significant, the arbitrator held that, given the fact that employees had the option to work remotely and the high vaccination uptake in the workplace, the employer's existing voluntary vaccination disclosure and testing policy was adequate to address the risks at this time.

In his reasons, the arbitrator in the instant case referenced another decision that considered a mandatory vaccination policy that was issued two days earlier. In *United Food and Commercial Workers Union, Canada Local 333 v. Paragon Protection Ltd.*, November 9, 2021 (unreported), Arbitrator Fred von Veh considered a mandatory vaccination policy that was unilaterally imposed by a security company requiring all employees who did not qualify for an exemption under its terms to be fully vaccinated by October 31, 2021. The exemption provisions allowed the company to assess requests for exemptions on a case-by-case basis but specifically noted medical, religious, or creed-based reasons and individuals waiting on second doses as potential bases for exemption. The union filed a grievance alleging that the policy violated the management rights and health and safety provisions of the collective agreement, contrary to *KVP*, as well as the Ontario *Human Rights Code*.

Paragon employed approximately 4,400 security guards who worked at approximately 450 client sites in Ontario. As of October 4, 2021, at least 226 of Paragon's 450 client sites were subject to Paragon's mandatory vaccination policy, and the coverage and applicability of the mandatory vaccination policy to Paragon's client sites was increasing daily. In addition, Article 24.05 of the parties' collective agreement stated the following, in part:

> If an employee is assigned to a site where specific vaccination and/or inoculation is required by law or where the conditions of contractors having access to the site stipulates specific vaccination and inoculation requirement, the employee must agree to receive such vaccination or inoculation. …
>
> When an employee refuses such vaccination or inoculation for any reason, the company shall reassign the employer as per the relevant provisions of this agreement.

In dismissing the grievance, von Veh held that Paragon's vaccination policy was "reasonable, enforceable, and compliant with the *Human Rights Code* and the *Occupational Health and Safety Act* [(*OHSA*)]." With respect to the human rights aspect, von Veh opined that the policy "strike[s] a balance in order to respect the rights of employees who have not [been] or do not wish to be vaccinated, while respecting a safe workplace for [staff], the Company's clients, and members of the public with whom [Paragon's] security guards interact." Turning to health and safety concerns, von Veh held that, by introducing the policy, Paragon was fulfilling its obligations and responsibilities pursuant to s.25(2)(h) of the *OHSA*. Moreover, noting that there is "a wealth of scientific information available on the pandemic and COVID-19," von Veh emphasized that "personal subjective perceptions of employees … cannot override and displace available scientific considerations." In this regard, he distinguished a case relied on by the union, *Ontario Nurses' Association v. St. Michael's Hospital and the Ontario Hospital Association*, 2018 CanLII 82519 (ON LA), reported in Lancaster's *Labour Arbitration*, December 17, 2018, eAlert No. 271, in which Arbitrator William Kaplan held that a hospital's policy requiring unimmunized health care workers to wear a face mask throughout the flu season was unreasonable and contrary to the collective agreement. Arbitrator von Veh stated that "there is a distinct difference between the influenza related considerations addressed in [that] award and the current pandemic…." In this respect, von Veh cited a chart comparing the seasonal flu with COVID-19, which indicated a much higher transmission and fatality rate for the latter.

Accordingly, von Veh dismissed the grievance, remarking that "the substantive and mandatory principles of Article 24.05 ('…the employee must agree to receive such vaccinations or inoculations') … ha[d] been correctly incorporated into [Paragon's] vaccination policy" and that the vaccination policy was an appropriate use of Paragon's management right to make reasonable rules.

In the instant decision, the arbitrator distinguished the case before him from *Paragon*, observing that *Paragon* "arises in a different context involving a different union and a different employer (a security company whose employees perform all their work at third-party sites) and specific language in the applicable collective agreement that requires employees to receive a specific vaccination required at an assigned site (see [Article] 24.05)." In addition, the arbitrator stated, "I do not see Arbitrator von Veh's award conflicting with my decision in this matter. Rather, I am of the view that in the circumstances before Arbitrator von Veh, he came to a reasonable conclusion."

As noted in the *Paragon* award, in *St. Michael's Hospital,* Arbitrator Kaplan struck down as unreasonable a hospital policy requiring unimmunized health care workers to wear a face mask throughout the flu season. In so doing, he relied on Arbitrator James Hayes' award in *Ontario Nurses' Association v. Sault Area Hospital*, 2015 CanLII 55643 (ON LA), reported in Lancaster's *Labour Arbitration*, April 5, 2016, eAlert No. 235, in which Hayes rescinded a hospital's policy requiring health care workers to wear a mask if they refused a flu shot as an unreasonable exercise of management rights, finding that there was "scant" evidence that unvaccinated health care workers posed a significant risk to patients and insufficient data to establish a conclusive relationship between mask use and protection against influenza infection. Hayes also held that the policy was a "coercive tool" implemented to increase vaccination rates rather than a valid patient safety measure, and it therefore violated both the management rights clause and the collectively bargained right of employees to decline vaccination. In *St. Michael's Hospital*, Kaplan determined that the hospital had failed to provide any additional evidence that served to displace Hayes' findings regarding the efficacy of masking, and he held that it was "illogical and unreasonable" to adopt a policy requiring only unvaccinated health care workers to wear a mask when it was undisputed that both vaccinated and unvaccinated individuals could contract and transmit the virus.

In *Sault Area Hospital*, Arbitrator Hayes was persuaded by expert evidence, which he concluded was stronger than that advanced in *Health Sciences Association v. Health Employers Association of British Columbia*, [2013] B.C.C.A.A.A. No. 138 (QL), reported in Lancaster's *Health Care Employment Law*, July 15, 2014, eAlert No. 82. In that case, B.C. arbitrator Robert Diebolt upheld a provincial government policy requiring health care workers to get a flu shot or wear a mask while caring for patients during flu season. Diebolt was persuaded by the expert evidence presented by the employer, particularly the evidence that immunization of health care workers reduced the transmission of influenza to patients and that masks were effective in preventing transmission of the virus. He agreed with the employer that the policy served a valid patient safety purpose and that it struck a reasonable balance between patient safety measures and employees' privacy rights, holding that the employer had chosen the least intrusive means to advance its interests.

In *Paragon*, the arbitrator similarly considered the medical evidence, the nature of the workplace, and the relevant collective agreement provisions to indicate that a mandatory vaccine policy was a reasonable exercise of management rights, whereas in the instant case, the arbitrator determined that a voluntary testing regime was adequate at that time.

Case Name: *Power Workers' Union v. Electrical Safety Authority* (unreported)

Jurisdiction: Ontario

Proceeding: Grievance Arbitration

Arbitrator: John Stout

Date: November 11, 2021

Case Name: *Power Workers' Union v. Electrical Safety Authority*

Jurisdiction: Ontario

Proceeding: Grievance Arbitration

Arbitrator: John Stout

Date: January 4, 2022

Citation: 2022 CanLII 343 (ON LA)

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Employer should pay the cost of COVID-19 tests for unvaccinated employees but not for time taken to self-administer test, arbitrator rules

Addressing a grievance challenging aspects of an employer's COVID-19 policy applicable to unvaccinated employees, an Ontario arbitrator held that the cost of the twice-weekly mandatory tests should be paid for by the employer, not the employee, but that it was reasonable for such testing to be self-administered by employees on their own time without compensation. The arbitrator also upheld the policy's stipulation that unvaccinated employees who refused testing were to be placed on an unpaid leave for six weeks, at which point an employee would be dismissed for failing to comply, adding that the arbitrator would most likely uphold a dismissal under this provision. Finally, the arbitrator upheld as reasonable the requirement for proof of full vaccination status to access the company's on-site fitness facility, despite a collective agreement provision that protected access to those facilities for certain employees. In the arbitrator's view, the employer's health and safety obligations in the context of a global pandemic trumped the collective agreement provisions.

The Facts:

When an employer informed the union that it intended to introduce policies requiring unvaccinated employees to bear the cost of COVID-19 testing, imposing unpaid leaves pending termination on unvaccinated employees who refused testing, and requiring proof of full vaccination status to access the company's on-site fitness facility, the union filed a grievance.

Effective September 23, 2021, Ontario Power Generation (OPG) implemented the OPG COVID-19 Response Instruction, which incorporated a vaccination standard that required unvaccinated employees (those who identified as unvaccinated or chose not to disclose their vaccination status) to participate in a COVID-19 testing program. Affected employees were required to self-administer rapid antigen COVID-19 tests on a weekly basis for an initial orientation period, followed by twice-weekly testing with 48 hours between tests. Employees were required to film themselves administering the test and take a picture of the result, then upload the video and photo through an agreed-upon online portal. OPG provided unvaccinated employees with tests for this purpose at a cost of $25 per week, which employees were required to agree to have deducted from their wages. Otherwise, they were required to procure their own test kits. The employees were required to perform the tests at home, outside of working hours, without compensation for the time spent performing and recording the tests and their results.

Participation in the testing program was a mandatory condition of employment for all unvaccinated employees. Those who refused to participate were placed on an unpaid leave of absence for a six-week period, at the end of which those who did not agree to participate in the testing program would be dismissed for cause.

In addition, in the fall of 2021, OPG reopened its fitness facilities, which it had closed in March based on health and safety concerns, to emergency response maintainers (ERMs) and nuclear security officers (NROs), who were subject to physical testing mandated by regulation. In September 2021, OPG informed the union that unvaccinated ERMs and NSOs would be required to provide proof of a negative COVID-19 test within 48 hours prior to using its fitness facilities. However, on October 12, 2021, the employer introduced a policy prohibiting all unvaccinated employees from using its on-site fitness facilities effective November 24, 2021.

The union filed a grievance seeking orders requiring the employer to bear all costs of testing as well as declarations that the employer was not permitted to place employees on an unpaid leave of absence pending completion of the discipline process and that the requirement for full vaccination status to access the company's on-site fitness facility was unenforceable.

Section 25(2)(h) of the Ontario *Occupational Health and Safety Act* (*OHSA*) requires an employer to take "every precaution reasonable in the circumstances for the protection of a worker."

Article 2A.3 of the parties' collective agreement stated, "Disciplinary penalties resulting in a suspension without pay will not be imposed until a final decision … (agreement between Union and Management, or an arbitrator's judgment) has been reached." As well, Article 8 of the parties' mid-term collective agreement provided, "Given the physical requirements of the position, all [nuclear response force (NRF)] qualified NSOs will have free access to the fitness facilities at Darlington and Pickering NGS. When operations permit, NRF qualified NSOs will be given one (1) hour per shift to use these facilities. This provision is non-grievable."

The Arguments:

The union argued that OPG should bear the cost of all tests and compensate employees for the time required to administer and record the tests, as the financial burden of fulfilling an employer's statutory duty to provide a safe workplace should not fall on employees. With respect to unpaid leaves pending discipline, the union argued that the practice was contrary to Article 2A.3, which prohibited all suspensions without pay pending completion of the discipline process. Finally, the union argued that the requirement for proof of full vaccination status to access the on-site fitness facility was inconsistent with Article 8 of the collective agreement and that a unilaterally imposed rule could not override specific provisions of the collective agreement.

The employer's arguments are not set out in the decision.

The Decision:

Arbitrator John Murray ruled that the employer should pay for the cost of the tests but dismissed all other claims raised in the grievance.

Turning first to who should bear the cost of testing, Murray began by noting that, in light of the employer's *OHSA* obligations, "[t]esting unvaccinated employees is *prima facie* reasonable," observing that the union had not objected to the employer's right to test. Murray also determined that having employees self-administer rapid tests on their own time was beneficial as it allowed the employer to learn of a positive result before the employee attended work, thereby allowing it to isolate the employee prior to entry into the workplace. He also noted that the time involved in processing the test at home was approximately 15 minutes, compared to the 30 to 40 minutes to test at work, which involved having employees leave their workstations. Finally, with respect to the financial aspect of having an employee self-administer the test, he opined that "to compensate employees for the time involved in self-administered tests (outside the workplace) may act as a disincentive for such employees to get vaccinated. This would not be consistent with OPG's rational objective to have as many employees vaccinated as is possible." Accordingly, Murray allowed the grievance in part, stating that "the legitimate interests of both parties are balanced by granting the [union] an order that the tests for the unvaccinated shall be paid for by the employer and by refusing an order that OPG compensate employees for the time spent outside normal working hours in self-administering the rapid antigen test." He also noted that this order and accompanying reasons were without precedent or prejudice to other workplaces represented by the Power Workers' Union, and to this workplace, as they flowed from the "unique circumstances at this time."

Next, Murray rejected the union's submission that sending unvaccinated employees who refused to participate in testing violated Article 2.A3 of the collective agreement in the circumstances:

> In this situation, where most employees have been vaccinated, and virtually all the rest are willingly participating in the reasonable alternative of Regular Rapid Antigen Testing, employees who refuse to do either can be sent home on an unpaid leave pending completion of the discipline process.
>
> The employees who will be placed on an unpaid leave of absence are refusing to take the necessary and reasonable step of taking a minimally intrusive test that would demonstrate that they are fit to work and do not present an unnecessary risk to their co-workers during a global pandemic that has cost 29,000 lives in this country and at least 5 million world-wide. … Unlike other occasions when the Company sends someone home

> pending potential discipline, in these circumstances, it is completely within the control of the employee to decide when to come back to work. All they need to do is to agree to participate in the Rapid Antigen Testing [program,] which is designed to reduce the risk they present to their fellow employees by remaining unvaccinated — a test that has been endorsed by the Chief Medical Officer of Health and other appropriate authorities as being safe and effective. … [T]his [is a] sensible and necessary part of a reasonable voluntary vaccination and testing program.

Of note, Murray emphasized that his determination that Article 2.A3 did not apply had been made within the specific context of the COVID-19 pandemic and emphasized that it was made on "a without precedent basis to any other situation." He also indicated that a dismissal after six weeks for failing to undergo testing would most likely be upheld as reasonable:

> The Company has given employees who are sent home without pay 6 weeks to consider whether they are willing to partake in the testing regime like so many of their colleagues. … [I]t is important for them to understand that … in the context presented by this global pandemic, when lives of co-workers are at risk, unvaccinated individuals who refuse to participate in reasonable testing are, in effect, refusing of their own volition to present as fit for work and reduce the potential risk they present to their co-workers. The Company has made it clear that termination of employment at the end of the 6-week period will typically occur. It is important for those individuals who are fired for choosing to not be tested to understand that they are very likely to find the termination of employment upheld at arbitration. Effectively, employees who refuse testing will likely … have made a decision to end their career with this Company.

Finally, Murray held that, again in light of the particular circumstances, OPG's health and safety obligations overrode s.8 of the collective agreement. Observing that the circumstances of the pandemic were "not in the contemplation of either party" when the parties agreed to the provision and that it was "a matter of public record that gyms are high risk areas for transmission of COVID-19," as recognized by the fact that the government required vaccination to access public gyms in Ontario, Murray reasoned as follows:

> The *Occupational Health & Safety Act* in section 25 (2)(h) requires an employer to take every precaution reasonable in the circumstances for the protection of a worker. This obligation trumps the Mid-Term [Agreement]. The gym … is part of the workplace and the obligation to take every precaution reasonable in the circumstances applies. Although the gym operated by OPG is not public, the same logic that has informed the Ontario Government to require patrons of gyms to be fully vaccinated is applicable here. The high risk of [COVID-19] transmission in gyms is a reality in private and public gyms. Requiring employees who use the gym to be vaccinated is reasonable and consistent with OPG's

> legal obligation under the … *Occupational Health & Safety Act*. It is a policy designed to protect the health and safety of all OPG employees who use the gym.

In the result, with the exception of the order requiring the employer to pay the cost of the tests, Murray dismissed all other claims raised by the grievance.

Comment:

When assessing unilaterally imposed employer rules or policies that affect employees' individual rights, arbitrators generally apply the test set out in *Lumber & Sawmill Workers' Union*, Local 253 v. KVP Co., [1965] O.L.A.A. No. 2 (QL) (Robinson), which requires, among other criteria, that the rule be both reasonable and consistent with the collective agreement. As noted in Mitchnick and Etherington's *Leading Cases on Labour Arbitration Online*, citing *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd*., 2013 SCC 34 (CanLII) (reported in Lancaster's *Human Rights in Employment*, July 11, 2013, eAlert No. 209), "the Supreme Court of Canada [has] endorsed [the test] as a 'persuasive' statement on the scope of management's unilateral rule-making authority."

The instant decision adds to the growing body of arbitral jurisprudence addressing the reasonableness of employers' unilaterally introduced policies or decisions made in response to the COVID-19 pandemic. In many of these cases, arbitrators have recognized the challenges that employers have faced and have generally upheld actions that have been taken to protect the health and safety of workers. See, for example, *Christian Labour Association of Canada v. Caressant Care Nursing & Retirement Homes*, 2020 CanLII 100531 (ON LA), reviewed in Lancaster's *Labour Arbitration*, September 2, 2021, eAlert No. 305, in which Ontario arbitrator Dana Randall upheld as reasonable an employer's unilateral imposition of bi-weekly mandatory COVID-19 testing via nasal swab of all employees at a retirement home. Randall held that, in weighing the intrusiveness of the test on employee privacy against the employer's goal of preventing the spread of COVID-19 in the home, the policy was reasonable, particularly in light of the seriousness of a potential outbreak given the vulnerability of the residents.

See also: *National Organized Workers' Union v. Humber River Hospital*, 2021 CanLII 80164 (ON LA), reviewed in Lancaster's *Health Care Employment Law*, January 25, 2022, eAlert No. 156, in which Arbitrator Colin Johnston upheld as reasonable a hospital's unilaterally introduced policy that significantly limited visitor access to the hospital during the COVID-19 pandemic, including non-employee union representatives, holding that the union's right to attend the workplace was outweighed by the hospital's obligation to protect the health and safety of its staff and patients, particularly in the absence of evidence that the union had been impeded in its ability to represent its members in the workplace; and *United Food and Commercial Workers Canada, Local 175 v. Hazel Farmer*, 2020 CanLII 104942 (ON LRB), reported in Lancaster's

Health Care Employment Law, October 15, 2021, eAlert No. 154, in which the Ontario Labour Relations Board allowed an appeal from a Ministry of Labour inspector's refusal to order that a long-term care home install a plexiglass barrier at the nursing station as part of the home's response to COVID-19, holding that the measure was reasonable for the protection of the employees under the provincial occupational health and safety legislation regardless of whether other measures were also being taken by the employer, given that the residents of the home often failed to mask and came into close contact with the employees working at the station.

And see *Ontario Nurses' Association v. Participating Nursing Homes*, 2020 CanLII 36663 (ON LA), in which Arbitrator John Stout upheld an employer's requirement that nursing home employees who were asymptomatic were required to self-isolate, opining that the nursing homes "rightly applied the precautionary principle by preventing those employees who pose a risk from working" and were "exercising their management rights reasonably and appropriately by preventing those employee[s] who may pose a risk from attending at the workplace." He also held that these employees were not entitled to the Hospitals of Ontario Disability Income Program (HOODIP) benefits as they did not meet the definition of having an "illness."

On the other hand, in *Electrical Safety Authority v. Power Workers' Union*, November 11, 2021 (unreported), Arbitrator Stout held that an employer's unilateral imposition of a mandatory COVID-19 vaccination policy was unreasonable, holding that its existing voluntary vaccination disclosure and testing policy was adequate to address any health and safety risks or operational issues in the workplace. However, he emphasized that his decision was addressing the current situation at the workplace, in which the vast majority of employees had complied with the policy and employees had the option to work from home, and the balance could change if the risks to health or to the employer's operations caused by third-party vaccination requirements became more significant.

Case Name: *Power Workers' Union v. Ontario Power Generation* (unreported)

Jurisdiction: Ontario

Proceeding: Grievance Arbitration

Arbitrator: John C. Murray

Date: November 12, 2021

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IN THE MATTER OF AN ARBITRATION

UNDER THE *ONTARIO LABOUR RELATIONS ACT*

Between:

UNIFOR LOCAL 333

(The "Union")

-and-

MOORE PACKAGING CORPORATION

(The "Employer")

2021 CanLII 117560 (ON LA)

RE: Grv. #595924 dated October 28, 2020 and Grv. #99942-7 dated September 10, 2020 - Masking Policy

Before: M.G. Mitchnick - Sole Arbitrator

Appearances:

For the Union

Ken Stuebing – Counsel
Lisa Marks – Local President
Sean Harrington - Plant Chair

For the Employer

Ron Smith – Counsel
Madeline Benn – Counsel
Pam White – Director, Human Resources

Hearing held by videoconference on January 19, February 9 and 10, March 15 and 16, April 23, May 17 and June 14, 2021

INTERIM AWARD

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This matter arises out of the many challenges posed by the coronavirus known as COVID-19. There are two grievances before me for determination, one challenging the failure of the employer to accommodate the grievor's medical disability in a timely way, and the other for ultimately terminating the grievor's employment without just cause.

The grievor, who for privacy reasons I will refer to simply as such, joined the employer's manufacturing facility in Barrie in the early part of 2018, initially in the starting position of General Labour. She is a single mother and has opted to work the midnight shift throughout, because the youngest of her three children has disability issues that on occasion require her to attend urgently at his school, and that also require a number of medical appointments. Generally a "quick study", the grievor has moved seamlessly through a number of positions since the summer of '18, including both second and third man positions on various machines, as well as on fill-in Operator assignments. In August of 2020 she successfully posted into the Second position on one of the company's box-making machines, the Hycorr 78. The Operator on another machine, the J and L however, was having back problems, and the grievor was asked to delay her move and continue to cover his role on an interim basis. She testified that she was given no formal training for that, but rather had to learn as she went, using what she knew from watching other operators in the past, as well as making inquiries of the other operators as needed.

