Arbitrator Deems COVID-19 Surveillance Testing Policy Reasonable in Retirement Home Setting

Date : December 17, 2020

Given the novelty of COVID-19, employers in various sectors continue to grapple with the implementation of health and safety policies and procedures that are both appropriate and reasonable to protect individuals in their particular workplace from the transmission of the virus. Where these policies and procedures are subsequently challenged by unions, arbitral jurisprudence should provide some measure of guidance to employers as to what will be deemed to be appropriate and reasonable in various circumstances. In particular, a recent decision from Arbitrator Dana Randall addresses the issue in light of a COVID-19 surveillance testing policy implemented in a retirement home setting.

In *Caressant Care Nursing & Retirement Homes and Christian Labour Association of Canada* – (December 9, 2020), the Union filed a group grievance on behalf of its members working at the Caressant Care Nursing and Retirement Home in Woodstock ("CCRH Woodstock"). CCRH Woodstock is a for-profit facility that provides rental accommodation with care and services to residents who require minimal to moderate support. Although CCRH is a retirement home facility regulated by the Retirement Homes Regulatory Authority under the *Retirement Homes Act*, this particular facility is physically connected to a nursing home regulated under the *Long-Term Care Homes Act, 2007*. Further, the staff at the retirement home provide laundry services to the residents of the nursing home. Accordingly, CCRH is in fact subject to certain directives issued under the *Health Protection and Promotion Act*, including Directive #3 for Long-Term Care Homes under the *Long-Term Care Homes Act, 2007*.

In the case of CCRH Woodstock, the Union challenged the reasonableness of a policy unilaterally imposed by the Employer which required all staff at the facility to undergo COVID-19 nasal swab testing every two (2) weeks. In brief, the policy adopted the provincial government's recommendations on COVID-19 surveillance testing and made them mandatory, with a refusal to comply resulting in the employee(s) being required to don full PPE for the entirety of their shifts or alternatively, being held out of service until such time as they chose to participate in the COVID-19 surveillance testing program. Further, the policy contained an accommodation provision that indicated that its requirements could be reviewed on a case-by-case basis where necessary. Of note, all employees of CCRH Woodstock were paid for one (1) hour of work and had their parking fees waived each time they underwent COVID-19 testing pursuant to the policy.

Although employees of CCRH Woodstock initially complied with the Employer's regular COVID-19 testing requests, some began to communicate their unwillingness to continue to do so once the mandatory policy was implemented in late