Shortly thereafter, however, COVID-19 intervened. Employers by this time were already grappling with the appropriate steps to take to ensure the safety of their employees, and as the coronavirus ramped up, the Health Unit for the area, Simcoe Muskoka, was reminding employers of their obligations under the *Ontario Health and Safety Act* and other emergency provincial legislation. At the same time, as all will recall, the "science" on the value of masks was evolving, with their value in containing the coronavirus being increasingly adopted as public policy. With the number of cases in August rising in the Barrie area, and the

return to schools in September posing an increased risk generally, Moore Packaging made a decision to adopt a mandatory masking policy to enhance the steps already being taken with respect to increased hygiene and social distancing. Pam White, the Director of Human Resources, played a major role in advising the employer on how it ought to proceed, and testified that Moore was particularly concerned about workplace exposure to the virus in light of the large percentage of its employee complement who were over the age of 50.

Labour Day that year fell on Monday, September 7th, and the announcement of the Policy to employees came on September 3rd in the following form:

> To: ALL Plant Employees
>
> From: Pamela White, People Resources
>
> In approaching the 6-month mark of the COVID-19 pandemic, we are so pleased to be able to say that, together, we have kept our workplace healthy and safe. With the right measures in place, it is the efforts of all our employees that have helped us accomplish this. THANK YOU! As the province works to get back to normal with the upcoming return to school, we know that as the situation evolves, we must continue to adjust our practices for everyone's safety. With the uncertainty, and possible increased risk of infection once school begins, we are implementing additional measures which will now include mandatory masks as of Monday, September 7th. Plant staff: Masks are mandatory while working at all times. This also applies when walking around in common areas outside the work station such as the changerooms, walkways and entranceways. For the lunchroom areas, using restaurant guidelines, it is expected that masks are worn whenever you are not seated. We are also working to implement partitions at the tables that will provide an additional barrier.

For some employees, that announcement may have been viewed as an irritant; for the grievor, it was a much bigger problem. The grievor as a young child had been sexually assaulted by a male baby-sitter, who used tape across the grievor's mouth to prevent her from screaming out. That, the employer unquestioningly accepts, has left her with chronic Post-

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> Traumatic Stress Disorder that makes it impossible for her to wear any kind of a face-covering for anything but a brief period of time. The grievor in her testimony recounted an incident as recently as the spring of last year when, attending to shop at a Walmart store where masking was required, found herself after some 10 minutes in full panic attack, vomiting and nearly passing out.

Given the short period of time between the employer's announcement of the mandatory masking policy and its implementation, the grievor simply attended for her scheduled shift on the week-end, and indicated that she was unable to wear a mask for medical reasons. The employer did not challenge her assertion, but ultimately indicated that she would not be able to attend at work until medical documentation was provided, and so that her situation could be assessed. The grievor was able to get in to see a doctor and explain her problem on September 8th, and the doctor, Marina Beshay, provided her with a note that simply read:

> Please be advised that the above-mentioned patient cannot wear masks for extended period of time due to medical conditions.
>
> Please feel free to contact me if you have any questions or concerns.

The employer clearly needed more specific information to work with in assessing whether or what accommodation were possible, and on the 9th Ms. White e-mailed Jason Shand, the employer's Health & Safety Co-ordinator, as follows:

> Jason**,**
>
> As this is a safety issue, can you please call [the grievor] to advise her that we received her note & message regarding a face shield. Please let her know that she will be provided a shield when she arrives to work tonight which is expected to be worn [the grievor]'s position & training on other equipment means she could be moved around the plant for coverage as needed. If there is a period of adjustment needed we can perhaps talk about that. Her note says she cannot wear one for extended periods, Please ask her:

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> • What is an extended period? How long a period can she tolerate right now?
>
> - Has she tried the face shield for any period to know that she can wear one? Please have her describe that.
> - How does she manage any daily living tasks that require her to wear a face covering in public? Describe.
>
> A combination of shield & mask over the course of the shift should alleviate the issue with extended periods & we will work with her to allow her to gradually increase her ability to tolerate the shield or mask if that would help. If she has another face-covering solution we are happy to look into it.
>
> If we are not able to come to a resolution we will have to review other options of position or shift to see if we have the ability to accommodate further.
>
> This measure was rolled out to mitigate any risk with the return to school. It's my understanding [the grievor] has a number of school-age children potentially increasing her risk of exposure & that of our employees.
>
> Thanks, Jason. Let me know how the conversation goes.

Mr. Shand and the grievor did communicate, in response to which the grievor obtained from Dr. Beshay's office a further note the same day making it clear that face coverings of ANY type were not a possibility for the grievor. That note read:

> Please be advised that the above-mentioned patient cannot wear a mask, face shield or any face covering due to medical reasons.
>
> Patient is aware that not wearing a mask increases her risk to catch Covid-19 in case she gets close to any positive cases.
>
> Thank you for your understanding related to this matter.

The employer did understand the problem for the grievor; but it equally had a huge problem of its own: the employer had both a moral and a legal responsibility for the health and safety of the rest of the employee complement, and the grievor was asking to be allowed to attend at work without wearing a

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mask. To its credit (and notwithstanding the grievor's view of the employer's intentions), I am satisfied reading the emails of Ms. White and hearing her testimony that the employer did not set out to create an accommodation for the grievor that was designed for failure. Rather, I find that the employer was grappling sincerely with the very challenging problem of the grievor's medical restrictions, in the face of COVID risks to all, and not unreasonably was searching for a more fulsome understanding of those restrictions, and how they could safely be accommodated within the jobs and lay-out of the plant. Following discussion of this Mr. Shand was asked to communicate further with the grievor with respect to her restrictions, and Mr. Shand advised the grievor of the necessary follow-up, e-mailing her:

> Subject: Medical Note
>
> Further to our conversation earlier today, you will be expected to report to work tonight September 9, 2020, for your regular shift & comply with the mandatory face mask or face shield now required by all employees working in the plant. You advised that you have a second medical note. Unfortunately, we are unable to accommodate your request without further information from your treating physician. If you remain unable to work, please forward the second note to me & call in to the attendance line as usual. We will assess your information as it relates to any absences. Attached is a letter to take to your treating physician to better understand your restrictions & limitations. Please have it completed & returned to us asap. If you have any questions please contact me.

Ms. White on September 10th also emailed the grievor as follows:

> Thanks for letting me know about your appointment for Monday to get the updated medical information.
>
> I noticed on your second note that the NP advises you are aware that you are at an increased risk of infection by not wearing a mask but, I wanted to say that the mask also serves, if not more so, to protect others. We are concerned about your increased risk of exposure from not wearing a face covering & then attending work, increasing the risk of spread to other employees who you may be in contact with.
>
> The decision to implement masks we felt was a necessary step with the increase in cases in the Simcoe Muskoka area in recent weeks, as well as

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with the return to school. Employers are required to take all reasonable precautions to protect the employees in the workplace and, as a result, we are not willing to put our employees at further risk. We feel it is reasonable to ask that you provide the medical information requested in the letter before making a decision on what work, if any, is available where you would not wear a face mask or shield. It is also unclear why the use of a face shield, which does not obstruct the mouth or nose, is not a suitable alternative.

In the interim, you will remain off work until we have reviewed the information from your physician. Although unpaid, the new protected infectious disease emergency leave of absence applies. Let me know if you would like to review that leave further. Please send the medical report to me and Jason once you have it on Monday. I am away next week but Jason will reach out to me.

Could you also ask the doctor to please respond to the following additional question:

Can full recovery be expected that would allow the use of a face covering, at all times, while in the workplace? If so, when can recovery be expected?

The letter from Ms. White to the doctor, dated September 9th, set out the following:

Dear Dr. Beshay,

Responding to continuing changes to the COVID- 19 pandemic and in the interest of the health and safety of our employees, we have implemented source controls to help reduce the risk of spread. These controls include masks and/or face shields. Due to the nature of the work and the work environment we may not always be able to ensure social distancing.

To provide some relevant background, Ms. [X] works in an industrial environment on midnight shift (11:00pm – 7:00 am). There is a 10-minute break approximately 90 minutes into the shift and a 20-minute lunch break about halfway through the shift. Ms. [X] has the skill and ability to perform several positions, which may cause her to be moved from time to time to perform in these different positions such as machine operator, machine feeder or general labour.

We are in receipt of two (2) notes issued on behalf of your patient, [Ms. X], advising that, due to a medical condition, she cannot wear a mask or

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face shield for extended periods of time. To determine our obligation and ability to accommodate her alleged disability under Ontario Human Rights, we kindly ask that you complete the following to clarify Ms. [X's] functional abilities and prognosis for recovery that would allow her to comply with safety measures.

Below are the questions put to the doctor by Ms. White, and the additions in italics show the hand-written replies that the doctor provided:

1. What are her current restrictions/limitations as it relates to this matter?

Patient can't have a mask on for more than 5-10 min at one time

2. What is the maximum time a face mask or shield can be worn?

5-10 minutes at a time

3. We have proposed that Ms. [X] alternate between use of a mask and shield. Is this a suitable alternative? If not, why?

No, she can't have a face cover for the total number of her shift hours

4. Do you have any recommendations for us to consider, other than what is provided, that may allow Ms. [X] to comply with the mask/shield requirement?

As it's related to PTSD Medical Condition, no accommodation is available

5. Have any treatment options been identified and recommended to Ms. [X] for this condition that would facilitate recovery and allow her to comply with the use of a face mask or shield?

She has received treatment in the past that didn't help

0. Has Ms. [X] been compliant with treatment? Yes [x] No

1. What is the expected duration of the above restrictions and limitations?

As long as face covering is required

2. What is the prognosis of this condition as it relates to her ability to comply with mandatory source control measures in an industrial environment where social distancing may not always be possible?

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It's PTSD Medical Condition

Please return the requested information no later than September 14th at 12:00 pm. If you have any questions or concerns, please do not hesitate to contact me at 705-737-1023 ext 269.

Added at the end of the Form, perhaps in response to the questions posed in Ms. White's email to the grievor, the doctor added:

0. Unknown if full recovery is gonna happen

Based on that the employer team decided that the assignment of the grievor to any machine, including the Hycorr 78 second position to which she had posted, was not an option. Instead it was decided that she would be reverted to the position of General Labour, and moved around the plant to perform such tasks as were available, and that in her supervisor's view could be carried out either in solitaire or within her restrictions. This Return to Work Plan was finalized by the employer on September 16th and provided:

Early & Safe Return To Work Plan (EHS-SAF-002 – Form 1)

Request for Accommodation: No use of face covering

Review Date: September 16, 2020 Department: Press

Employee's Name: [X]

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Functional Abilities Review

Employee's Limitations:

As per medical documentation dated September 14, 2020

- Employee is unable to wear a face covering for duration of shift
- Employee can only wear a face covering for 5-10 minutes at a time

Accommodation:

An accommodation will be provided on a trial basis. The plan will be monitored and assessed regularly (at least weekly) and will consider the health and safety of all employees as priority. It may be modified or cancelled if the plan is unable to be adhered to, negatively impacts the health and safety of workers, or as changes with the pandemic warrant.

- Employee will perform General Help duties to ensure 6-foot distancing can always be maintained.
- Employee break times will be altered to ensure safe distancing and to minimize contact with co-workers.
- Mask will be provided for times the employee cannot maintain safe distancing.

Employee's Responsibilities:

- Always maintain 6-foot distancing from other employees when a mask cannot be worn.
- When 6-foot distancing cannot be maintained, a mask must be worn for the entire duration.
- Employee must immediately notify a supervisor when social distancing cannot be maintained AND when a mask cannot be worn.
- Mask must be worn when employee leaves her station & must be worn in all common areas such as changerooms, lunchroom, walkways and employee entrance.
- Employee must communicate any issue related to this accommodation plan promptly to a supervisor so that options to resolve the issue may be reviewed.
- In addition to the daily assessment, employee must notify a supervisor immediately if she is experiencing any ill symptoms, if anyone in the home is ill or there has been possible contact with someone who has tested positive for COVID-19.

Recommended hours and duties for work:

- Modified duties

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Lisa, •Full hours, where modified work is available

Proposed terms meet the functional abilities and accommodation request?

Yes No

[redacted]

Date of Next Review: The terms of this accommodation plan will be reviewed as needed or when face masks are no longer mandatory as deemed necessary by Moore packaging

The Plan was forwarded by Mr. Shand to the grievor, and the grievor came back with an email and some questions, the tone of which is noteworthy:

> Good Evening Jason
>
> I have received and reviewed your email with regards to my return to work proposal. At this time, I have a few questions that I would like to have addressed before signing it, as I do not want any miscommunication between myself and Moore Packaging. I am aware that Lisa has also sent an email addressing mine and the union's concerns. If it is possible to have clarification with this matter either through email or via phone it would be greatly helpful. I will call the attendance line to notify the supervisor that I will not be in again this evening as you stated I cannot attend until this form is signed. Thank you for your consideration in this matter.
>
> Warmest regards,
>
> X

The grievor at this stage was being represented by Lisa Marks, the Local's President, and Ms. White on the 16th responded to the grievor's questions as set out in red below:

While this may not be the perfect accommodation, I think it is reasonable & we will make best efforts to work through any issues jointly.

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You know yourself we are seeing more changes & increased cases with the highest volumes since June. We continue to monitor things to make what we feel are the best decisions in the circumstances.

Thanks.

Pam

> Will the employee be paid General Help rate or her own rate? She will be paid the rate of the position she is assigned & performs.
>
> If there is no General Help work what job will [the grievor] be doing? If there are no General Help tasks to perform she may be sent home after 4 hours as per the collective agreement. This is not the intent but we want to be clear that work will not be created for an accommodation.
>
> Mask will be provided for the times the employee cannot maintain safe distancing. As per the doctor orders she can only wear the masks for 5 to 10 mins. How will this work? Every attempt will be made to ensure she is given tasks that do not involve her working with others within 6 feet. But if an employee needs to approach her, pass by her or she is in common area then she needs to put a mask on. The employee should not be in the walkways or common areas for more than 10 minutes at a time. Her break times will be altered to ensure the 6 foot distancing

When 6 foot distancing cannot be maintained, a mask must be worn for the entire duration.

> As per the doctors orders 5 to 10 mins. What if the duration is more then 5 to 10 mins? See Above
>
> Mask must be worn when employee leaves work station.
>
> Is this more the 5 to 10 mins? All change rooms and common rooms are not more than a 3 minute walk from anywhere in the plant. If a washroom break is longer than 10 minutes she

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may remove her mask while in the stall & then put back on to get back to her work station.

Nobody is wearing a mask in the changeroom. Moore Packaging expectations are that every employee, visitor must wear a mask while inside the building. If employees are not complying with this, then a supervisor should be notified.

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Having received the company's answers, the grievor reported for work the night of September 17th and, along with her steward, Sean Harrington, signed off on the Return to Work Plan. There was no further discussion about it. Apparently in reference to Ms. White's responses to her questions, the grievor wrote subsequently in a text:

> "I have no issue with her comment except the GC rate."

. . .

. . .

On October 28th the grievor was asked to attend a meeting with Ms. White, Mr. Santin, and her Union representatives. She thought she was being brought in to further discuss the Plan, and the question of her accommodation. Instead she was handed a letter of termination, with Ms. White saying that her employment contract with the company had been "frustrated". The grievor testified that she tried several times to explain what had been happening, but was told by Ms. White that this was not the time for it, and that the company's decision was final. The letter itself, signed by Mr. Santin, read:

> On September 7, 2020 we implemented mandatory face coverings as a reasonable measure to protect the health and safety of our employees during the pandemic. On September 8th you submitted medical documentation advising you could not wear a face covering and that you required an accommodation. At that time, we offered an alternate option in using a face shield, however, as you said you would, you provided a secondary doctor note on Sept 9th clarifying your inability to wear any face covering including a face shield.
>
> To better understand the details of your restrictions, we requested additional medical documentation on your prognosis, expected duration of your limitations and confirmation that you were compliant with treatment options. On September 14th you submitted this information and, although your physician explicitly states that no accommodation is available for your medical condition, we provided a trial accommodation plan as part of our duty to accommodate under the Ontario Human Rights Code. This plan was implemented on September 17th and was signed and agreed upon by all parties.
>
> The following were the agreed upon terms and conditions of the plan that clarified your responsibilities:
>
> - Always maintain 6-foot distancing from other employees when a mask cannot be worn.
> - When 6-foot distancing cannot be maintained, a mask must be worn for the <u>entire duration</u>.

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- Employee must immediately notify a supervisor when social distancing cannot be maintained AND when a mask cannot be worn.
- Mask must be worn when employee leaves her station & must be worn in all common areas such as changerooms, lunchroom, walkways and employee entrance.
- Employee must communicate any issue related to this accommodation plan promptly to a supervisor so that options to resolve the issue may be reviewed.
- In addition to the daily assessment, employee must notify a supervisor immediately if she is experiencing any ill symptoms, if anyone in the home is ill or there has been possible contact with someone who has tested positive for COVID-19.

We advised that this plan would be reviewed as needed, that it would be monitored at least weekly, and that it may be modified/cancelled if the plan was not adhered to, or negatively impacted the health and safety of workers or as changes occurred with the pandemic.

We have established through regular monitoring that you have not complied with the terms of the plan from the beginning up until as recently as October 22, 2020. We brought forth concerns of your non-compliance to the attention of Unifor President, Lisa Marks, on September 25th. She advised us that she spoke with you on September 25th about the importance of complying with the terms of the plan, however we have not seen any consistent improvement. Over the course of the accommodation, your supervisor has had to remind you daily to wear your mask when within 6 feet of other workers and he confirms there has been no consistent effort made on your part to follow the accommodation. Further, when assigned general cleaning tasks on October 13th, to further assist in physical distancing as part of your accommodation, you advised your supervisor that you neither wanted to or would sweep for a full shift which, again restricts our ability to provide an accommodation.

As per the Occupational Health and Safety Act, we have a duty to take every reasonable precaution to ensure the safety of our workers. We provided an accommodation; however, you have continually failed to adhere to our policy and the rules set forth in your accommodation plan, even though your supervisor has spoken with you on countless occasions as has Ms. Marks, Unifor President. In balancing our Employer responsibility, we have no alternative but to make the protection of others a priority.

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> Effective immediately, we are advising you that we have concluded that you have failed to follow the accommodation provided to you in contravention to your obligations, and thus the accommodation plan shall cease. As you have advised, and as per your doctors' guidance, you have no ability to perform the duties of your position as per the terms of your employment contract and there is no available timeline for when you would be able to perform such duties. Accordingly, your employment contract is deemed to be frustrated and thus your employment with us shall end effective today October 28th, 2020.
>
> In an effort to ease your transition and on a without prejudice, good faith basis, we are prepared to offer you three (3) weeks payment in lieu of notice, which shall be paid in accordance with our obligations, in the normal fashion under which you have receive your salary payment. As well, your benefits will continue through the notice period. We will arrange a time for you to be able to clean out your personal effects, if any.
>
> We wish you the best moving forward.

The second of the two grievances before me was filed immediately, and soon thereafter the grievor on her own filed a Human Rights Complaint which remains outstanding. Prior to submitting the grievances to arbitration, the Union held a Step 3 meeting with the company, to which the company responded, consistent with the theme of the termination letter:

> We maintain we have gone over and above in trying to accommodate **when even her own physician stated she could not be accommodated** and there is no violation of the CA or Human Rights Code. (emphasis added)

That reference to her doctor, seen in the termination letter as well, is based on what I would find to be a fundamental misreading of the response in the Questionnaire, that "no accommodation is available". Dr. Beshay testified and confirmed what I would have taken to be her meaning in any event, that her statement "no accommodation is available" referred to the fact that there was no known type of face-covering available that would not potentially cause a triggering of the grievor's symptoms. Beyond that, the treatment that the grievor had received in the past was in the form of counselling to assist her in dealing with her unfortunate history, and Dr. Beshay was candid in stating, as

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she did in her written responses, that with a chronic condition like PTSD, it cannot be said with any certainty at what point recovery may be obtained, if at all. That, however, in the unusual circumstances creating the "incapacity" in the present case, begs the question. The underlying problem is not the grievor's disability, but the state of the epidemic, for which there is, more likely than not, a finite point in time when extraordinary measures like masking will come to an end.

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THE CASE LAW

The company's use in the termination letter of the term "frustration" spawned considerable resort to the case law, as to whether that common-law doctrine of contract law has any application in a unionized setting. Little turns, however, on the use of that specific term: whether under the common-law doctrine of frustration or the jurisprudence in a unionized setting of "innocent incapacity", the test remains the same. As the Supreme Court of Canada pithily set it out in the off-cited *Hydro-Quebec* case, [2008] 2 S.C.R. 561:

> 14. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.

Nonetheless, "an employer will have discharged its burden of proof and established undue hardship", and thus be entitled to relief from the employment contract, if it is able to demonstrate that "the employee will be unable to resume [here, perform] his or her work in the reasonably foreseeable future" (paragraph 17). This symmetry in the unionized and non-unionized settings is amply captured by Arbitrator MacDowell in the *International Comforts* case set out by the employer, [2001] O.L.A.A. No. 633:

> **44** The [Court] cases above arose in the common law world of employment contracts. However, in a collective bargaining regime, arbitrators have adopted a broadly similar approach, holding that, at some

point, even innocent absenteeism will justify a "no fault" termination of the employment relationship.

And further:

> **44** The cases above arose in the common law world of employment contracts. However, in a collective bargaining regime, arbitrators have adopted a broadly similar approach, holding that, at some point, even innocent absenteeism will justify a "no fault" termination of the employment relationship.

But then this added word of caution:

> **46** This is not to say that the discharge of a disabled employee will be easily justified; for, no doubt, such action would be subject to rigorous scrutiny under both the "just cause for discharge clause" found in most collective agreements, and the Human Rights Code. Indeed, a discharge that has the effect of depriving a disabled individual of the disability benefits contemplated by the collective agreement, might well be considered to be "unjust", and set aside on that ground. (See, for example, the views expressed by arbitrator J.D. O'Shea Q.C. in Re Port Colborne and District Ambulance Service and OPSEU, Local 214 (1988) 33 L.A.C. (3d) 30). The point is: in both the common law/judicial arena, and in the collective agreement/arbitral arena, adjudicators have held that a complete and permanent inability to perform work, can bring the employment relationship to an end. It is a question of fact, not fault; and in this sense, arbitrators and judges have both recognized that it is something quite different from a "wrongful dismissal" at common law, or a "discharge without just cause" under a collective agreement.

Similarly, on this parallel case law, see *Oxford Automotive Inc. and UAW, Local 251,* 2004 CarswellOnt 5701; *Dynamex Express and Teamsters, Local 141,* 2001 CarswellOnt 5944; *HSAA and Alberta Health Services,* 2009 CarswellAlta 2243.

Much of the evidence in the case centred on the question of the extent to which the mask-wearing policy itself was being adhered to generally, as opposed to the level at which the grievor was complying with the requirements of her Plan. The inquiry into that was assisted by the existence of truly “objective” evidence, in the form of the company’s normal video-taping of the workplace (reviewed by the company comprehensively only after the termination had taken

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place), as well as photographs taken by the grievor's fellow employees to demonstrate the degree of other employees' compliance with the "masking" policy (again after, and in reaction to, the termination of the grievor's employment). In simple terms that evidence convincingly demonstrates that the grievor was less than scrupulous at times in remembering to raise her mask, that her efforts in that regard significantly declined in mid to late October (as she has here acknowledged), and that there similarly were numerous other employees who were less than scrupulous about wearing the mask, at least in a proper fashion, when engaged in close proximity with other employees. The photographs do catch at least one occasion where Mr. McCormack appears to totally ignore the fact that the employee he was conversing with was not wearing his mask; but I nonetheless accept Mr. McCormack's evidence that he in general worked hard at the difficult task of ensuring compliance with the masking policy amongst all staff in the plant, and generally providing direction to employees who were falling short, as he did with the grievor.

That said, a very big difference between the treatment by the company of these other employees versus that of the grievor is its ultimate response to the problem. To the end of October when the grievor was terminated the record shows NO formal action being taken by the company against any other employee, and even from November onward the incidents of discipline show no more than verbal or occasionally written warnings.

The grievor on the other hand was given no indication that she was on a disciplinary path that could lead to her termination until the letter of termination itself was handed across to her. The company's explanation for that was that "we don't discipline people for their inability to meet their accommodation plan". That is fair enough, from a "disciplinary" point of view; but one of the fundamental requirements of the recognized ability of employers to end an employment relationship based on "innocent" absenteeism or incapacity is appropriate warning that termination may be imminent. As Arbitrator Michel Picher, for example, notes in *CPR and the Brotherhood of Maintenance Employees,* Canadian Railway Office Case No. 3396 (Noel):

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> This Office accepts that it may, in the proper circumstance, be appropriate for an employer to terminate an employee for innocent absenteeism, even though that individual may be disabled and be owed a duty of reasonable accommodation. In that circumstance, however, procedure is of the essence. As part of the continuing duty of accommodation it is essential that the employer make all reasonable efforts to verify, prior to the point of discharge, whether the person in question can be accommodated. Given the decision of the Supreme Court of Canada in *Renaud*, that inquiry necessitates reasonable notice to the employee and to his bargaining agent.

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The kind of "counselling" that the grievor was receiving on a regular basis was no different than what was occurring with other employees -- but with dramatically different results. And those warnings were taking place against the backdrop of an ongoing dialogue between the parties as to whether a more appropriate form of accommodation might exist around the position that the grievor was otherwise entitled to, being the Second position that she had successfully posted into on the Hycorr.

The Union provided detailed evidence on that, primarily through the evidence of Sean Harrington. Mr. Harrington, the grievor's steward throughout this relevant time period, joined the company in 2001 and since that time has worked on virtually every machine in the plant, including the Second and the Operator position on the Hycorr 78. He testified that the 78 is one of the most isolated machines in the plant, being located toward the outer end of the line of machines, between the Ward and the 113 (as the plant schematic demonstrates). He is currently the night-shift Operator on the 113, and noted that the Ward machine does not operate on nights. He added that the 78 is located on the drive side of the 113, meaning that the only time any of the crew might come around to that side, anywhere close to the position of the grievor, would be once or twice a night for a matter of seconds to fill the ink pot. As for the 78 itself, he testified that the Operator and the Second are essentially at opposite ends, coming together only to look over the night's Order form as needed. And in that regard, he noted, there typically are multiple copies made

of the Order form, and each of the two crew members could easily be looking at their own copy. Other than that, Mr. Harrington testified, the Operator and Second each do their own set up, as required during a particular shift, on their own separate areas of the machine. That leaves the question, frequently adverted to by the company, of the initial training of the grievor, and Mr. Harrington was emphatic that that could be worked out between the Operator and the grievor in a way that did not violate the terms of the Return to Work Plan. The job of the second for the most part consists of feeding the machine, and Mr. Harrington added in uncontradicted evidence that the company at times will put "temps" on that job with no training whatsoever.

The company, on the other hand, called very little direct evidence on the point. Mr. McCormack expressed some views in an internal email, but the Union was not brought into that discussion, and Mr. McCormack did not speak to the point in his evidence, other than noting in response to Union counsel that the training the grievor had received on another of the machines, the Martin, would not put her in a position to simply step into the Hycorr job because the latter was much less automated. Mr. McCormack was also not part of the discussion at the more senior level of bringing an end to the grievor's employment, other than providing the specific answers shown to the questions that were put to him, and he was not consulted on the timing. The only other oral evidence from the company on this training question was given by Ms. White; while Ms. White was clearly the company lead on dealing with the Union and the grievor's accommodation request, not being on the Operations side she had no direct knowledge of the machine, and simply conveyed the various concerns of the Plant Manager Mr. Santin as they were expressed to her. It is of significance, therefore, that the company elected not to put Mr. Santin on the witness stand, and expose to cross-examination his various concerns about the grievor assuming her position on the Hycorr.

In sum, on the weight of the evidence I do not find the company to have demonstrated unequivocally that accommodation of the grievor's restrictions on her own job on the Hycorr 78 was not a viable option for discussion, prior to

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coming to the unilateral conclusion that the grievor's employment contract had been "frustrated". This is not a matter, in the well-known words of *Renaud*, [1992] 2 S.C.R. 970, of demanding a "perfect" accommodation, as opposed to a "reasonable" one (although, it may be added, demotion to a much lower-rated job would be a consideration as to "reasonableness" as well). As noted by Arbitrator Picher in the Railway case, the Court also noted in *Renaud*, at paragraph 43: "The search for accommodation is a multi-party inquiry". The issue here is one of process, and it is in that regard that I find the company to have failed to meet its legal obligations at the point of termination.

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Nothing in this award should be taken as minimizing the challenge that the employer, and all similar employers, have faced during the potentially-lethal effects of the COVID epidemic. The grievor, the employer never disputed, has a genuine medical disability that requires accommodation to the point of undue hardship. In COVID, however, the notion of undue hardship takes on a whole new meaning. While accommodations in the past have often had to consider the effect on, and risks to, other employees, in COVID those considerations rise to a whole new level, as the bulletins from the local Health Unit repeatedly point out. As the employer notes, that counter-balancing risk even the Guidelines of the Ontario Human Rights Commission itself set out:

> 9.2.3...
>
> If an accommodation is likely to cause significant health and safety risks, this could be considered "undue hardship."
>
> www.ohrc.on.ca/en/book/export/html/18436

It comes down to the level of risk, and it is apparent from the evidence the effort the employer, and in particular Ms. White, was going to in trying to fashion a response that would allow the grievor to maintain income, without jeopardizing the remainder of the plant's employees. With respect to the Plan itself, whatever she did or did not say to Mr. McCormack, I have no doubt that the grievor was *not* happy with the answers she received to her questions -- the answer on pay

rate in itself makes that obvious. Nor do I doubt that the reason the grievor nonetheless signed off on the Plan was that she was told unequivocally that this was the only way she was coming back to work. From a financial point of view the grievor clearly *was* under duress to accept an offer that she did not consider reasonable; but it also can be seen from the evidence that she, initially at least, did not adopt a hostile tone or otherwise challenge it. And the Union signed off on it as well. It is not surprising, therefore, that Ms. White, for a period at least, believed that the situation had been resolved -- to the extent that that could be said when the Plan itself was characterized as a "trial", to be "monitored and assessed" at least weekly.

What *is* surprising, given the efforts that Ms. White otherwise had been making, is that, when difficulties clearly were being encountered under the Plan as it existed, there was no follow-up with the Union to say that the employer's tolerance under that Plan was at an end, notwithstanding Ms. White's representation to Ms. Marks in her email of September 16th. That email, putting forward the Plan being proposed by the employer, once again stated:

> While this may not be the perfect accommodation, I think it is reasonable & we will make best efforts to work through any issues jointly.

By acting unilaterally, the employer obviously foreclosed discussion of any other possible options for the grievor. More critically, however, this collective agreement provides both a short- and long-term disability plan, and the employer's immediate declaration of "frustration" (which probably captures quite accurately the employer's feelings toward the grievor at that point) also foreclosed any opportunity for the grievor to seek the benefit of those. The case law is clear on the consequence of that.

In perhaps the leading case on the point, Arbitrator Whitaker (as he then was) in *Maple Leaf Meats and UFCW, Local 175,* 2001 O.L.L.A. No. 43, surveyed the case law and summarized his conclusions as follows:

> **44** In my view, there are three propositions that may be distilled from the preceding review of authorities:

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1. A discharge for innocent absenteeism is in fact a discharge for cause. Although not based on culpable conduct, the "cause" is a frustration of the basis of the employment contract – the exchange of labour for compensation; An employer's obligations under the Code do not necessarily preclude a discharge for innocent absenteeism;

2. An employer may not discharge for innocent absenteeism where the discharge will preclude entitlement for a benefit that has not yet vested but is intended by the parties to be triggered by an inability to attend at work.
(emphasis added)

The employer here was, accordingly, in trouble coming out of the gate. In short, there was, as set out above, a good deal left to talk about, before the company was in a position to declare the grievor's contract of employment to have been "frustrated".

It is accordingly my order that the grievor be re-instated forthwith as an employee with the company, to enable consideration and discussion of the possible options for the grievor that I have enumerated in the paragraphs above. Any question of damages will be left to a further stage of the decision, should such additional decision prove necessary. The parties in the interim are directed to meet and, with regard to the findings and order made in this initial award, attempt to come to a resolution of all issues. The parties are to advise me before the date specified in the accompanying email of their success on any of the issues, and should success not be complete, I will proceed to render a final decision on any issues that remain outstanding.

Dated at Toronto this 6th day of July, 2021

Sole Arbitrator

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HUMAN RIGHTS TRIBUNAL OF ALBERTA

Citation: Pelletier v 1226309 Alberta Ltd. o/a Community Natural Foods, 2021 AHRC 192

BETWEEN:

David Pelletier

Complainant

- and -

1226309 Alberta Ltd. o/a Community Natural Foods

Respondent

SECTION 26 DECISION
ALBERTA HUMAN RIGHTS ACT

Member of the Commission: Michael Gottheil

Decision Date: November 12, 2021

File Number: S2021/02/0406

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Facts and Arguments

[1] The complainant, David Pelletier, alleges that the respondent, 1226309 Alberta Ltd. o/a Community Natural Foods, discriminated in the area of goods, services and accommodation on the grounds of physical disability and religious beliefs (the Complaint), in contravention of section 4 of the *Alberta Human Rights Act* (the *Act*).[1]

[2] The complainant is an individual who identifies as someone who is "medically exempt" from wearing a face mask. In addition, he alleges that wearing a face mask infringes his religious beliefs. He was a long-standing customer at the respondent's store. The essence of the Complaint is that the respondent's face mask policy, introduced in late January 2021, infringes his rights. He also argues that the accommodations offered by the respondent for those who cannot or choose not to wear face masks on entering the store (on-line shopping, home delivery, personal shoppers) were inadequate, unreasonable, and do not justify the infringement of his right to be free from discrimination.

[3] For the reasons that follow, I find this review should be dismissed.

[4] On January 31, 2021, the complainant attended the respondent's store. On arrival, he was told that he would be required to put on a face mask in order to enter the store. He objected, and said that he was medically exempt from wearing a face mask. The following day, he escalated his concern to the store General Manager, who confirmed that the respondent's new policy was that all persons over the age of 2 years old entering the store were required to wear a face mask. There were no exemptions. Persons who could not wear a face mask, for example due to medical reasons, or chose not to wear a mask, were offered alternatives, such as on-line shopping, home delivery, curb-side pick up, or the use of a personal shopper who would put together a customer's order.

[5] Prior to January 29, 2021, the respondent's policy provided that persons who were unable to wear a face mask because of a disability could enter the store without masks. The respondent states that this policy became untenable, as it created arguments and confrontations between customers, and between customers and staff. As a result, it decided to implement a "no exemption" policy, instead offering accommodations for those who could not or chose not to wear masks.

[6] The complainant filed this Complaint on February 1, 2021. He argues that the policy is discriminatory and contrary to the Calgary municipal bylaw that recognizes exemptions for those who are medically unable to wear face masks. He also argues that the accommodations offered by the respondent do not work for him. The complainant states that he does not use computers or the Internet, he cannot afford to have home delivery or use personal shopping, and that even with the personal shopper option, customers cannot browse the aisles, and must put on a face mask and enter the store in order to pay for their order. He states that he cannot wear a face mask, even for "a second or a minute."

[1] *Alberta Human Rights Act*, RSA 2000, c A-25.5

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[7] The complainant further argues that requiring him to wear a face mask is contrary to his religious beliefs. He states that "God created me in his own image and if he cannot see that image because it is covered with a face mask then I have committed sacrilege."

[8] The Commission accepted the Complaint only on the ground of disability. It appears that because of an administrative error on the part of the Commission, the Complaint did not immediately come to the respondent's attention. After receiving the Complaint, the respondent requested an extension to file its response, which was granted.

[9] The respondent argues that its mask policy was instituted in response to the global COVID-19 pandemic, and was aimed at protecting the health and safety of staff, customers and the general public. It submits that the policy was justified in the circumstances, and it provided accommodations for those who could not wear face masks. Contrary to the assertions of the complainant, it says that the alternatives to in-store shopping were offered free of charge to person who were medically exempt from wearing face masks.

Director's Decision

[10] A Human Rights Officer (Investigator) prepared an investigation memo recommending to the Director of the Commission (Director) that the Complaint be dismissed.

[11] In submissions to the Investigator, the complainant argued that the respondent had not filed its response within the time limits set out in the Commission's Bylaws, and therefore should not be considered. He argued that his claim should be accepted, and the Director should grant the remedies set out in his complaint.

[12] The Director agreed with the Investigator's recommendations, and dismissed the Complaint.

Request for Review

[13] The complainant filed a Request for Review of the Director's decision. He re-iterated his previous arguments. He again submitted that the respondent failed to file a response within 30 days of receipt of the Complaint. He argued that the Director and Investigator did not have the authority to grant the respondent an extension to file its response, or should not have done so in the circumstances.

[14] The complainant also took issue with the failure of the Director and respondent to address his claim of discrimination on the ground of religious beliefs.

[15] The respondent provided a reply to the complainant's request for review. It denied that the complainant's claim amounted to discrimination on the ground of religious belief. It said that the complainant had a personal belief about the effectiveness of face masks in preventing the spread of COVID-19, but this was not sufficient to amount to a religious

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belief. It argued that, in any case, even if the complainant could establish that he experienced discrimination, the respondent provided reasonable accommodations.

Analysis and Decision

[16] Section 26(3) of the *Act* states: "The Chief of the Commission and Tribunals shall … review the record of the director's decision and decide whether … the complaint should have been dismissed." In this review of the record before me, I must decide whether there is a reasonable basis in the evidence for proceeding to a hearing before a Tribunal.[2]

[17] In my view, there are several reasons why this review must fail. First, while the complainant takes issue with the Director granting the respondent's request for an extension to file its response, and to consider the response because it was allegedly filed out of time, under a section 26 request, the Chief does not review the process undertaken by the Director. A section 26 review provides for a fresh assessment of the information, not an inquiry into the investigation or whether the Director's process was procedurally fair. Any alleged unfairness will be cured by the parties having a full opportunity to make their submissions to the Chief or their designate.

[18] In any event, the Director has no authority to "grant" a complaint or award remedies. Pursuant to section 22 of the *Act*, the Director's powers are restricted to attempting to settle a complaint, dismissing the complaint, discontinuing a complaint where the complainant has failed to accept a reasonable offer of settlement, or referring it to the Tribunal for a hearing. Therefore, the complainant's argument that the Director ought to have found in his favour, and ordered remedies against the respondent, is without merit.

[19] Second, the complainant misunderstands the effect of the Calgary face mask bylaw, and its relevance to whether the respondent's policy violates his rights under the *Act*. While the bylaw provides for exemptions based on, amongst other reasons, disabilities, it does not prohibit businesses from establishing their own policies. It does not prohibit businesses from requiring all persons to wear face masks, including those who may have disability-related grounds for not doing so. It does not force, as the complainant argues, businesses to allow persons who may be medically unable to wear face masks to enter premises without wearing face masks. The exemption in the bylaw provides a defense to a charge that a person has violated the bylaw. It bestows no positive right to enter a business without a mask.

[20] In addition, the Calgary bylaw does not create any right enforceable under the *Act*. The *Act* and the municipal bylaw are two separate legal schemes. It may be that in considering the circumstances surrounding an alleged violation of the *Act*, the Commission or Tribunal may have regard to a municipal bylaw, policy or regulation where relevant. Where there is a conflict, the *Act* will take precedence. There is not, however, any conflict here.

[2] *Mis v Alberta Human Rights Commission*, 2001 ABCA 212 at paras 8 & 9; *Economic Development v Wong*, 2005 ABCA 278 at para 16 - 20

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[21] Third, in my view, the complainant has not provided sufficient information or argument that there is a reasonable basis for his complaint to proceed to a full hearing. Under human rights law, the analysis begins with the complainant establishing a "*prima facie* case" of discrimination. In order to do this, the complainant must demonstrate that: a) they have a characteristic protected by the *Act* (for example, a disability or a religious belief), b) that they experience adverse treatment, and c) that the characteristic was at least a factor in the adverse treatment.[3] If the complainant can establish these three elements, then the onus shifts to the respondent to demonstrate that: a) the policy, rule or practice is rationally connected to a legitimate business purpose, b) that it was adopted in good faith, and c) that it is impossible to accommodate the complainant, without incurring undue hardship.[4]

[22] In this case, the respondent did not dispute that the complainant was a person with a disability, and was negatively affected by its policy. It does dispute that the complainant can establish a claim of discrimination on the ground of religion.

[23] Notwithstanding, the respondent argues that even if the complainant could establish discrimination on both grounds, its policy was justified, and it provided reasonable accommodations. I agree with the respondent, and so need not decide whether there is a reasonable basis in the information to establish a *prima facie* case of discrimination. I would, however, make the following observations.

[24] While the complainant asserts that he has a disability that prevents him from wearing a mask, the only evidence he has provided is a note from a physician that reads: "The above named patient, David Pelletier is medically exempt from wearing a mask due to a medical condition."

[25] The note provides no indication of the nature of any disability, or on what basis any diagnosis was made. There are no details about the particular restriction, or to support that, as the complainant asserts, if he wears a mask, even "for a second or a minute", he will become immediately and violently ill.

[26] I do not mean to suggest that the complainant may not have a disability that would restrict him from using a face mask. Neither do I suggest that in order to seek accommodation from a service provider or employer, an individual must first produce a comprehensive medical report. Where an individual asserts that they have a disability-related restriction, or provides a brief medical note, the service provider or employer may have a duty to inquire further. Practically, the service provider or employer, as with the respondent in this case, may simply accept the complainant's claim at face value, and move to justifying the impugned policy and proposing accommodations. However, where an individual files a human rights complaint, and seeks to have that complaint adjudicated

[3] *Moore v British Columbia (Education),* 2012 SCC 61

[4] *British Columbia (Public Service Employee Relations Commission) v BCGSEU,* 1999 CanLII 652 (SCC), [1999] 3 SCR 3; *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights*), 1999 CanLII 646 (SCC)

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by a Tribunal in order to obtain monetary and other redress, they require more than the type of note provided here. Without making any finding that would apply in all cases, the Tribunal would need something more than a note that indicates the person is "medically exempt because of a medical condition." For example, there should be information that certifies that the individual has been diagnosed with a disability, the nature of the disability, and the nature and scope of the restrictions that flow from that disability. Ideally, it should set out the accommodations the individual requires.

[27] Again, I do not mean to suggest that all this information must be provided to a service provider or employer in every case. There will be potential, legitimate privacy and other practical considerations. An employer or service provider will not generally be entitled to know personal medical information or a medical diagnosis. Still, in order to establish a contravention of the *Act*, the complainant must establish that they have a disability, and that the nature of the disability is a factor in the alleged adverse treatment or barrier to equitable service.

[28] On the question of discrimination on the ground of religious beliefs, it is not at all clear that the complainant has provided sufficient information to support his claim.

[29] The complainant argues that his right to freedom of religion, thought and conscience are protected by the Canadian *Charter of Rights and Freedoms*. It is important to note that the protections in the *Charter* are broader than those in the *Act*. For example, there is no protection in the *Act* for political thought or freedom of conscience. There is protection from discrimination on the ground of religion, but that concept is narrower than thought or conscience.

[30] As noted earlier, the complainant says: "My religious beliefs do not permit me to wear a face mask or face covering of any kind. God created me in his own image and if he cannot see that image because it is covered with a face mask then I have committed sacrilege."

[31] In his request for review, he expands on the basis for the claim:

> My faith instructs me that however well-meaning government health provisions are, they may conflict with my personal conscientious convictions and when they do, I am to choose the later [*sic*]. This is the present case. Daniel 1:5-8
> My faith instructs me that even when government officials think my choices will make me sick or put other lives in danger, I need to follow conscientious conviction. Daniel 1:10
> My faith instructs me that my obligations [*sic*] to my community is love. I am to love others as I love myself. The wearing of face masks encourages others around me that this face mask wearing is safe and best for them. It communicates a message that I am not convinced is true. And therefore, it is not a loving act towards my community. Romans 13:8

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[32] The respondent argues that the complainant's assertions are almost identical to those in a recent British Columbia Human Rights Tribunal decision, where a complaint on the ground of religious belief was dismissed. In *The Worker* v *The District Managers,*[5] the Tribunal wrote:

> [9] I turn then to the question of the Worker's religious belief and its connection to the adverse impact. Under human rights legislation, protection of a religious belief or practice is triggered when a person can show that they sincerely believe that the belief or practice (a) has a connection with religion; and (b) is "experientially religious in nature": *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at para. 69.
>
> [10] The Worker describes his religious belief as follows: "We are all made in the image of God, a big part of our image that we all identify with is our face. To cover-up our face arbitrarily dishonors God". The Worker says it is his freedom of expression to show his face in the general public and his religious liberty to identify his face to others. He says the mask requirement infringes on his "God given ability to breath". The Worker does not believe that mask wearing is effective. He says, "God makes truth of high importance that I must follow ethically and morally", "forced mask wearing does not help protect anyone from viruses", and, therefore, he cannot "live in that lie". On this point, he continues (as written):
>
> > The BC health provincial health office even stated the order was not being put into place for safety reasons, but because business pushed her to enforce it. Furthermore there is no case that this is safety issue and any of the data shows no difference where masks where enforced, in fact the opposite is true that cases went up. The studies that have been on masks show no reason to wear them in general public and that has been repeated by health professional around the world.
>
> [11] <u>These facts, if proven, could not establish that the Worker's objection to wearing a mask is "experientially religious in nature". He has not pointed to any facts that could support a finding that wearing a mask is objectively or subjectively prohibited by any particular religion, or that not wearing a mask "engenders a personal, subjective connection to the divine or the subject or object of [his] spiritual faith": *Amselem* at para. 43.</u> Rather, his objection to wearing a mask is his opinion that doing so is "arbitrary" because it does not stop the transmission of COVID-19. As set out in *The Customer*, that view is not protected under the *Code*:
>
> > The *Code* does not protect people who refuse to wear a mask as a matter of personal preference, because they believe wearing a

[5] *The Worker* v *The District Managers,* 2021 BCHRT 41

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> mask is “pointless”, or because they disagree that wearing masks helps to protect the public during the pandemic. … (para. 14)
>
> The Worker’s opinion that masks are ineffective is not a belief or practice protected from discrimination on the basis of religion. While the Worker states his belief that it dishonours God to cover his face absent a basis for doing so, the Workers’ complaints, in essence, are about his disagreement with the reasons for the mask-wearing requirement set out in the Orders. [Emphasis added]

[33] Like the complainant in the above cited case, the complainant here sets out at length why he believes the masking policy is unwarranted. For example, in his initial complaint and other submissions, he writes:

> I stated that all your employees are protected as they are wearing a mask so if you do not think that face masks are protecting you and your staff and employees ten you shoud [*sic*] not be wearing them. I stated I have no cold, flu or symptoms. That I have been a long time customer of this store for over 20 years and that I have not worn a face mask all year and have had no issues contracting any covid or sickness.
>
> …
>
> By denying my entry and to physically shop in their store they are alleging that I infected and sick with covid. For anybody or business that can believe such nonsense that you can have a cold, flu or disease or virus and not have or show any symptoms is beyond comprehension. If a person is feeling ill they were to stay home. So the statement that CNF makes that wearing a mask is protecting other persons not just the wearer is absurd. If your [*sic*] sick and wearing a face mask then you are protected from spreading and you are protecting other non face mask wearers. So if I do not have an issue or concern not wearing a face mask or contracting a cold, flu or virus as I have an impeccable immune system then why should CNF have any concerns of me not wearing a face mask especially when I am to be protected under the law and rights of medical exemption.
>
> There are current law suits against the Canadian Government and AHS as they did not provide evidence of these forced restrictions benefiting the people. The wearing of faces mask bylaw was merely a preventative measure put in place to help try to reduce the spread. However is persons were sick they were to self quarantine at home. Furthermore the wearing of a face mask was not a guarantee that it would stop the spread or protect the wearer. So the face masks are useless.

[34] The essence of the complainant’s claim is that he believes he is medically exempt from wearing a face mask, and that face masks are not an effective measure to prevent the spread of COVID-19.

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[35] The complainant does not identify what religion or faith tradition he follows. He refers to passages from two Books of the Bible, but those verses do not appear to relate to a tenet or practice of not covering one's face. I accept that the jurisprudence on the question of religious beliefs does not require adherence to a "mainstream" religious faith, or to demonstrate that all persons of that faith share the same beliefs. I also acknowledge that the complainant asserts that he believes that it is sacrilege to cover one's face, but apart from that assertion, he does not explain how that belief is tied to any particular religion, how it is religious in nature, or that the requirement to cover his face restricts his ability to practice his religious faith. In *Law Society of British Columbia v. Trinity Western University*,[6] the Supreme Court summarized the elements of a claim based on religious freedom:

> [62] This Court has adopted a broad and purposive approach to interpreting freedom of religion under the *Charter*. This encompasses "the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination" (*R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295, at p. 336).
>
> [63] Section *2*(*a*) of the *Charter* is limited when the claimant demonstrates two things: first, that he or she sincerely believes in a practice or belief that has a nexus with religion; and second, that the impugned state conduct interferes, in a manner that is more than trivial or insubstantial, with his or her ability to act in accordance with that practice or belief (*Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 65; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations*), 2017 SCC 54, [2017] 2 S.C.R. 386, at para. 68)
>
> …
>
> [70] Because s. 2(*a*) protects beliefs which are sincerely held by the claimant, the court must "ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice" (*Amselem*, at para. 52; see also *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 35). [emphasis added]

[36] It is clear from all of the above that an individual must do more than identify a particular belief, claim that it is sincerely held, and claim that it is religious in nature. This is not sufficient to assert discrimination under the Act. They must provide a sufficient objective basis to establish that the belief is a tenet of a religious faith (whether or not it

[6] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293

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is widely adopted by others of the faith), and that it is a fundamental or important part of expressing that faith.

[37] Turning to the question of justification and accommodation, assuming a *prima facie* case of discrimination, on the information before me the respondent has demonstrated that its actions were reasonable and justified.

[38] First, while the complainant argues that there is no scientific or public health reason for the respondent's policy, he provides no evidence, other than his own assertions, to support this view. Therefore, there is no basis, on the information before me, that the respondent's policy was adopted in bad faith, or that it had no legitimate business rationale.

[39] Second, the respondent's policy provides for alternatives to in-store shopping for those who cannot, because of human rights grounds, wear a mask. The complainant states that the option of on-line shopping does not assist him, since he does not use computers or the Internet. It is apparent that the complainant has access to mobile services and email connectivity. It is not entirely clear how or why he cannot use the respondent's on-line shopping option. He says that he cannot afford home delivery, or curb-side pick-up. The respondent's policy provides that these options are free of charge for persons who cannot wear masks because of a disability.

[40] The respondent provided "personal shoppers", where a customer provides a staff member with a list of items to be purchased, and the customer then enters the store briefly, albeit wearing a face mask, to pay for the items. The complainant states that this option is not available to him. The complainant states that he cannot wear a mask, even for a minute, since he will become immediately, violently ill. He provides no evidence for this statement. He also argues that not being able to shop in person constitutes an undue hardship. In this regard, he writes:

> You can ask a personal shopper to get you milk and bread but you cannot have them walk up and down a grocery isle [*sic*] and show you what is on the shelves for you to make a determination of what you need or want to purchase. Again not possible without physically being in the store to look at all items for sale to make a purchasing decision. I need to physically be in the store to make a shopping determination.
>
> …
>
> I have stated that I do not use a computer so online shopping is irrelevant. AS [*sic*] is a personal shopper as then I am being limited to what I can remember to tell the individual to buy for me. I cannot look at a baking product and see what ingredients are required for that to be made when I am not in the store to read instructions on some products. Or just use my own determination on what products and baking supplies I may want to make in the future etc without physically seeing the products. It is impossible to shop for my own personal use without physically being in the store myself. If the

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Classification: Protected A

> store cannot accommodate a physical or mental handicap, then that store needs to be shut down and closed.

[41] There is no question that various public health measures and policies introduced by governments, businesses and institutions since the onset of the COVID-19 pandemic have caused inconvenience and hardship. The fact that an accommodation that limits an individual's ability to peruse grocery products, as a trade-off to limiting the spread of a disease that has reportedly caused the death of 5 million people worldwide, does not mean that it is unreasonable. Further, Courts and Tribunals have recognized that accommodations need not be perfect, or be the complainant's preferred accommodation.[7] Certainly, the duty on a service provider is to accommodate the needs of an individual to the point of undue hardship. However, the analysis must take all of the circumstances into account, and be applied with common sense.[8] Here, the respondent was operating in an environment of a world-wide pandemic, with evolving science and health requirements, and attempting to address competing concerns. I cannot find a reasonable basis in the information to refer this complaint to a Tribunal, in order to test whether the respondent failed to accommodate the complainant.

[42] Finally, before concluding, I wish to address one other argument put forward by the complainant. He argues that the respondent's policy restricting access to persons with disabilities is no different than restricting access to persons based on race. He writes:

> A business cannot simply state "No Colored people permitted but it is ok we are accommodating you by curbside pick-up or online shopping". This is out right the definition of discrimination. There is no difference from stating if you do not wear a face mask or you are a person of color that you are not permitted into our store.

[43] With respect, the complainant is incorrect. If the respondent had a policy restricting access to its store on the basis of race, before evaluating whether any accommodation was reasonable, the respondent would have to establish that the policy was legitimately connected to a valid business purpose, and was adopted in good faith. It is not clear what possible business purpose would be achieved by refusing entry to racialized individuals. In this case, the respondent argues, and I accept, that employee, customer and public health and safety are legitimate business purposes, and the policy is rationally connected to those objectives. Therefore, the case at hand is quite different than the case the complainant puts forward as an analogy.

[7] *Callan v Suncor Inc*., 2006 ABCA 15

[8] *Commission scolaire régionale de Chambly v Bergevin*, [1994] 2 SCR 525

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[44] Having reviewed all the information, and for the reasons above, there is no reasonable basis in the evidence to proceed to a hearing. I am therefore upholding the Director's decision to dismiss the Complaint.

November 12, 2021

Michael Gottheil
Chief of the Commission and Tribunals

2021 AHRC 192 (CanLII)

Written Submissions

David Pelletier, Complainant
Self-represented

Joshua Sadovnick, Norton Rose Fulbright Canada LLP
For the Respondent 1226309 Alberta Ltd. o/a Community Natural Foods

2021 AHRC 192 (CanLII)

British Columbia Human Rights Tribunal dismisses complaint alleging COVID-19 mask requirement interfered with worker's religious beliefs

In a recent decision, the British Columbia Human Rights Tribunal refused to proceed with a worker's complaint alleging that a mandatory COVID-19 mask policy was discriminatory on the basis of religion.

In the midst of the COVID-19 pandemic, the Government of British Columbia issued Ministerial Orders M425 and M012 requiring all persons to wear a face covering indoors, subject to certain exemptions.

A contract worker filed a human rights complaint against a facility after he was denied entry to the facility and his contract was subsequently terminated for refusing to wear a mask. The worker alleged that he had been discriminated against on the basis of religion, contrary to s.13 of the provincial *Human Rights Code*, since mask-wearing was against his "religious creed."

The worker explained that "[t]o cover ... our face arbitrarily dishono[u]rs God," and the mask requirement infringed on his "God[-] given ability to breathe." The worker also alleged that mask-wearing was ineffective, and it was against his faith to "live in that lie."

In a screening decision dated April 8, 2021, 2021 BCHRT 41 (CanLII), British Columbia Human Rights Tribunal member Steven Adamson refused to accept the complaint, finding that the worker had not demonstrated that his objection to mask-wearing was grounded in a sincerely held religious belief.

"[The worker] has not pointed to any facts that could support a finding that wearing a mask is objectively or subjectively prohibited by any particular religion, or that not wearing a mask 'engenders a personal, subjective connection to the divine or the subject or object of [his] spiritual faith,'" Adamson wrote. "Rather, his objection to wearing a mask is his opinion that doing so is 'arbitrary' because it does not stop the transmission of COVID-19. ... [T]hat view is not protected under the *Code*."

In reaching this conclusion, Adamson cited his earlier decision in *The Customer v. The Store*, 2021 BCHRT39 (CanLII), in which he similarly refused to proceed with a discrimination complaint brought by a customer who was denied entry to a grocery store because she refused to wear a face mask. Finding that the customer had not provided any evidence to support her

claim that mask-wearing caused her "breathing difficulties," or that her "anxiety" was grounded in a disability within the meaning of the *Code*, Adamson held that the customer failed to set out facts which could, if proven, establish discrimination.

In both decisions, Adamson stressed that an individual's opinion that masks are ineffective is not a belief or practice protected under the *Code*. "The *Code* does not protect people who refuse to wear a mask as a matter of personal preference, because they believe wearing a mask is 'pointless,' or because they disagree that wearing masks helps to protect the public during the pandemic," he wrote. "Rather, the *Code* only protects people from discrimination based on certain personal characteristics."

Accordingly, Adamson concluded in both cases that the complaints did not set out a possible contravention of the *Code*.

Case Name: *The Worker v. The District Managers*

Jurisdiction: British Columbia

Tribunal: British Columbia Human Rights Tribunal

Adjudicator: Steven Adamson, Member

Date: April 8, 2021

Citation: 2021 BCHRT 41 (CanLII)

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IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADA POST CORPORATION

("Corporation")

AND:

CANADIAN UNION OF POSTAL WORKERS

("Union")

IN THE MATTER OF:

APPLICATION FOR INTERLOCUTORY CEASE AND DESIST ORDER IN RELATION TO CUPW GRIEVANCE NO. N00-20-00008

ARBITRATOR:

Kevin M. Burkett

APPEARANCES FOR THE CORPORATION:

Christopher Pigott	- Counsel
Lennie Lejasisaks	- Counsel
Rebecca Rossi	- Counsel
Grace Skowronski	- Senior Legal Counsel, Canada Post

APPEARANCES FOR THE UNION:

Jackie Esmonde	- Counsel
Kylie Sier	- Counsel
Jan Simpson	- National President, CUPW
Carl Girouard	- National Grievance Officer, CUPW

AWARD

I have before me a cease and desist application filed under article 9 of the collective agreement. There is no challenge to my jurisdiction to hear and determine this matter.

The cease and desist application before me arises out of the imposition of a mandatory vaccine policy by the Corporation. The Corporation announced that, effective Friday, November 26, 2021, all bargaining unit employees (indeed, all employees of the Corporation) must attest to having been fully vaccinated or partially vaccinated failing which, unless unable to be vaccinated, employees will be "restricted from attending at work, including remotely, and placed on leave without pay after November 26, 2021, or if the employee is not actively at work when they provided such attestation, on the expected date of return to work." This sanction, therefore, would apply to the group of employees who "attest to being unwilling to be fully vaccinated."

The parties are agreed that under article 9.93 the two relevant criteria for the issuing of a cease and desist order in this case are:

- Firstly, the balance of inconvenience must favour the granting of such an order;

- Secondly, that without such an order the consequences of the contravention would be severe and could not be eventually corrected or compensated adequately, i.e. reparable harm versus irreparable harm.

It is important to emphasize that this is not a hearing on the merits and that nothing herein should be taken as speaking to the merits. Indeed, the brevity of this decision reflects the need to address the narrow issues that pertain to whether or not a cease and desist order should be granted without influencing the substantive determination that will be made after a full hearing before another arbitrator.

The Union argues that there is a much less coercive alternative to the mandatory vaccination policy that is being imposed upon unwilling employees by the Corporation – an alternative that would satisfy the same health and safety objectives. The Union proposes that those unwilling to be vaccinated be required to undergo a self-administered antigen test (quick test) prior to each shift so that there would be a high degree of certainty that they are not coming to work infected. The Union points out that this is the same regime as proposed by Canada Post prior to the direction of the federal government to all Crown corporations to mirror the federal public service and impose a vaccine mandate and it is essentially the same regime as would apply to those under the policy who are willing but must await the second dose. The Union maintains that for many employees the threat of withholding income effectively removes any real choice and forces them to become vaccinated, an irreparable event. The Union tendered

employee evidence to establish the coercive effect and relied on the evidence of its expert witness to establish that a testing regime as proposed would satisfy the necessary health and safety objectives of minimizing employee transmission.

Two expert witnesses were called, one by each party. The Union expert is Dr. Colin Furness, a non-medical infection control epidemiologist and assistant professor at the University of Toronto. The Corporation expert is Dr. Mark Loeb, a medical doctor and professor at McMaster University in the Departments of Pathology and Molecular Medicine and Health Research Methods who holds the Michael G. De Groote Chair in Infectious Diseases. For our limited purpose, their evidence establishes:

- Vaccination is safe and effective (Furness and Loeb);
- There is a "significantly lower" risk of becoming infected with COVID-19 if a person is vaccinated (Furness and Loeb);
- Vaccination represents the most effective strategy to reduce transmission in a workplace such as Canada Post (Loeb);
- Rapid antigen testing is a better diagnostic test than screening tool (Loeb);
- Rapid antigen testing cannot be considered equivalent to vaccination as a means of reducing transmission (Loeb);
- The ideal frequency of testing is unknown and early infection might not be detected with rapid antigen testing (Loeb);
- The sensitivity of a rapid antigen test might be compromised if conducted by an untrained employee and not by laboratory or health care professionals (Loeb).

Two very recent court decisions that refused to grant injunctive relief from the *Amalgamated Transit Union, etc. and TTC Superior Court of Justice – Ontario (November 20, 2021), as yet unreported* and *Lavergne-Poitras and PMG Technologies (November 13, 2021) 2021 FC 1232.*

The Union argues that these judgements should not be followed because:

- Arbitrators under collective agreements have established their own jurisprudence that should govern. Specific reference is made to the award of arbitrator Swan between these parties (see *re: Canada Post and CUPW Natl Co. N00-12-00003, April 26, 2013)* wherein he found that an invasion of privacy constitutes an irreparable harm within the meaning of article 9 of this collective agreement and that the harm does not have to be the same for every member.

- The court in *TTC* mistakenly conflated two harms (loss of income and coerced invasion of body privacy).

- The *Lavergne-Poitras* judgement deals with a different claim of harm, i.e. loss of employment and stress.

The Union position, summarized, is that given the option of daily rapid testing, which was the initial Corporation response, the alternative of the vaccine mandate with

its specified consequences tilts the balance of convenience in its favour. Further, given the coerced invasion of bodily privacy, it is asserted that a case of irreparable harm has been made out.

The Corporation position, summarized, is that the Canada Post workplace is at risk given the evidence of 19 previous declared outbreaks, including the shutdown at the Gateway hub for a shift, the last of which was declared in September 2021. The Corporation, relying on the expert advice, points to the vaccine mandate, as compared to voluntary vaccination with self-administered daily rapid testing for the unwilling, as the most effective option. The position of the Corporation is that the court judgements cited are on all fours with this case, especially the *TTC* judgement of the Ontario Superior Court, and should be followed. As for the 2013 Swan award, the Corporation points to the caution therein that "the privacy of individuals sometimes must yield to other interests...." It is submitted that this is such a case. In the circumstances of a pandemic, where the federal government, in the interests of public safety, has advocated a vaccine mandate and where the evidence is that this is the most effective way of minimizing transmission, both tests (balance of convenience and irreparable harm) weigh in favour of denying the application for a cease and desist order.

I accept the court's definition of harm. The court in *TTC* reasoned, at paragraphs 50, 52, 75 and 77:

> [50] In my view, NOWU has mischaracterized the harm at issue. The harm which the employees may suffer is being placed on unpaid leave, or being terminated from employment, if they remain unvaccinated. They are

> not being forced to get vaccinated; they are being forced to choose between getting vaccinated and continuing to have an income on the one hand, or remaining unvaccinated and losing their income on the other.
>
> [52] Because I have concluded that the harm in this case is not the alleged violations of informed consent, bodily autonomy or the reasonable probability of personal injury from being coerced into becoming vaccinated, the expert evidence proposed by the parties with respect to the safety of vaccines is not relevant, and I need not address it, nor consider whether the experts ought to be qualified. No one is forced to get vaccinated.
>
> [75] Irreparable harm cannot exist for some employees and not others because they react differently to the same policy. As much as it is legally untenable to determine the court's jurisdiction on a case-by-case basis, it is equally untenable to ascertain irreparable harm in an application brought by a union on a member-by-member basis, importing a subjective element into the analysis.
>
> [77] Fundamentally, I do not accept that the TTC's vaccine mandate policy will force anyone to get vaccinated. It will force employees to choose between two alternatives when they do not like either of them. The choice is the individual's to make. Of course, each choice comes with its own consequences; that is the nature of choices.

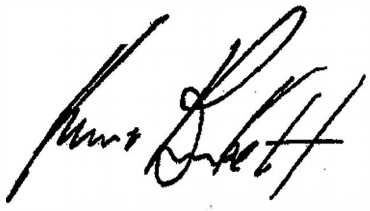
It follows from the foregoing that the harm in this case is harm that can be remedied by means of compensation, the restoration of seniority, etc. if a determination is made on the merits that the imposition of the mandatory vaccine policy constitutes an improper exercise of managerial discretion under the collective agreement. It is reparable harm.

The efficacy of the alternative means of accomplishing the necessary health and safety objectives, as proposed by the Union, is relevant to determining where the balance of convenience lies. In this case, it is clear on the evidence that the most efficacious means of accomplishing the necessary health and safety objectives is

through mandatory vaccination. Accordingly, for the narrow purpose of deciding whether or not to grant the injunctive relief sought (and not for the purpose of deciding whether the alternative sufficiently satisfies the health and safety objectives so as to outweigh the choice that has been forced on employees as a precondition to active employment in determining whether there has been a breach of the collective agreement), the balance of convenience must rest with the Corporation. This is so because a cease and desist order would result in an added risk to employees and the public, however small, of severe illness.

Having regard to all of the foregoing, the application for a cease and desist order is denied. Further, pursuant to my authority under article 9.97 of the collective agreement, I hereby order that this grievance be heard by way of priority in the same manner as described in article 9.96.

Dated this 30th day of November, 2021 in the City of Toronto.



KEVIN BURKETT

IN THE MATTER OF AN ARBITRATION

BETWEEN

HYDRO ONE INC.

("Hydro One")

and

POWER WORKERS' UNION

(the "PWU")

GRIEVANCE NUMBER: HO-P-136

CHIEF ARBITRATOR: John Stout

APPEARANCES:

For Hydro One:
Daniel McDonald, Norton Rose LLP
Samantha Black, Norton Rose LLP

For the PWU:
Donald K. Eady, Paliare Roland LLP
Lauren Pearce, Paliare Roland LLP

HEARING HELD BY VIDEOCONFERENCE ON NOVEMBER 21, 2021

AWARD

Introduction

[1] This matter concerns a grievance (HO-P-136) filed by the PWU challenging some aspects of Hydro One's COVID-19 Vaccination Policy (the "Policy"). The PWU is not challenging the overall reasonableness of the policy. Instead, the PWU has raised a number of concerns that it believes must be addressed to ensure that the Policy meets the requirements under *KVP Co. v. Lumber and Sawmill Worker's Union, Local 2537*, [1965] 16 L.A.C. 73 (the "*KVP* test").

[2] Hydro One is of the view that they have engaged in a collaborative consultative approach that reasonably and fairly balances the competing interests. It is their strongly held view that the Policy meets the *KVP* test.

[3] The parties filed extensive written briefs prior to the hearing that was held on November 21, 2021. Counsel made oral submissions at the hearing to supplement their written material. It was agreed that I could issue a bottom line award to resolve the dispute.

[4] Before addressing the concerns raised by the PWU, I wish to commend Hydro One for how they have addressed this very serious and delicate issue. Hydro One has acted reasonably by engaging the PWU in a consultative manner to formulate a Policy that carefully balances Hydro One's legitimate interests in providing a safe and healthy workplace and privacy rights. I also wish to applaud the PWU for supporting Hydro One's efforts in addressing this issue. These parties have both acted in good faith and in accordance with good labour relations by working together to resolve the vast majority of their differences. These parties have set an example that others ought to replicate as it saves time, costs and most importantly makes for peaceful and harmonious labour relations.

Decision

[5] Therefore, after carefully considering the parties submissions, I find, and order as follows:

I. Testing Costs

[6] I find that the award of Arbitrator Murray in *Ontario Power Generation and Power Workers Union (OPG-P-185)* dated November 12, 2021, provides guidance and is eminently reasonable. There are some individual considerations that must be taken into consideration based on Hydro One's operations. Therefore, I order as follows:

- Employees who have not confirmed that they are fully vaccinated are required to self-administer the rapid antigen test, and the cost of providing such tests is to be borne by Hydro One. This order is without prejudice to Hydro One being able to bring this issue back before me on 30-days' notice.

- Employees are required to self-administer rapid antigen tests on their own time, prior to reporting to work, and are not entitled to compensation for the time spent in the administration of the test or in the reporting of the results. Hydro One will consider reasonable compensation, on a case by case basis, for those granted a medical or religious exemption for administering the rapid antigen tests. In addition, Hydro One will consider reasonable compensation, on a base-by-case basis, for those employees who are required to travel to obtain a PCR test. Any individual situation where the parties cannot agree on the reasonableness of how Hydro One has treated an individual employee may be brought before me at the monthly arbitration hearing.

II. Religious exemption

[7] Hydro One has advised that they have made the following amendments to the Policy:

> REQUIRED; Please describe below the belief(s) based on your religion and/or creed that preclude you from being vaccinated. Your response below should address the following questions:

1) What creed/religion do you belong to?
2) How long have you practiced your creed/religion?
3) Why does your belief in this creed/religion prevent you from being vaccinated against COVID-19?
4) Have you been vaccinated against any other illnesses? If so, why were those vaccinations permissible under your creed/religion?

Please also provide any documentation that my support your position that you are unable to be vaccinated due to your creed/religion. This could include, for example, an excerpt from your religious text, or a letter from your religious leader.

[8] I am satisfied that Hydro One's amendment clarifies and resolves any concerns raised by the PWU.

III. Hydro One use of medical information and privacy concerns

[9] Hydro One has clarified that they do not store any individual employee's QR code in their systems. Once Hydro One verifies the vaccination status of an employee, they delete the QR code. The timing for verification of vaccination status is a relatively short period of time. The only information retained on Hydro One systems is the notation that an employee is either subject to testing or they are not subject to testing.

[10] Hydro One has also clarified that managers are only informed whether or not an employee may or may not attend the workplace. Managers have no access to any medical information. In their brief, Hydro One explains the following:

> Practically speaking, on a day-to-day basis, this means that people managers only see the personal information of employees who report to them. Notably, the filtering function described in the User Guide for managers and Supervisors does not allow managers or supervisors to access the personal information of employees who do not report to them. The filtering function allows managers and supervisors to filter within their own teams so that they can narrow, for example, to solely view those employees who have submitted test results, rather than entire team list that

would also include vaccinated employees who do not need to submit to testing.

The Union's proposed limitations on the nature of information that may be accessed by managers and supervisors are unduly restrictive and would preclude Hydro One from ensuring the health and safety of the workplace. They are also without a foundation in law. The Union proposes that managers and supervisors solely require the following information: (i) whether the employee is in a testing program or not; and (ii) whether the employee is barred from the workplace on a particular day. However, this information is not sufficient. Managers and supervisors need to know that an employee's test results were negative to permit access to the workplace. Hydro One's policies and practices strike a reasonable balancing of interests in all the circumstances.

[11] I accept Hydro One's explanation in their brief as clarified at the hearing.

[12] Finally, Hydro One has acknowledged that they are not permitted to share any information they collect relating to this Policy externally, except as required by law.

IV. International access to medical information

[13] Hydro One has clarified that the security of employees' personal information is not compromised by Hydro One's relationship with its' service provider Qualtrics. Hydro One collects employees' personal information via a tracking tool, and this information is solely stored in Canada unless an employee decides to access their application outside of the country. Hydro One is not requiring employees to consent to the disclosure of their personal medical information to Qualtrics. Hydro One's international service providers do not have access to any medical information, the only information that they may have access to involving the Policy is the self-report of an employee and not the actual medical information or testing results. In addition, Hydro One has agreements in place with their external international service providers that protects information that may be shared with them.

[14] I am satisfied that Hydro One has generally taken reasonable measures to protect employee's personal medical information.

[15] Hydro One has undertaken to advise individual employees and the PWU if there is ever a data breach with respect to the information. In the event of such a situation arising and the parties cannot resolve the issue between them through the grievance procedure, then the matter may be brought before me.

V. Consequences for non-compliance

[16] Arbitrator Murray also addressed this very issue in his *Ontario Power Generation and Power Workers Union (OPG-P-185), supra,* award. I agree with Arbitrator Murray that Article 2A.3 does not apply to this unique situation that has occurred during a global pandemic, the likes of which we have not seen in over 100 years. It could not have been contemplated by the parties that such a global pandemic would occur, resulting in the unprecedented event of employees being required to either be vaccinated or undertake testing in order to provide a safe and healthy workplace. Therefore, I also find that on a without prejudice basis Article 2A.3 does not apply to this unique situation and nothing in this award should lead anyone to believe that the traditional interpretation and application of Article 2A.3 should not continue and apply in all other circumstances.

[17] Similar to the cost of testing, there are some unique Hydro One issues that need to be clarified. In this regard, it has been agreed that Hydro One will maintain the *status quo* with respect to the six employees currently on unpaid leaves due to their refusal to confirm their vaccination status or have not completed testing as required by the Policy. These issues that need to be clarified shall be brought back before me on December 6, 2021. In the meantime, the PWU will speak to these six individuals and hopefully they will agree to comply with the Policy, rendering these issues moot.

[18] I remain seized to address any issue fairly raised by the grievance and not addressed in this award, including implementation of my award.

Dated at Toronto, Ontario this 22nd day of November 2021.

John Stout- Chief Arbitrator

Employee not entitled to compensation during quarantine, but employer cannot require that she draw from sick bank, arbitrator rules

An Ontario arbitrator ruled that an employee was not entitled to be paid during her time off work while she was required to remain at home for 14 days after being outside the country when the COVID-19 pandemic was declared. The arbitrator held that the employer's instruction to the employee to do so was reasonable despite the fact that, at the time, no health directives barred her from returning to work. He also held that she was not entitled to payment while off work through the collective agreement. The arbitrator did allow the grievance in part, declaring that the employer had breached the collective agreement by imposing a policy requiring full-time employees to draw from their sick bank while off work for COVID-related reasons. However, the employee was left without a satisfactory remedy as the arbitrator held that the policy itself was not unreasonable or discriminatory in its application.

The Facts:

When an employee was instructed to self-isolate at home after she returned from vacation shortly after the global COVID-19 pandemic was declared and was forced to draw from her sick bank while she was off work, the union filed a grievance.

Carolann Moynahan began working as a library assistant for the Municipality of Chatham-Kent at the Chatham Library's main branch in 2003. On February 29, 2020, Moynahan began a two-week vacation in Mexico and was not in Canada when the World Health Organization declared COVID-19 a global pandemic on March 11, 2020. After returning to Canada on Saturday, March 14, 2020, Moynahan had several communications with her manager and human resources and received conflicting directions as the municipality was having difficulty keeping up with the emerging public health directives over the weekend. On March 14, 2020, the Public Health Agency of Canada issued a travel advisory, which included a directive that all people travelling outside the country self-isolate for 14 days upon their return to Canada. Moynahan was initially told that she could return to work on Monday morning. However, early Monday morning, she was instructed to remain off work pending further notice after the Chief Medical Officer of Health for Ontario issued a statement advising all non-essential workers returning from outside the country to self-isolate for 14 days. The employer notified Moynahan the next day that she would have to self-isolate for 14 days. On the same day, the Ontario government declared a province-wide state of emergency and ordered that all libraries close to the public. Staff continued

working on site, however, and Moynahan would have otherwise been permitted to work at the branch. On March 24, 2020, the Government of Canada issued an Order in Council requiring mandatory isolation for a period of 14 days for anyone entering Canada.

During Moynahan's quarantine period, which lasted until March 30, 2020, the employer introduced an Income Protection Policy (IPP), which was designed to compensate municipal employees who were unable to work for COVID-related reasons. The policy required full-time employees to exhaust their sick bank before receiving any compensation through the IPP, but part-time employees, who did not accrue sick time, had immediate access to compensation. As a result, Moynahan, who worked full time, was forced to use 10 days from her sick bank for the working days during which she was self-isolating and did not receive any compensation through the IPP.

On March 24, 2020, the Canadian Union of Public Employees filed a grievance on Moynahan's behalf, challenging the reasonableness of the IPP and seeking credit for the 10 days that were drawn from her sick bank.

Article 12 of the collective agreement addressed layoffs, defined as "a reduction in the workforce or reduction in the regular hours of work for an employee." Article 12.02 provided that layoffs should occur in reverse order of seniority and entitled affected employees to bump a less senior employee, while Article 12.04 required the employer to provide employees laid off for three weeks or less with no less than two weeks' notice or pay in lieu thereof. As well, Article 13.02 of the collective agreement stated, in part, "Posted work schedule(s) for full-time employees shall not be changed with less than forty-eight (48) hours[’] notice, except by mutual agreement … or except for emergencies." Article 28.03 provided that in the event of "emergency conditions" that make it "necessary to close certain locations and/or halt certain library services, … the Employer will continue the employees' wages based on a regular working day for the period involved." Finally, Article 17.01 provided sick pay for "absences due to illness or non-work[-]related injury including dental and medical appointments."

The Arguments:

Emphasizing that no health directives barred Moynahan from returning to work on March 16, 2020, and that she was willing to work and was symptom free, the union argued that the quarantine period was effectively a layoff for which she was entitled to be paid in lieu of notice pursuant to Article 12.04. It also submitted that the employer had improperly changed Moynahan's hours of work with less than 48 hours' notice contrary to Article 13.02, and in the alternative, her wages should have been kept whole pursuant to Article 28.03. With respect to the IPP, the union submitted that the policy discriminated against Moynahan as a full-time employee by requiring that she exhaust her sick bank, a condition that did not apply to part-time

employees, and that this requirement also violated Article 17.01 by requiring full-time employees to draw from their sick banks for purposes unrelated to illness; therefore, the policy was an unreasonable exercise of management rights and in violation of the principles set out in *KVP Co. v. Lumber & Sawmill Workers' Union, Local 2537*, [1965] O.L.A.A. No. 2 (QL), for unilaterally imposed employer policies. The union also maintained that the quarantine policy had been applied inconsistently as the employer had allowed some employees who were out of the country to return to work without quarantining.

The municipality maintained that the instruction to Moynahan to self-isolate was a reasonable exercise of management rights based on the information that was available from health authorities at the time, and it argued that the fact that no public health directive mandating quarantine yet existed did not diminish its obligations under the provincial *Occupational Health and Safety Act* (*OHSA*) to take every reasonable precaution for the protection of its staff. In regard to the IPP, in addition to submitting that it was reasonable and denying that it was discriminatory, the employer argued that the policy was a gratuitous payment outside the collective agreement designed to provide income stability to its employees and that Moynahan was not entitled to be paid while she was off work under the collective agreement as she did not meet the criteria for being ill or injured. The employer also asserted that Moynahan was not laid off within the language of Article 12 as staff continued to work their regular hours despite the closure, and Article 28.03 was not applicable as Moynahan did not lose hours because of a closure due to an emergency such as severe weather; rather, she was off work due to her quarantine.

The Decision:

Arbitrator Colin Johnston allowed the grievance in part, ruling that Moynahan was not entitled to wages for the time that she was off work but that the requirement that she draw from her sick bank violated the collective agreement.

Johnston began by setting out "two central questions" arising from the grievance:

> The first [was] whether it was unreasonable for the Employer to direct the Grievor to stay home and quarantine before there was any clear mandate to do so; and whether the rule itself was applied inconsistently. The second question was whether the Grievor was entitled to be paid while she was off work either through the collective agreement or through the IPP; and whether the requirement to use her sick bank was in violation of the collective agreement.

With respect to the first question, Johnson cited the precautionary principle, which he noted was encapsulated in the *OHSA* by the requirement that an employer take every reasonable precaution in the circumstances for the protection of its staff. Johnston held that the employer's

instruction to Moynahan to self-isolate at home was reasonable despite the fact that a state of emergency was not declared by the province until the following day:

> Although [Moynahan] remained symptom-free, at the time she was asked to remain off work the Employer had a genuine concern that she could be [a] potential risk to other library staff. The fact that the Province did not declare a state of emergency until March 17 does not detract from the Employer's obligations under the *OHSA*. The Employer's decision to require her to remain off work beginning on March 16 was, in my view, reasonable in light of the precautionary principle.

He also held that the employer should not be faulted for not applying the same rule to the employees who had arrived home earlier, given the rapidly changing information at the time; thus, he held that the employer had not applied the rule arbitrarily.

In regard to whether Moynahan was entitled to be paid while she was off work under either the collective agreement or the IPP, Johnston noted that, because the IPP was outside the collective agreement, he had no authority to enforce its terms, as the payments made were therefore gratuitous and not based on any contractual obligation. However, he did have the authority to determine if the policy was unreasonable, discriminatory, or otherwise contrary to the collective agreement. Emphasizing that "[e]ntitlement to payment for time off work must be found in the collective agreement itself or exist as a statutory right," Johnston rejected the union's attempt to characterize the quarantine as a layoff. Determining that "[t]he meaning of the term 'layoff' must be understood within the context of the overall language of the provision," Johnston reasoned as follows:

> The facts in this case are more akin to a situation where there is an outbreak of flu in a workplace that cares for vulnerable people such as a nursing home. Staff … who do not get a flu shot or are delayed in doing so … may be kept off work during an outbreak. Unless the language of the collective agreement provides otherwise, those staff members are generally considered to be on an unpaid leave of absence and not on layoff. …
>
> Upon review of the language of Article 12 as a whole, it is clear that a layoff is premised on a reduction in work such that employees can utilize their seniority to avoid a layoff altogether. It is important to keep in mind that the Municipality did not reduce its workforce due to the closure of any building or services. The staff at the library continued to work throughout the period in question despite the branches being closed to the public. There is no question [Moynahan] experienced a reduction in her regular work hours during the period [of] March 16 to March 29, but she was not laid off in a manner contemplated by Article 12 and therefore, was not entitled to notice of layoff or payment in lieu of notice.

Moreover, Johnston held that Article 13.02 was also not applicable, observing that the language of this provision was "premised on changes to the posted schedule" and that "[t]he only thing that changed was [Moynahan's] hours of work[, which were] eliminated altogether for reasons unrelated to the posted schedule." Even if this elimination did amount to a change in the posted schedule, he opined that the circumstances fell within the exception for emergencies as set out in the provision, and he also noted that no remedy other than a declaration would result from any breach. Similarly, he held that Article 28.03 was not applicable in the circumstances as Moynahan did not lose work as the result of a branch closure or the halting of services but was placed off work for health and safety reasons.

However, although opining that the employer's "intentions were commendable" in providing the IPP gratuitously in order to help its employees, Johnston held that the employer had breached Article 17.01 in its application of the IPP by requiring full-time employees to use sick pay without the union's consent:

> Entitlement to sick pay under this provision is premised on the employee being absent due to illness, non-work[-]related injury or attendance at medical or dental appointments. The parties are free to expand entitlement to sick pay benefits to situation[s] where employees are not necessarily ill, but to do so would require agreement among the parties including the affected employee. The policy was unilaterally introduced by the Municipality. It cannot unilaterally impose a requirement that employees access their sick bank for purpose[s] unrelated to illness without the agreement of the Union and the consent of the employee. There is no evidence to suggest that there was a mutual agreement to use full-time employees' sick banks … in this way.

Finally, Johnston declined to rule that the IPP was discriminatory. Noting that "not every distinction is discriminatory" and that there "must be some link between membership in that group and some arbitrary action on the part of the employer which disadvantages the individuals in that group," he stated, "The fact that the Municipality sought to make sick pay available to full-time employees was meant to give them an advantage they would otherwise not have under the collective agreement. … [T]his was not meant to disadvantage full-time employees."

In the result, Arbitrator Johnston declared that the municipality had violated Article 17.01 of the collective agreement, but he dismissed all other aspects of the grievance and awarded no remedy other than a declaration. He noted, however, that his ruling "should not be interpreted as an invitation to claw back the money that [Moynahan] received from her sick bank; that money has already been paid out and that decision should not be reversed to disadvantage [her]."

Comment:

As noted in the instant case, this arbitration decision is not the first to address whether requiring employees returning from international travel to quarantine due to the COVID-19 pandemic is reasonable and whether they should be paid while off work. In this regard, the arbitrator cited Arbitrator John Stout's award in *Ontario Nurses' Association v. Participating Nursing Homes*, 2020 CanLII 36663 (ON LA). In that case, Arbitrator Stout held that employees who were asymptomatic but required to self-isolate were not entitled to the Hospitals of Ontario Disability Income Program benefits as they did not meet the program's definition of having an "illness." Noting that "[t]here is no assertion by either party that those nurses who were self-isolating ought to have been at work," as it was "understood … that all the nurses involved in this matter may have been infected with COVID-19 and as such pose[d] a risk to other employees and vulnerable residents," Stout also observed that "[i]t is well accepted that employees are not entitled to be paid if they do not attend work"; thus, "payment for an absence must be found in legislation or the collective agreement." Also noting that, at that time, neither the federal nor provincial governments "mandated that employers pay employees for not coming to work when they [were] required to self-isolate," Stout held, "In this case the right to compensation must be found within the four corners of the Collective Agreements." He opined that "the asymptomatic full-time employees who did not test positive or were not tested were not absent due to a legitimate illness, but rather they were absent because they could possibly be ill or might be unwell or unhealthy" and "because they posed a hazard or risk to the health and safety of other employees and vulnerable residents."

Although Stout noted, as did the arbitrator in the case under review, that "the parties are free to expand the entitlement of sick pay benefits to cover for situations such as those currently unfolding," as they had done with respect to "entitlement to sick leave in relation to the influenza vaccine," he opined that the nursing homes "rightly applied the precautionary principle by preventing those employees who pose a risk from working" and were "exercising their management rights reasonably and appropriately by preventing those employee[s] who may pose a risk from attending at the workplace." Accordingly, he dismissed the grievance and declared, "The full-time employees who were symptomatic or tested positive [were] entitled to disability income protection benefits pursuant to Article 14 for their absence due to COVID-19, including any time they were no longer experiencing symptoms but were not allowed to return to work." However, he concluded, "[a]ll other employees are not entitled to any income replacement benefits or other wage protection."

As well, with respect to the decision to impose a quarantine on an asymptomatic employee, although the arbitrator in the instant case acknowledged that the grievor did not work with a vulnerable population like the nurses working in long-term care homes, he held that Stout's

reasoning and application of the precautionary principle was "equally applicable" given that the grievor could have placed her co-workers at risk if she attended work.

The precautionary principle was also relied on in *Newfoundland and Labrador Teachers' Association v. Newfoundland and Labrador School Boards Association and Her Majesty the Queen in Right of Newfoundland and Labrador*, February 16, 2021 (unreported), reviewed in Lancaster's *Education Employment Law*, September 16, 2021, eAlert No. 139. In that case, an arbitration board chaired by David Buffett allowed a policy grievance filed by a teachers' union contesting a directive issued by the school board that teachers who were experiencing COVID-like symptoms, based on results of a self-screening questionnaire, were required to stay home and use their sick leave while symptomatic. As in the instant case, the board held that the directive was inconsistent with the collective agreement and therefore inoperative, as no provision in the collective agreement authorized the employer to require employees to use their sick leave. Moreover, in cases in which teachers were required to stay home due to symptoms but were not so ill that they were unable to work, they were not eligible for sick leave under the collective agreement. However, the board also determined that it did not have the jurisdiction to order that the school board or the government provide discretionary paid leave, as requested by the union. Thus, as in the instant case, although the union's grievance was allowed in part — since the union succeeded in its argument that the employer was not entitled to force teachers to avail themselves of paid sick leave — the union was left without a satisfactory remedy, as other leave options under the agreement were discretionary. This result left the teachers with no guaranteed right to be paid for the time during which they were required to self-isolate.

For other decisions in which the reasonableness of employer initiatives regarding COVID-19 have been addressed, see *National Organized Workers' Union v. Humber River Hospital*, 2021 CanLII 80164 (ON LA) (reported in Lancaster's *Health Care Employment Law*, January 25, 2022, eAlert No. 156), in which Arbitrator Colin Johnston upheld as reasonable a hospital's policy that significantly limited visitor access to the hospital during the COVID-19 pandemic, including non-employee union representatives, holding that the employer's interests in protecting the health and safety of its staff and patients outweighed the union's right to attend the workplace, particularly in light of the fact that no evidence showed that the union had been impeded in its ability to represent its members; *United Food and Commercial Workers Canada, Local 175 v. Hazel Farmer*, 2020 CanLII 104942 (ON LRB), reported in Lancaster's *Health Care Employment Law*, October 15, 2021, eAlert No. 154, in which the Ontario Labour Relations Board allowed an appeal from a Ministry of Labour inspector's refusal to order that a long-term care home install a plexiglass barrier at the nursing station as part of the home's response to COVID-19, holding that the measure was reasonable for the protection of employees under provincial occupational health and safety legislation regardless of whether other measures were also being taken by the employer, given that the residents of the home often failed to mask and came into close contact with the employees working at the station; and *Christian Labour*

Association of Canada v. Caressant Care Nursing & Retirement Homes, 2020 CanLII 100531 (ON LA), reported in Lancaster's *Labour Arbitration*, September 2, 2021, eAlert No. 305, in which Ontario arbitrator Dana Randall dismissed a group grievance and upheld as reasonable an employer's unilateral imposition of bi-weekly mandatory COVID-19 testing via nasal swab of all employees at a retirement home, in light of the seriousness of a potential outbreak and the vulnerability of the residents.

Case Name: *Canadian Union of Public Employees, Local 12.2 v. Municipality of Chatham-Kent*

Jurisdiction: Ontario

Proceeding: Grievance Arbitration

Arbitrator: Colin Johnston

Date: April 30, 2021

Citation: 2021 CanLII 37778 (ON LA)

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Employer cannot require teachers to use sick leave when staying home with COVID-19-like symptoms, arbitration board rules

A Newfoundland and Labrador arbitration board allowed a policy grievance filed by a teachers' union contesting a directive issued by the school board that teachers who were experiencing COVID-19-like symptoms, based on results of a self-screening questionnaire, were required to stay home and use their sick leave while symptomatic. The board held that the directive was inconsistent with the collective agreement and therefore inoperative, as there was no provision in the collective agreement authorizing the employer to require employees to use their sick leave. Moreover, in cases where teachers were required to stay home due to symptoms but were not so ill that they were unable to work, they were not eligible for sick leave under the collective agreement. However, the board also determined that it did not have the jurisdiction to order that the school board or the government provide discretionary paid leave, as requested by the union.

The Facts:

When the employer imposed a requirement that teachers use their sick leave when required not to attend work and to remain at home after reporting COVID-19-like symptoms, the union filed a policy grievance.

In August 2020, the Newfoundland and Labrador School Boards Association and the Newfoundland and Labrador Teachers' Association signed a memorandum of agreement, which provided, among other things, that "[w]here a teacher is asymptomatic but is directed not to attend work as a result of being identified as a close contact of a confirmed or probable [COVID-19] case they will be placed on special leave with pay for all days missed while awaiting results of testing." That same month, the association was informed that, effective September 2020, teachers who were experiencing COVID-19-like symptoms based on results of a self-screening questionnaire, including cough, headache, runny nose, nausea, vomiting, diarrhea, or loss of sense of taste or smell, were not to attend work and were required to access sick leave under their collective agreement for such periods. If teachers had no sick leave available, they were required to take unpaid sick leave. Members were required to stay home until they had been symptom-free for 24 hours.

In response, the union filed a policy grievance, alleging that the employer's requirement was an unreasonable exercise of management rights and violated the collective agreement.

Article 15.01 of the collective agreement provided, "A teacher is eligible for sick leave with pay when the teacher is unable to perform duties because of illness, injury or other disability provided the necessary sick leave credits have been accumulated and provided the other requirements of this Article have been complied with." As well, Article 18.09 stated, "A teacher may be granted leave with pay, not exceeding three (3) days in the aggregate in the school year, for reason(s) deemed valid by the Board." Article 18.11 provided, "When no other provision is made for leave with pay, a teacher may be granted leave with pay upon application to the Minister, where the Minister is satisfied that such leave is warranted."

Section 76(1)(f) of the provincial Schools Act authorizes a board to "require an employee … to undergo a physical examination by a medical practitioner … and to submit a certificate … setting out the conclusions regarding the physical … health of that employee." Section 76(1)(h) states, in part, that the board may, "where a certificate submitted … under paragraph (f) shows that an employee['s] … physical health … would be injurious to an employee of the board or the students, direct the employee … to take sick leave."

The Arguments:

The union argued that the employer's directive was an employer rule that attracted the analysis set out in *Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co.*, [1965] O.L.A.A. No. 2 (QL). The union submitted that the rule failed the first two criteria of the *KVP* test, as it was both inconsistent with the collective agreement and unreasonable. It asserted that the collective agreement did not contain any provision enabling the employer to require a teacher to take sick leave, and that persons required to self-isolate at home rather than attend work with COVID-19-like symptoms did not meet the eligibility requirements for sick leave under Article 15.01 if they were not so ill as to preclude them from working. It argued that the only instances in which an employer could require an employee to take sick leave were either under a provision in the collective agreement dealing with pregnancy, or pursuant to s.76 of the *Schools Act*. The union further maintained that, because the rule required an employee who was able to work to remain at home, teachers should be allowed to teach virtually from home, or paid leave should be provided to teachers by the school board under Article 18.09 or by application to the minister under Article 18.11. The union, therefore, sought a declaration that its members be provided with paid leave (not sick leave) when required to be absent from their workplace due to COVID-19-related symptoms until they received the results of a COVID-19 test or the symptoms were resolved.

The employer argued that teachers who answered "yes" to experiencing a symptom in the COVID-19 questionnaire met the criteria for illness and, as they were unable to perform their duties due to the requirement to stay home, they were eligible to avail themselves of sick leave. It maintained that the rule requiring teachers who experience COVID-19 symptoms to stay at home was a reasonable one, and that sick leave was the only leave available. The employer argued that the leaves provided under Article 18 could be accessed only where there were no other options and furthermore, that the arbitration board had no jurisdiction to order it to use its discretion to provide paid leave in circumstances where the collective agreement did not require it. Therefore, the employer maintained that it was reasonable and within its management rights to implement a rule, on the recommendation of public health and consistent with its obligation to keep staff and students safe, that required teachers who might have a deadly or infectious disease to stay home, even if it meant that they might be required to exhaust their sick leave while doing so.

The Decision:

An arbitration board chaired by David Buffett allowed the grievance, ruling that the employer rule was inconsistent with the collective agreement and that the employer could not require teachers who stayed home because of COVID-19 symptoms to use their sick leave. However, Buffett also held that the board did not have jurisdiction to issue the declaration sought by the union, as it did not have the authority to require the employer to grant other leaves, which were within the employer's discretion.

Determining that the directive was an employer rule as it was issued by the Department of Education, not Health, Buffett agreed that the *KVP* analysis applied, and required that the rule be consistent with the collective agreement and also reasonable. Turning to the applicable collective agreement provisions, Buffett held that Article 15.01 was an eligibility clause only and that there was nothing in its wording permitting the employer to require an employee to use sick leave. Therefore, the employer directive was inconsistent with the provision. In addition, although finding that a teacher experiencing symptoms met the criterion of having an "illness," as set out in Article 15.01, Buffett agreed with the association that a teacher who was symptomatic but able to work would not be eligible for sick leave:

> [A] person with [COVID-19] would fit … within Article 15.01[,] and the sort of inability that the parties refer to when they use the words "unable to perform duties because of illness" would include an inability arising from the fact that they are infectious and contagious. The infectious and contagious character which their body has taken on results from the illness and the fact that a Government order or law prevents going to work does not change the fact that they are prevented from performing their job duties by reason of the illness.

> The person this arbitration deals with is not such a person but a person who could potentially be infectious and contagious with [COVID-19] but who could also be potentially infectious and contagious with something as benign as the common cold or be not even infectious or contagious at all. …
>
> Teachers who have COVID-19 like symptoms but who feel fine enough and able to work and are not known to be infectious as a result of having COVID-19 are not, on the wording of Article15.01, eligible for sick leave. They are not eligible because they do not have an inability to work arising from how they feel physiologically or arising from the fact that they are infectious or contagious with something whereby, by law[,] they are prevented from going to work. There is no inability to work arising from whatever illness or condition they are experiencing. This gives rise to another inconsistency with the Collective Agreement. They are, in effect, being told to avail of something they are not eligible for and that the parties by their bargain intended for something else. Sick leave is in limited supply and might well be needed in the future for the situation for which it was intended.

Having determined that the rule was also inconsistent with the collective agreement in this respect, Buffett turned to assess whether another form of leave could be made available. Holding that s.76 of the *Schools Act* did not apply in the circumstances, since a person administering a COVID-19 test was not a medical practitioner and the results of a test were not equivalent to a medical certificate, Buffett held that the leaves under Article 18 could potentially be made available, given his determination that such employees were ineligible for sick leave. Therefore, the criterion that no other leave be available would be met. However, given the discretionary nature of those leaves, Buffett ultimately held that an arbitration board did not have jurisdiction to order the employer to use its discretion to provide paid leave:

> Even though [the Article 18.11 hurdle of there being no other provision for leave with pay has been cleared], based on [the arbitration board's] reading of Article 18.11 [the arbitration board is] not able to give the Union the relief it is asking for, namely a declaration that the teachers in question are entitled to paid ministerial leave. Even if the Minister is satisfied that leave itself is warranted and even if there is no other provision made for paid leave, the Minister still has the discretion as to whether it will be granted. The parties['] in the Collective Agreement bargain they arrived at gave the Minister that discretion. If [the board] gave the Union what it was seeking [it] would be usurping an authority given by the parties to the Minister.

Finally, the board held that it was within the employer's management rights to determine how instruction was to take place and that there was no requirement for it to not permit such persons to teach virtually from home.

In the result, Arbitrator Buffett allowed the grievance in part, declaring that the directive was inoperative, as it was "inconsistent with the Collective Agreement to the extent that it requires teachers to avail [themselves] of sick leave" and "[t]o the extent [that the employer] purports to suggest sick leave is available" to teachers who exhibit symptoms but feel well enough to go to work. He further declared that, while the employer could not be mandated by the arbitration board to grant it, such teachers were entitled to apply for paid leave under Articles 18.09 and 18.11 of the collective agreement and to have their cases considered.

Comment:

As set out in the instant case, the seminal decision on the validity of rules that have been created and implemented unilaterally by the employer is *KVP*, which, among other things, requires that the rule be both consistent with the collective agreement and reasonable.

In the instant case, the arbitration board determined that there was nothing in the language of the collective agreement that permitted the employer to force an employee to take a paid sick leave, which was sufficient to render the rule inconsistent with the collective agreement and thus inoperable. Nonetheless, the arbitration board also considered whether merely experiencing a COVID-19-like symptom rendered an employee eligible for sick leave as set out in the provision, which required that the employee be experiencing an illness that rendered said employee unable to work.

In *Leading Cases on Labour Arbitration Online*, Mitchnick and Etherington discuss the definition of "illness" in the labour context:

> The parties normally specify in the collective agreement any conditions to which a claim for sick leave benefits is subject. Such conditions may range from a right on the employer's part to request satisfactory proof of illness at its discretion, to a mandatory requirement for a medical certificate in respect of an absence. … In addition, the collective agreement (or an external plan which is incorporated by reference) may set out a threshold that the submitted medical documentation has to meet in order to establish entitlement to benefits, i.e. by stipulating that the employee must be unable to perform regular duties due to illness or injury. In most cases, though, the collective agreement does not specifically define what constitutes an illness or sickness for the purpose of benefit entitlement, and this has led to frequent disputes about the legitimacy of an employee's purported condition.

In the instant case, the arbitration board determined that the mere presence of a COVID-19 symptom, which could range from the presence of a fever to a stuffy nose or headache, met the definition of illness, stating: "[W]e reject the argument that persons covered by the rule do not have an illness or meet the definition of illness. The very notion of symptoms is suggestive that

there is something giving rise to the symptoms." However, it also held that experiencing a COVID-19 symptom in and of itself did not mean that the teacher was unable to perform the duties of the position if well enough to do so. Such teachers did not meet the eligibility language for the sick leave provision, which explicitly required that the teacher be "unable to perform duties because of illness." In *CEP, Local 2000 v. Metrovalley Newspaper Group Ltd.*, [2001] B.C.C.A.A.A. No. 205 (QL), reported in Lancaster's *Disability and Accommodation*, September/October 2001, Arbitrator Rod Germaine took a similarly interpretive approach when addressing a provision entitling an employee to sick leave when "unable to work due to sickness or injury." Germaine held that employees were eligible for sick leave when they were unable to work due to stress-related conditions, ruling that the focus of the inquiry should be on the employee's symptoms and their impact on the employee's ability to work.

In the case under review, although the union's grievance was allowed in part — since the union succeeded in its argument that the employer was not entitled to force teachers to avail themselves of paid sick leave — the union was left without a satisfactory remedy, as other leave options under the agreement were discretionary. This left the teachers with no guaranteed right to be paid for the time when they were required to self-isolate.

A similar result was obtained in *Ontario Nurses' Association v. Participating Nursing Homes,* 2020 CanLII 36663 (ON LA), relied on by the employer in the instant case in support of its position that requiring teachers to self-isolate was a reasonable requirement, and that they could not expect to be paid for this time unless that entitlement was provided for in the collective agreement. In that case, Arbitrator John Stout held that employees who were asymptomatic but required to self-isolate were not entitled to the Hospitals of Ontario Disability Income Program (HOODIP) benefits, as they did not meet the definition of having an "illness." Noting that "[t]here is no assertion by either party that those nurses who were self-isolating ought to have been at work," as it was "understood … that all the nurses involved in this matter may have been infected with COVID-19 and as such pose[d] a risk to other employees and vulnerable residents." Stout also observed that "[i]t is well accepted that employees are not entitled to be paid if they do not attend work," and thus "payment for an absence must be found in legislation or the collective agreement." Also noting that, at that time, neither the federal nor provincial governments "mandated that employers pay employees for not coming to work when they [were] required to self-isolate," Stout held that "[i]n this case the right to compensation must be found within the four corners of the Collective Agreements." He stated the following:

> In this case, the disability income protection plan provisions in Article 14 provide payment to full-time employees for "legitimate personal illness or injury, which is not compensable under the *Workplace Safety and Insurance Act*." At this point, there is no evidence … that any of the asymptomatic full-time employees [had] a legitimate personal illness. Therefore the asymptomatic full-time employees who did not test positive or were not

> tested were not absent due to a legitimate illness, but rather they were absent because they could possibly be ill or might be unwell or unhealthy.
>
> Contrary to [the union's] assertion, the government did not deem any employees sick. Rather[,] the Federal and Provincial Governments have deemed certain employees a hazard or risk of spreading infection. … These employees were absent because they posed a hazard or risk to the health and safety of other employees and vulnerable residents.

Although Stout noted that "the parties are free to expand the entitlement of sick pay benefits to cover for situations such as those currently unfolding," as they had done with respect to "entitlement to sick leave in relation to the influenza vaccine," and opining that "the [nursing homes] are exercising their management rights reasonably and appropriately by preventing those employees who may pose a risk from attending at the workplace," Stout dismissed the grievance. He declared that "[t]he full-time employees who were symptomatic or tested positive [were] entitled to disability income protection benefits pursuant to Article 14 for their absence due to COVID-19, including any time they were no longer experiencing symptoms but were not allowed to return to work." However, he concluded, "[a]ll other employees are not entitled to any income replacement benefits or other wage protection."

[*Editors' Note*: In late April/early May 2021, the provinces of Ontario and B.C., respectively, moved to legislate paid sick leave for employees required to miss work for reasons related to COVID-19. In both instances, the leave of up to three days would apply to employees who, among other reasons, are absent from work due to being diagnosed or sick with COVID-19, or due to a requirement to self-isolate because of symptoms or potential exposure to COVID-19. For more detailed information about statutory sick leave provisions in Ontario and B.C., see upcoming issues of Lancaster's *Labour Law News* eAlert.]

Case Name: *Newfoundland and Labrador Teachers' Association v. Newfoundland and Labrador School Boards Association and Her Majesty the Queen in Right of Newfoundland and Labrador* (unreported)

Jurisdiction: Newfoundland and Labrador

Proceeding: Grievance Arbitration

Arbitrator: David Buffett, Chair

Date: February 16, 2021

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Teal-Jones Group v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers' International Union, United Steelworkers, Local 1-1937 (Fothergill Grievance), [2021] B.C.C.A.A.A. No. 138 (QL)

Panel: Jessica Gregory (Arbitrator)
Award: September 23, 2021.

AWARD

...

61 Teal-Jones explained that the Grievor was sent home on November 18, 2020 because someone in his "bubble" (his father) had flu-like symptoms and a risk of COVID-19. Teal-Jones indicated that its November 1, 2020 Policy required employees who had family members with COVID-19 symptoms not to report to work.

62 A unilaterally imposed rule, such as an employer policy, must meet certain basic criteria in order to be valid and enforceable [*KVP, supra; Irving Pulp, supra*, and related authorities]. For example, as stated above, the rule must be clear and unequivocal.

63 I have concluded that the November 1, 2020 Policy was ambiguous. It did not contain a clear and unequivocal instruction directing asymptomatic employees with symptomatic but untested family members to refrain from reporting to work. The November 1, 2020 Policy instructed "anyone with flu-like symptoms, or anyone with family members experiencing flu-like symptoms...must notify their supervisor and contact their local health authority for guidance on how to proceed...with testing and self-isolation...". The November 1, 2020 Policy appears to leave the decision (about whether the employee should attend work) up to the local health authority. There is no evidence to suggest that the public health authority provided any direction indicating that the Grievor should leave the workplace on November 18, 2020 or any direction that the Grievor should remain off work on November 19th or 20th.

64 While the absence of evidence of any direction from the public health authority is not determinative, it was the method chosen by Teal-Jones in its November 1, 2020 Policy for determining whether the Grievor should be barred from the workplace on November 18, 2020. Therefore, the absence of any such evidence serves to further spotlight the ambiguity in the language of the November 1, 2020 Policy.

65 Notably, in contrast, the November 26, 2020 Policy clearly and unequivocally instructed employees not to attend work if any member of their household "had any flu-like symptoms, is seeking a COVID-19 test or is awaiting test results for COVID-19". The November 1, 2020 Policy did not contain that explicit instruction. In contrast, the ambiguity is apparent.

66 Therefore, having concluded that the November 1, 2020 Policy was ambiguous as outlined above, the policy cannot form the basis for the decision to send the Grievor from the workplace on November 18, 2020 and keep him away from work on November 19 and 20, 2020.

Reasonableness

i) the reasonableness of the November 1, 2020 Policy

67 The parties also joined issue on the reasonableness of the November 1, 2020 Policy. First, I concur generally, that an employer has the authority to access an employee's fitness for the work duties required [*Thompson General*

Hospital, supra], the authority to remove sick employees from the workplace [Inco Ltd., supra] and the authority to develop policies in furtherance of those rights and duties.

68 Assessing whether a unilaterally-imposed policy is reasonable requires a balancing of interests between employees and employers including assessment of the impact of a policy on employees and consideration of potential and less intrusive measures [*Association of Justice Counsel v Attorney General of Canada, [2017] 2 SCR 456, as cited in Alberta (Michner Centre), supra*]. While the conclusions above were reached under human rights considerations, in my view, they also apply to the current balancing of rights required in the current situation under *Irving Pulp, supra and KVP, supra*, and consistent with the managements' rights and responsibilities outlined in the Collective Agreement.

69 Turning to the broad context, an employer is entitled or, arguably, required, to review and analyze the PH Orders or WorksafeBC directives in combination with other expert-based information with a view to adapting and applying the knowledge and thresholds within its own context.

70 Through this fulsome analysis, an employer can develop a policy tailored to its own sector and operations that best protects its own workers. Crafting that policy requires a balancing of health and safety factors including considerations that permit the employee to remain in the workplace [*CKF, supra*]. The employer's role is more challenging in the current circumstances where knowledge about COVID-19 symptoms, diagnosis and transmission continues to evolve and therefore, in some situations, it may be reasonable to adopt a more precautionary approach [*Cloverdale Paint, supra*]. However, a policy that follows a precautionary road must still meet the balance of an employer's legal obligations.

71 In other words, in designing its policies, Teal-Jones was not required to merely duplicate the PH Orders or WorksafeBC directives provided the requirements were treated as minimum standards and reviewed along with other expert-based information in order to create a health and safety policy that protected the employees at the Duke Point operation from the exposure to the COVID-19 virus.

72 I accept that it would be extremely difficult for a Human Resources professional to create a precise map of the decision to be followed when removing an employees from the workplace that completely encompasses all possible situations. I recognize Ms. Jones' efforts (in her November 26, 2020 email) to provide some guidance and parameters to operational management including her example involving the boom boat operator. Her efforts to synthesize a voluminous amount of emerging material about COVID-19 are acknowledged.

73 I further note that, although the undated Federal document [*COVID-19 How to Self-Isolate At Home When You May Have Been Exposed to COVID-19 and Have No Symptoms*] adopted a broader perspective, the Federal directives were not binding on Teal-Jones and there is no evidence that the document was considered by the Human Resources Department at the relevant time when the policies were drafted or implemented.

74 In light of the health dangers associated with the risk of transmission of the SARS-CoV-2 virus (as outlined in the documentation in evidence from various sources including the PH Orders and accepted, for example, in: *Alberta (Michner Centre), supra*, and *Garda, supra*) and the availability of testing at the relevant time (November 17-18th), it would have been appropriate for the November 1, 2020 Policy to recommend the removal of symptomatic employees who had not been cleared to return to work by public health. Moreover, it may, under the circumstances, have been acceptable to direct asymptomatic employees to remain off work in the short term if their close contact (including a family member in the same household) was experiencing flu-like symptoms. However, in order for the COVID-19 policy to be deemed reasonable, it required a second step in the decision-making process: consideration of potential ways to mitigate the impact of that decision on employees; particularly, discussions focused on whether and how the financial impact could be mitigated [*Alberta (Michner Centre), supra*].

75 The November 1, 2020 Policy does not meet the standard of fairness and reasonableness required in the exercise of management discretion and unreasonably fails to incorporate a second step involving discussions about options

to mitigate its impact. Either of these failures would render the policy unenforceable and would lead to the conclusion that the policy does not meet the established requirements including the criteria outlined in *Irving Pulp, supra; and KVP, supra*.

ii) implementation of the November 1, 2020 Policy

76 Although an employer can be deemed to have acted reasonably by requiring additional information in fulfilling its positive obligation to satisfy itself as to the fitness of the employee where the nature of duties being performed require good health and the employee is suffering from a serious illness, the employer is also required to act fairly and the employee may not be required to bear the entire cost of that endeavour [*Thompson General Hospital, supra; Inco Ltd., supra*]. In *Inco Ltd., supra*, the employee remained on light duties pending the employer's receipt of the required information.

77 Teal-Jones was obligated to exercise its managements rights (under the Collective Agreement) in a fair and reasonable manner. Additionally, the absence of consideration of any potential avenues to mitigate the impact of the policy on employees has been deemed to be an unreasonable implementation of an acceptable policy [*Alberta (Michner Centre), supra,*].

78 In my view, on November 18th Teal-Jones management was obligated to consider and discuss possible options for mitigating the impact of the November 1, 2020 Policy (as they interpreted it) including options that permitted the Grievor the opportunity to remain at work [see: *United Steelworkers, Local 2551 v Algoma Steel (Union Grievance 20-0636), [2020] O.L.A.A. No. 172 (Gendron)(Ont.) as cited in: CKF, supra]* and the light duties assigned to the employee in *Inco, supra*.

79 Not surprisingly there is no evidence of any such discussions or considerations when determining the Grievor should be permitted to remain at work on November 18th and whether he should be permitted to return to the worksite on November 19th and 20th.

80 There was no effort to consider potential actions that could mitigate the impact of the situation on the Grievor and other employees. For example, allowing the Grievor to continue to work as a bundler but with increased distancing or choosing the precautionary route of removing the Grievor from the workplace but doing so without loss of pay.

81 To be clear, I am not saying that those options should have been implemented, merely that they should have been discussed in light of the Employer's obligation to balance relevant competing considerations.

82 In the absence of this important step, there was no reasonable basis for Teal-Jones' decision to remove the Grievor from the workplace on November 18 and hold him out of work on November 19 and 20th.

83 Returning to the context of the current situation, nothing in the November 1, 2020 Policy instructed the supervisor to send the Grievor home from the worksite in the circumstances before him on November 18th. The decision to remove an employee from the workplace (i.e. on the basis of fitness) must accord with the ordinary principles of fairness [*Thompson General Hospital, supra; Alberta (Michner Centre), supra*]. The removal of the Grievor from the workplace was not based on his own fitness since there is no evidence suggesting that the public health office had expressed concerns about the Grievor's fitness. Instead the Grievor was sent home on the basis of a self-report by an untested symptomatic parent based on an ambiguously worded policy and an interpretation of that policy that was not supported by the prevailing PHOrders or WorksafeBC information.

84 It appears that management simply made a precautionary decision based on an erroneous implementation of the November 1, 2020 Policy. His conclusion is supported internally (albeit belatedly) by Human Resources in its November 26, 2020 email which acknowledged that "the safest solution is not to report to work".

85 Teal-Jones relied on the undated Federal Guidelines. However, there is no evidence to suggest that the undated Federal Guideline was in place at the relevant time or was considered by management.

86 Therefore, I have concluded that on November 18, 2020 it was unreasonable for management to interpret and apply the November 1, 2020 policy without considering and discussing possible options for mitigating the impact of the policy on the employees including options that permitted the Grievor the opportunity to remain at work.

Conclusion

87 In summary, an employer has the right and obligation to manage its business during the COVID-19 pandemic. It was open to Teal-Jones to design and implement a reasonable policy that would weigh relevant factors and determine whether the Grievor should be away from the workplace. In order to meet its obligations pursuant to the Collective Agreement and under the jurisprudence outlined above, the policy must consider reasonable options that would mitigate the impact on the employee such as options that allow the employee to remain at work or options where the employee was absented without loss of pay.

88 The November 1, 2020 Policy was unenforceable. It was ambiguous with respect to the Grievor's removal and failed to include consideration of options to mitigate the impact of employees. In addition, since there is no evidence indicating that management considered options that would mitigate the impact on the Grievor and other employees, the implementation of the policy on November 18th is also unreasonable.

89 Since, the November 1, 2020 Policy was unenforceable and the Grievor was not prevented from working by a PH Order, there was no basis for the Employer's decision to remove the Grievor from the workplace on November 18, 2020 or for keeping him away on November 19th and 20th.

90 In light of the conclusions outlined above pertaining to ambiguity and reasonableness, although all of the positions advanced by the parties were reviewed and considered, it is unnecessary to address the balance of the arguments raised.

91 The grievance is upheld. The Grievor is entitled to be made whole for his losses.

92 I will remain seized to address any issues emanating from this Award including issues pertaining to its interpretation and implementation.

93 It is so ordered.

Jessica Gregory
Arbitrator

* * * * *

<u>Appendix A -- Agreed Statement of Facts -- Incorporated into the Above Award</u>

<u>Agreed Statement of Facts:</u>

a) Teal is a forestry company operating throughout BC. Its operations include a dry land sort located at Duke Point on Vancouver Island.

b) The Union is the certified bargaining agent for employees at Teal's Duke Point dry land sort. A copy of the applicable collective agreement is attached as **Tab A**.

c) At the material times, the individual grievor, Nolan Fothergill, was employed as a bundler. His seniority date is April 22, 2020.

d) The grievor lives in Honeymoon Bay with his father (Rick). Rick is also a Teal employee who works in the Duke Point bargaining unit.

COVID-19 Historical Background

e) On March 25, 2020, and as a result of the global covid-19 pandemic, the B.C. Government issued a press release containing guidelines to employers in the manufacturing sector in BC to assist them operate safely. A copy of the March 25 guideline is attached as **Tab B**.

f) On March 30, 2020, the B.C. Government issued a press release reminding employers of their statutory obligation to ensure a safe workplace and directing them to WorkSafeBC resources for operating safely during the covid pandemic. A copy of the press release is attached as **Tab C**.

g) On April 23, 2020, and as a result of the global covid-19 pandemic, the B.C. Provincial Health Officer ordered all employers in the forestry sector in BC to adopt a Workplace Covid-19 Safety Plan. A copy of that order is attached as **Tab D**.

h) On April 27, 2020, and in response to the B.C. Provincial Health Officer's order and using WorkSafeBC's sample covid-19 safety plan as a template, Teal introduced a safety plan for all employees in its workplaces. A copy of the safety plan applicable for Duke Point is attached as **Tab E**.

i) On May 14, 2020, the B.C. Provincial Health Officer ordered all employers in BC to adopt a Workplace Covid-19 Safety Plan. A copy of that order is attached as **Tab F**.

j) On July 2, 2020, the B.C. Provincial Health Officer amended its April 23 order requiring forestry employers to have comprehensive covid safety plans. A copy of the amended order is attached at **Tab G**.

k) Throughout the pandemic, the B.C. Government has provided resources to employers and employees with respect to COVID-19 precautions in the workplace, including attendance at work:

   (a) For the private sector, WorkSafeBC has developed a Covid-19 Safety Plan template for employers. A copy of that template is attached at **Tab H**.

   (b) For the public sector, the B.C. Government has included specific FAQs with answers as to when employees must not attend work. A copy of these FAQs, updated March 29, 2021 is attached at **Tab I**.

l) The BC Centre for Disease Control also provides resources to residents of B.C., including advice as to when to self-isolate. Attached as **Tab J** is the BCCDC's online materials on "Self-isolation."

m) At all material times, Teal's safety plan included a direction to employees that if they experienced flu-like symptoms they were not to come into work, but were instead to contact their local health authority for guidance on self-isolation. The employee was to remain away from work until symptom free and allowed by the health authority to return.

n) Teal also provided to its employees shorter form directions from time-to-time reminding them of safe work procedures in a covid pandemic. A copy of a direction from July 29, 2020 setting out how employees who experience flu-like symptoms should respond is attached as **Tab K**.

o) In the fall of 2020, BC experienced a second wave of covid infections.

p) On November 1, 2020, Teal issued a further health and safety direction to its employees. Attached as **Tab L** is a copy of the November 2020 direction issued by Teal. That direction reads in part:

Anyone with Flu-like symptoms, or anyone with family members experiencing Flu-like symptoms, such as sore throat, fever, sneezing or coughing, must notify their supervisor, and contact their local health authority for guidance on how to proceed, including compliance with testing, and self-isolation at home for the minimum prescribed time-frame from onset of symptoms and until symptoms have completely resolved

q) On November 1, 2020, Teal posted the November 2020 direction at various locations around the sort at Duke Point. Teal posted all directions related to covid safety protocols at various locations around the sort at Duke Point.

r) Also in November 2020, WorkSafeBC published a poster for employer use as an "entry check for workers." A copy of this poster is attached as **Tab M**.

s) On November 26, 2020, Teal issued a safety directive reminding employees again about the importance of not attending at work if they or any member of their bubble had covid type symptoms. A copy of Teal's November 26, 2020 safety directive and the email Teal sent explaining the directive is attached as **Tab N**.

t) Teal has had two outbreaks of COVID since the pandemic began: one at its planer mill in July; and one at its sawmill in December. In both instances Teal was required to shut down the operation, send all employees home, and disinfect equipment resulting in lost production and extra cleaning costs.

COVID-19 Individual Grievance

u) The grievor was on lay off from October 2020 to November 10, 2020. The grievor would not have seen the November 2020 direction (Tab L) until his return to work on November 10, 2020.

v) On the evening of November 17, 2020, the grievor's father, Rick, developed flu-like symptoms. Rick texted his supervisor, Rod Ouellette, that if he was not better by morning he would get a covid test.

w) The morning of November 18, 2020, Rick texted Rod to confirm his symptoms persisted and that he was scheduling a covid test. In accordance with Teal policy, Rick did not come into work, but instead self-isolated and arranged for a covid test.

x) On November 18, 2020, the grievor came into work.

y) The grievor himself did not have flu-like symptoms.

z) During the morning crew meeting, Rod asked the grievor to confirm whether he was currently living with his father and the grievor acknowledged he was.

aa) Teal sent the grievor home. Teal explained that it was sending the grievor home because the grievor was in the same bubble as Rick, and Rick had flu-like symptoms and a risk of covid, and Teal took the position that its policy required that employees who had family members with covid type symptoms not to report to work.

bb) Teal paid the grievor for four hours on November 18, 2020.

cc) On November 20, 2020, Rick's covid test came back negative.

dd) Neither the grievor nor Rick were scheduled to work on November 21 or 22, 2020.

ee) On November 23, 2020, the grievor and Rick both returned to work.

ff) The grievor was off a total of 2.5 days, or approximately 20 hours. At the material times, the grievor's rate was $33.64 per hour for a wage claim of $672.80.

COVID-19 Policy Grievance

gg) The Union has grieved Teal's policy that an employee is not to attend at work if "any member of [the employee's] household has any Flu-like symptoms, is seeking a COVID-19 test or is awaiting test results for COVID-19" on the basis that it violates the lay off provisions of the collective agreement and that it is discriminatory under BC human rights legislation.

hh) By letter dated January 12, 2021, the Union referred this matter to arbitration. A copy of the grievance and its referral to arbitration is attached as **Tab O**.

End of Document

United Food and Commercial Workers, Local 1400 v. P&H Milling Group, a Division of Parrish & Heimbecker Ltd. Saskatoon (Blatz Grievance), [2021] C.L.A.D. No. 14 (QL)

Panel: Leslie Belloc-Pinder, Q.C. (Arbitrator)
Award: January 26, 2021.

I. INTRODUCTION

1 I was appointed by the parties to hear four grievances filed by United Food and Commercial Workers, Local 1400 ("UFCW" or the "Union") on behalf of the Grievors: Kerry Blatz, Kerry Rossmo, Ed Keindl, and Lindsay Neufeld. All are employed by P&H Milling Group in Saskatoon ("P&H" or the "Employer").

2 The parties agreed that the grievances could be heard together, and no one raised any issues regarding jurisdiction. Counsel shared all documents to be introduced as evidence before the arbitration began, and all Exhibits were entered by consent.

3 UFCW asserts that P&H violated the Collective Agreement by failing to compensate the Grievors while they were required to self-isolate for reasons related COVID-19. Due to the nature of their jobs, they could not work from home and P&H's isolation policies meant they were unable to report for work at the plant as scheduled.

4 P&H takes the position that only employees who are ill as demonstrated by exhibiting symptoms or testing positive for COVID-19 are entitled to paid compensation pursuant to the Company Sick Leave Program if absent from work. While P&H does not dispute the Grievors acted appropriately by self-isolating, as and when they did, it argues that their inability to report for work due to pandemic precautions does not entitle them to sick pay.

…

VI. ANALYSIS

22 There is no doubt that the effects of COVID-19 have been devastating and profound, and humanity has not yet emerged from its worldwide grip. The tremendous economic and personal losses resulting from the pandemic are made real by the multi-faceted burdens individual people carry -- and the struggle is far from over. The Grievances advanced by UFCW in this arbitration represent an effort to eliminate the economic loss four workers experienced because they did their duty as Canadians, community members, and conscientious employees. They did not report to work because they may have been exposed to COVID-19. They followed the rules and their employer's directions to eliminate the possibility they could infect co-workers with the virus, even though they did not know if they carried the virus themselves.

23 This dispute is essentially about who bears the loss within this workplace; the individual employees or the Employer. The Grievors seek access to their sick leave benefits because they were absent from work due to COVID-19 isolation requirements. The Union submits the Collective Agreement requires them to be compensated this way, instead of having them resort to accessing EI or CERB payments, or claiming vacation or personal leave which would then diminish their future entitlement.

24 Like legislation in every Canadian province and territory, *The Saskatchewan Employment Act*, *SS 2013, c S-15.1* and *The Occupational Health and Safety Regulations, 1996*, c O-1.1 Reg 1 impose a duty on employers to take reasonable precautions for protecting the health and safety of workers in their workplace. It requires employers to communicate about workplace hazards and train employees to deal with them. Employers obligations extend to addressing the risks of COVID-19 transmission in the workplace. An employer could face prosecution if a COVID-19 outbreak occurs due to insufficient efforts to control exposure.

25 Employees also have obligations under the provincial statute and regulations which require them to take reasonable care to protect their own health and safety, and that of co-workers. Implicit in this responsibility is that employees should not attend at the workplace if they pose a hazard. There is no doubt that potentially transmitting COVID-19 to co-workers would constitute a hazard.

26 Across Canada, government and public health guidance for operating businesses during the COVID-19 pandemic has required employers to develop protocols for employees. Some workplaces have closed, either temporarily or permanently, and others have modified their operations. The federal government has implemented legislation to provide financial assistance to people whose livelihoods and income have been affected by the pandemic. The government has also expanded access to statutory leave for self-isolating employees or those caring for family members afflicted with COVID-19, but such leaves are unpaid; compensation flows through EI or CERB. To date, neither the federal nor Saskatchewan government has passed legislation requiring employers to pay employees for not coming to work when they are required to self-isolate without any evidence of illness, and no distinction is warranted between unionized and non-unionized workplaces.

27 If an employee poses a risk that he/she/they might transmit COVID-19 in a workplace, an employer has the right and obligation to protect its workforce pursuant to health and safety requirements. A reasonable precaution in the context of the pandemic is to bar that employee from the workplace pending confirmation that the employee is not infected with COVID-19 and/or potentially infectious to others. This consideration is germane to the Union's argument about the unreasonableness of the Employer's decision(s) in this arbitration. Leaving aside the specific sick pay issue for the moment, I find the Employer's direction, that each of the Grievors remain away from the workplace and self-isolate for the specified periods they were advised, was reasonable from a health and safety perspective to inhibit the spread of COVID-19. I find P&H exercised its management rights reasonably and appropriately be preventing the Grievors from attending at the workplace and remaining away until they no longer posed a risk, as indicated by public health guidelines. The Union did not disagree with this proposition and emphasized that its view of the unreasonableness of the Employer's decision was related to compensation, not to the isolation requirement itself.

28 Turning now to the compensation question, the P&H emails and memos communicating the company's policy regarding COVID-19 prevention in the workplace reflect the availability of EI and CERB for employees required to self-isolate. For example, the P&H email dated March 13, 2020 includes the following direction:

> If you are not ill but are required to go into quarantine by law or by public-health official, you should contact your supervisor to determine if working from home is possible in your case. If not, you may qualify for EI benefits which have been enacted to assist individuals who have been quarantined due to COVID-19 ...
>
> ... If you would prefer to use paid vacation time or banked time, if applicable, please advise your supervisor.1

I find, as a fact, that supervisors advised each Grievor about compensation and leave options flowing from their absence from work due to self-isolation, but the advice given to the Grievors was not consistent. While all were advised of their option to claim EI, some supervisors suggested a Grievor could take vacation days while others spoke about CERB or personal leave. Kerry Rossmo received one- or two-days sick pay, but it appears this was not provided intentionally or as the result of an Employer policy. Bernie Moberly testified that the company ultimately developed the firm position that sick pay pursuant to the Sick Leave Program was not available for any employee who was self-isolating but not unwell.

29 At the risk of stating the obvious, if an employee is not working either at home or the workplace during self-isolation, then an employer is not obliged to pay the employee unless required by statute, an employment contract, an employer's workplace policy or a collective agreement. The email excerpt above, along with other documents filed as Exhibits, demonstrate P&H developed and communicated policies adapting workplace protocols to address the effects of COVID-19. However, these policies standing alone do not implement or bind the Employer to provide paid leave for self-isolating employees, nor do they form part of the Collective Agreement.

30 Subject to contractual modification, the common law provides that employees are not entitled to be paid if they do not attend work. In this case, the Grievors did not report for work on certain days for reasons entirely outside their control; their absence was occasioned by a pandemic for which no one bears personal responsibility. The question then becomes whether the pandemic is a circumstance which engages the benefit provisions of the Collective Agreement which provide that they may be paid, even when not working as scheduled.

31 Employees exercising vacation leave receive their usual pay while absent, as do employees taking certain personal days with approval. Sick leave is provided by the Program set out in Schedule B of the Collective Agreement (signed February 12, 2019 with expiration date February 28, 2021). In qualifying circumstances, employees are to be paid their regular rate of pay for hours they would have worked but for their illness, injury, or disability.

32 The obvious purpose of such sick leave/sick pay is to ensure employees who cannot work due to a relatively short-term illness can continue to receive their usual income to sustain themselves and their dependants, if any. The Program is funded entirely by the Employer, and leave is paid for between 1 and 30 days in accordance with a straightforward accumulation calculation for eligible employees who have reached seniority status. Longer term illnesses or disabilities are treated differently, such that eligible employees are paid through a Weekly Income Plan (for workplace absences between 31 and 119 days) and a Long-Term Disability Program (for absences of 120 days and beyond). I agree with the Union's submission that employees ought to have recourse to their accumulated sick time, where the Collective Agreement provides.

33 The Union also submits there is a second purpose for the Sick Leave Program which should be read into the Collective Agreement arising from the circumstances of the pandemic and the Employer's "constant and consistent message" that it values the health and safety of employees during this unprecedented time. Without a definition of "sick leave" in the contract, the Union argues a contextual and purposive understanding of the scope of the Program is appropriate and underscores the Employer's obligation to "protect the safety of the public" - a population which includes its employees and their families.

34 I do not agree that the circumstances giving rise to these Grievances create an obligation on P&H to provide sick pay arising from a broad public policy obligation as submitted by the Union. It is correct that public policy spawned by the pandemic, as articulated by government and public health authorities, includes the expectation that employers, including P&H, will take active steps to prevent the spread of COVID-19 at workplaces. It is also true that P&H instituted a policy which requires employees to self-report potential exposure. However, neither of these circumstances are described by or implicit in the clear language of the Sick Leave Program.

35 Turning next to examine the language referenced above, P&H submits that paragraph 8 assists in defining the Sick Leave Program's scope because it requires a Doctor's Certificate to confirm an employee's illness or injury. It reads as follows:

> 8. In order to qualify for sick pay, an employee must provide a Doctor's Certificate from the attending physician upon the third day of absence that confirms the employee's illness or injury and estimated date of return to work.

Thus, the Employer argues that an "illness" or "injury" must be verifiable to support an employee's eligibility for sick pay. Within the context of the COVID-19 pandemic, both parties submit that if an employee is symptomatic and/or tests positive for COVID-19, there is no doubt that employee would be entitled to sick pay. Further, Moberly testified that an infected and contagious employee, who does not feel unwell, will also be entitled to sick pay. However, he qualified this statement to state that an asymptomatic, but COVID-19 positive, employee will only be entitled to sick pay if that employee produces a positive test.

36 As noted above, there is no evidence that the any of the Grievors were sick, infectious, or contagious, and all agreed that they were willing and able to work. None underwent a COVID-19 test, however, and as a result, none tested either positive or negative. This fact undermines the Union's argument that an employee may be asymptomatic,

but still entitled to sick leave. Paragraph 8 of the Program requires a Doctor's Certificate to support a sick pay claim. By extension, a positive COVID-19 test result would serve the same purpose for individuals infected with the virus who have no discernable symptoms. The mere possibility an employee might be infectious is insufficient to gain access to the sick bank.

37 The Employer submits the contractual language, and purpose and intent of the Company Sick Leave Program, is clear and uncomplicated. Simply put, P&H has no legal requirement to provide sick pay to an employee who is not sick. Further, P&H submits it has been "unable to find a single instance of an arbitration in which an employee was awarded sick pay when they were not sick."

38 The cases cited by P&H in its Written Submission support the proposition that determining whether an individual is "sick" is a finding of fact, and the Union agrees this is a correct statement of the law. That said, there are an almost infinite number of ways an employee may present as sick, with various means by which an employer can be satisfied the sickness is authentic. In its Brief of Law, the Union cites *City of Calgary v CUPE Local 38* (*2015 CarswellAlta 1742*) where it was held that a supervisor's decision to send an employee home based on an observation the employee was ill was sufficient proof of illness to support subsequent days off while the illness continued without corroborative medical documentation. By analogy, the Union argues that the Grievors were "sent home" by the Employer to self-isolate and treated as if they were sick. As a result, the argument goes that they experienced employer-mandated sick leave which entitles them to sick bank access.

39 I do not find the facts in this matter sufficiently similar to the *Calgary v CUPE* case to warrant applying its reasoning or result. In *Calgary v CUPE*, the employer observed the grievor was unwell at work. The employer's "suspicion of illness" was based on an actual perception and not the abstract concept of potential contagiousness unaided by personal observation or even the Grievors' self-assessment that they felt ill. On the contrary, the evidence in this matter is that the Grievors were neither exhibiting nor reporting symptoms of illness. I cannot find, as a fact, that "potentially infectious" means the same as "sick" in order to find the Employers' direction that the Grievors self-isolate was employer mandated sick leave. The evidence does not support such a conclusion.

40 The final argument the Union makes is that public policy, or the public interest, requires that the economic burden of the pandemic not be borne excessively or unfairly by taxpayers. While this submission is broadly appealing, it also flies in the face of the government's obvious mandate to deal with the multifaceted, complex, and enormous public problem of the pandemic. The argument also requires that I fix my gaze beyond the four corners of the Collective Agreement, for which I have no jurisdiction, no matter how dire the world's circumstances beyond the parties' contract.

41 Article 10 of the Collective Agreement makes it clear I have no jurisdiction to make a decision inconsistent with the terms to which the parties agreed in 2019, nor may I alter modify, or insert any new contractual provision. Therefore, I cannot read a benefit or obligation into the Collective Agreement that is not already there -- whether to fill a gap, fix an error, or ease the burden on an employee who can ill-afford to subsidize government health directives from their paycheque. In years to come, it is predictable that the lessons and consequences of COVID-19 will be recalled around bargaining tables nationwide, but they cannot be imported into agreements struck before the current pandemic appeared absent specific provisions already in place.

42 The Employer acknowledged "discomfort" with its legal position in this case, because the Grievors did everything their supervisors asked and, nevertheless, they cannot look to P&H for compensation. Similarly, the Union emphasized the Grievors were completely non-culpable for their financial losses which flow from their self-isolation. I agree that there is an unfairness to the Grievors having to look outside the Collective Agreement for the compensation they require, but the language of the Agreement must clearly authorize me to do what the Union asks. For the reasons set out above, I find the Employer's decision not to provide sick pay to the Grievors, who were not ill but required to self-isolate due to the COVID-19 pandemic, accords with a plain reading of the Sick Leave Program which forms part of the Collective Agreement.

43 Speaking broadly, P&H and its employees alike need to support the public health goals clearly expressed and

implemented in government orders and programs created in response to the COVID-19 pandemic, however neither the evidence nor the legal principles inherent in this arbitration support the proposition that P&H should bear consequential financial burdens unrelated to the operation of its business (which includes obligations pursuant to the Collective Agreement). There is no satisfactory or "fair" solution to the problem of assigning responsibility for the pandemic's negative effects, and neither employees nor employers should be financially penalized when disclosing and implementing self-isolation requirements. However, the unfortunate reality is that human and economic consequences are distributed unevenly across society as we endure the calamity of the COVID-19 pandemic.

VII. DECISION

44 Regarding the Grievors who were required to self-isolate due to COVID-19, the Collective Agreement does not provide compensation for any of their lost wages while they were unable to report for work.

45 The Grievances are dismissed.

Dated at Saskatoon, Saskatchewan, January 26, 2021.

Leslie Belloc-Pinder, Q.C.
Sole Arbitrator

1 Exhibit E1, pages 37-38.

End of Document

IN THE MATTER OF AN ARBITRATION

(Pursuant to the Mediation/Arbitration Protocol, Appendix D)

BETWEEN:

TORONTO TERMINALS RAILWAY WEST DIVISION

(The "Employer")

AND:

UNIFOR LOCAL 101-R

(The "Union")

BRIAN CUSHNAGHAN GRIEVANCE

(PAY FOR COVID SELF-QUARANTINE)

ARBITRATOR:	RICHARD COLEMAN
FOR THE EMPLOYER:	JASON SHAW LAUREN McGINLEY JASON BARKER
FOR THE UNION:	JIM WIENS RYLEE WRAY CURTIS DESROSIERS JASHAN GILL
DATE OF HEARING:	OCTOBER 15, 16, 2020
DATE OF AWARD:	OCTOBER 20, 2020

2020 CanLII 99175 (ON LA)

This award concerns a grievance filed by the Union on behalf of the Grievor, Brian Cushnaghan, with respect to whether he is entitled to compensation for a period of fourteen days, during which he was in self-isolation due to possible exposure to someone with a confirmed COVID diagnosis. These proceedings take place pursuant to the Mediation/Arbitration Protocol set out in Appendix D of the collective agreement, which provides for an informal and expedited hearing process involving mediation, and if that fails, arbitration, leading to awards which "shall not be precedential for the purposes of any future case".

2020 CanLII 99175 (ON LA)

It is common ground that the Grievor's self quarantine took place on the recommendation of the Fraser Health authority, and was appropriate. The issue, as above, is whether or not that absence should be considered with or without pay. The Company's position is that he was entitled to short term sick leave (STD) and CERB from the Federal Government, but no more. The following facts are evident from the information presented by the parties:

1. The Grievor was legitimately off work for the period in question, which commenced on May 19.

2. He was informed by the Company prior to the leave, and in the same telephone conversation in which he reported his need to self isolate, that he would not be paid wages for the period he would be away.

3. He was compensated for most of the period through a third party benefits carrier, with the absence being considered short term illness; with three additional days paid as personal days pursuant to the Canada Labour Code.

3. Early in the COVID pandemic period, on March 10, 2020, the Company set out its policy with respect to COVID, which outlines a number of protective measures, but included the following paragraph with respect to leaves granted for necessary quarantine periods recommended by health authorities:

> Self-Isolation Period (Current)
>
> Employees are required to comply with the self-isolation period recommended by the CDC, as may be updated from time to time. Currently, the CDC recommends a minimum 14-day self-isolation period upon returning from a Level 3 zone. Employees may elect to take vacation time during this self-isolation period. Otherwise, this administrative leave will be unpaid.

As can be seen, the policy is clear that self isolation periods will be unpaid.

4. Some time later, on April 24, the following refinement to the above policy statement was provided to staff, effectively establishing an exception to the aforementioned "leave will be unpaid" policy:

> TTR takes our employees 'health & safety very seriously, and we are doing what we can to provide the necessary equipment, as well as changing some procedures to help alleviate your concerns. It is important to note that at both locations, there are latex gloves, hand sanitizers, cleaning supplies, running water and masks for those people who want them.
>
> I also want to let all employees know that should you attend a funeral for your immediate family which **also requires** airplane travel, TTR **will pay** for your 14 days of isolation upon your return to your household.

5. A bargaining unit employee, Devin McKinstry, satisfied the criteria set out in the second paragraph of the notice, and was paid his regular wages for the period of his quarantine period, which commenced on May 2.

The Union maintains that it is unfair to treat the Grievor's leave period differently from that of his colleague, Mr. McKinstry. As per the Union's submission:

> Since the outbreak of Covid-19 the Company and the employees have done a tremendous job keeping the working conditions clean and limiting the spread of germs by wearing proper PPE within the workforce. The Company stated in multiple emails and bulletins "we're all in this together" however, Devin was given full wages and Brian received no pay for his 14-day isolation.
>
> The Grievance replies in the instant matter purposefully avoid identifying the discrepancies in compensation to these employees. The suggestion that management is able to arbitrarily make the determination of financial compensation eligibility of employees covered by the same Collective Agreement is troubling.

For its part, the Company argues that the circumstances of two employees were different. Mr Barker, Director of Operations, was under the impression at the time that individuals entering (or reentering) the province faced a mandatory 14 day quarantine. Hence he drafted the April refinement to the initial policy, which, he submits, is clear in its limiting criteria, which were not met by the Grievor. As per the Employer's submission:

> In the case at hand, the Grievor was required by Fraser Health to be off work. Accordingly, the Grievor's absence was treated like every other situation

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involving a doctor restricting an employee for any other medical reason. When employees are restricted by medical professionals and those restrictions prevent employees from coming to work, employees have the ability to apply and, when appropriate, utilize short term disability and other applicable benefits. Accordingly, the grievor applied for and was granted short-term disability.

The Company recognizes that the scope and impact of the COVID-19 (Coronavirus) pandemic is something nobody could have predicted; however the decisions made, such as to compensate an employee restricted from work by an external medical professional could have long lasting precedential effect. Further the payment of such lost wages would place the Company in a position of undue hardship.

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Decision:

The grievance is denied. The fact that the Company implemented a separate policy for employees quarantining subsequent to having traveled to a funeral of an immediate family member, does not create a contractual right to the same compensation for those who have not travelled to attend such a funeral, and whose self isolation arises from different circumstances. The circumstances are indeed, quite different. The exemption from the main policy set different criteria and incorporated different considerations, including elements of compassion and anticipated mandatory isolation even without exposure to COVID.

In any case, it is long established law, that the mere payment of an extra-contractual benefit to one employee, does not establish a contractual right, without more, for example: in the nature of proof of some sort of prejudice, or bad faith/lack of *bona fides*, none of which is present here.

As above, the grievance is denied.

Dated this 20th day of October, 2020.

Richard Coleman,
Arbitrator

ONTARIO LABOUR RELATIONS BOARD

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OLRB Case No: **1395-21-U**

Rosanna Mustari, Kevin Francis, Terence Thomas, Rodney Nembhard, and Quincy Akande, Applicants v CUPE Local 79, Responding Party v City of Toronto, Intervenor

BEFORE: Lindsay Lawrence, Vice-Chair

DECISION OF THE BOARD: January 11, 2022

1. This is an application filed under section 96 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). Rosanna Mustari, Kevin Francis, Terence Thomas, Rodney Nembhard, and Quincy Akande (the "applicants") have filed this application together. They allege that the responding party, Canadian Union of Public Employees, Local 79 (the "union"), breached its duty of fair representation in relation to matters arising out of their employment with the City of Toronto (the "employer").

2. The union filed a detailed response requesting that this application be dismissed without a hearing on a number of grounds, including for failure to make out a *prima facie* case. The union emphasized, among other things, the large number of related ongoing grievance proceedings undertaken by the union and the Board's limited jurisdiction in this regard.

3. For the reasons set out below, the union's preliminary request is granted. The applicants have not established a *prima facie* case of a breach of the Act and the application is dismissed without a hearing or consultation.

Process

4. By way of decision dated December 21, 2021, the Board provided the applicants with an opportunity to make any further submissions they wished the Board to consider. The applicants filed

their further submissions on January 5, 2022. In determining the union's request to dismiss, the Board has considered the initial application, as well as all supplementary material filed by the applicants.

5. In the December 21, 2021, decision, the Board wrote:

> It would also be beneficial to the Board's assessment of these matters to know the extent to which the applicants agree or disagree with (or do not dispute) the facts pleaded by and documents filed by the union. The applicants are directed to review the facts set out in the union's response at paragraphs 18-22, 24-25, 30-31, 37, 39-43 of Appendix "A". If the applicants disagree with any alleged fact in those paragraphs, they must so indicate in writing with specific reference to the union's paragraph number, and provide the facts or reasons upon which they rely instead. Any fact alleged by the union that is not challenged by the applicants in this manner may be deemed by the Board to be true and provable.

6. The applicants did file submissions, with specific reference to each of the union's paragraph numbers, as set out above. While the applicants disagreed with some facts as alleged by the unions, other facts were agreed or uncontested. Facts with which the applicants agreed or did not contest, are included in the summary of facts below.

Facts

7. The applicants are members of the union's bargaining unit and work for the City of Toronto.

8. In mid-August 2021, the employer advised the union that it would implement a COVID-19 vaccination policy.

9. In late August 2021, the union held electronic town hall meetings for its members with respect to the policy. Each town hall was an hour long. Speakers included members of the union's executive and the union's long-time counsel. Approximately 1,000 members attended the town hall meetings.

10. At the town hall meetings, counsel summarized and explained his legal opinion of the policy. He explained the basis for his views, including in respect of possible arguments based on the *Charter of Rights and Freedoms.* The union president stated that the union

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encouraged vaccination. He also stated that the union did not support discipline or discharge of those members who did not comply with the policy. He advised the union would challenge discipline or discharge if actually pursued by the employer.

11. The union created and made available to the membership a document setting out frequently asked questions and responses to those questions, with respect to the policy. The union also sent out information in other email communications and in its President's Report.

12. In early October 2021, the employer updated the policy. The updated policy detailed the sanctions for non-compliance: an initial six-week suspension followed by termination in the event of continuing non-compliance.

13. The union filed a policy grievance challenging the policy including but not limited to the updated sanctions. The union notified its membership by way of "eblast". It also updated and re-circulated a copy of its frequently asked questions document.

14. In late October 2021, the union began filing and processing individual grievances on accommodation denials in relation to the application of the policy.

15. Six-week suspension meetings were initiated with the non-compliant employees starting in the first week of November 2021. The applicants were suspended for non-compliance.

16. The employer began terminations, pursuant to the policy, on or around January 2, 2022.

The duty of fair representation

17. Section 74 provides:

> A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

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18. The Board defined "arbitrary", "discriminatory" and "in bad faith" as follows in the often cited *Chrysler Canada Ltd.*, [1997] O.L.R.D. No. 2605, at para. 37:

> a) "arbitrary" means conduct which is capricious, implausible or unreasonable, often demonstrated by a consideration of irrelevant factors or a failure to consider all the relevant factors;
>
> b) "discriminatory" is broadly defined to include situations in which a trade union distinguishes between or treats employees differently without a cogent reason or labour relations basis for doing so; and,
>
> c) "bad faith" refers to conduct motivated by hostility, malice, ill-will, dishonesty, or improper motivation.

19. Rule 39.1 of the Board's Rules of Procedure sets out the approach of the Board in determining whether an application discloses a *prima facie* breach of the Act. The Rule reads as follows:

> 39.1 Where the Board considers that an application does not make out a case for the orders or remedies requested, even if all of the facts stated in the application are assumed to be true, the Board may dismiss the application without a hearing or consultation. In its decision, the Board will set out its reasons.

20. The Board will not dismiss an application for failing to make out a *prima facie* case unless it is clear, or plain and obvious, that it has no reasonable chance of success for establishing a violation of the Act based on the allegations made. In making this determination, the Board assumes all of the facts set out in the application to be true and provable, and it does not consider contradictory facts or defences put forward by the responding party.

Decision

21. A duty of fair representation application is not about the legality or reasonableness of the employer's policy. As this Board has previously concluded, a duty of fair representation application is about a union's conduct in the representation of its members and is "not the forum for debating or complaining about vaccination in general, this vaccine in particular, scientific studies, the government's directions, and/or a particular employer's policy": *Tina Di Tommaso v Ontario*

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Secondary School Teachers' Federation, 2021 CanLII 132009 (ON LRB).

22. In their materials, the applicants assert variously that the employer's policy is unfair, is contrary to the collective agreement, is in breach of legislation and/or fails to provide reasonable and available alternatives. To the extent that the applicants seek to challenge the employer's policy, a section 74 complaint is simply not the right forum.

23. The applicants' complaints about the union are not clearly enumerated in their lengthy materials. However, their complaints can generally be summarized as falling into one of the categories below: (i) the union did not respond to them and/or answer all of their questions; (ii) the union has not protected them from the application of the policy; (iii) the union did not provide adequate representation in the discipline process; and (iv) the union's actions have not been sufficiently quick and/or aggressive.

24. None of the applicants' complaints about the union establish a *prima facie* case of a breach of the duty of fair representation.

25. With respect to communications by the union, there is nothing in the applicants' materials, other than bald allegations, to suggest that the union acted in a manner that was arbitrary, discriminatory on in bad faith. The union sent out electronic communications, answered frequently asked questions and even set up town hall meetings at which its members could hear directly from the union's counsel. While the applicants complain that their microphones were muted at the town hall meetings and that they were limited in their ability to ask questions, they acknowledge that they were able to post questions in the chat function. The materials provided to the applicants show various instances of the union responding to email inquiries. It is hardly surprising that, when facing a new workplace-wide policy on an emergent issue affecting its thousands of members, the union relied upon written communications and group meetings to communicate. Whether or not the applicants received a response to each and every inquiry, it cannot be said that the union was uncommunicative or unresponsive.

26. It equally cannot be said that the message conveyed to the applicants was arbitrary, discriminatory or in bad faith. The union based its position on the legal advice it received about potential legal outcomes. Generally speaking, the Board has said that it is not for the

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Board to determine the correctness of a legal opinion, and this is particularly true where there is no dispute of substance on the facts underlying the opinion: see, for example, *Lorraine Facey v SEIU Local 1 Canada*, 2021 CanLII 111245 (ON LRB) and the cases cited therein. The applicants complain that many of their arguments were "disregarded and aggressively dismissed" by counsel and that they did not get satisfactory responses to arguments they wished to make. However, the union was not required to agree with the applicants or to debate endlessly with them, provided that its position was not taken in a manner that was arbitrary, discriminatory or in bad faith.

27. There are no facts in the materials which could demonstrate that the union failed to represent the applicants in the discipline meetings. The applicants assert that they "scrambled" to find a union representative to attend with them. Whether or not this characterization is accurate, it is not asserted that they were ultimately without a representative at any meeting. Moreover, while the applicants assert that the representatives did not in some cases speak at the meetings or did not advance arguments the applicants wished to make about the policy, it does not seem likely that any speech or argument at any particular individual discipline meeting would have made a difference in terms of the overall policy and the ongoing policy grievance.

28. The union's duty of fair representation does not require it to insulate the applicants from the application of the policy, or to ensure that the applicants were not suspended and/or discharged. Contrary to the applicants' statement that the union "has not done one thing to prevent the applicants' employment from being terminated…", it is clear that the union has done what it was supposed to do. The union communicated with members about the risks and then filed grievances when discipline/ discharge was imposed.

29. The applicants have no reasonable chance of success in establishing that the union's actions in respect of the grievances have not been sufficiently quick or aggressive. The applicants make much of their assertions that a different union local has processed a policy grievance concerning this employer's COVID-19 vaccination policy and has had some hearing dates before an arbitrator. It goes without saying that there are many factors which can and do impact the speed with which a grievance is sent to arbitration, an arbitrator is selected, and hearing dates are held. The mere fact that another union or local

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may have done some or all of these steps more quickly does not demonstrate anything, much less a violation of the Act.

30. In terms of remedy, the applicants effectively requested that the Board require the union take grievances to arbitration. There is nothing to suggest that the union has not or will not do so, even assuming that the union was required to do so, which is not determined here. Any argument to that end is premature. Moreover, the Board will not and should not dictate the arguments that the union should advance in the context of any grievance(s) it may decide to pursue, and it is not the Board's role to monitor the conduct of the union (or its counsel) while a grievance process is ongoing: see, for example, *AB v Ontario English Catholic Teachers Association*, 2021 CanLII 20752 (ON LRB) and the cases cited therein.

Determination

31. For the reasons set out above, the application is dismissed.

"Lindsay Lawrence"
for the Board

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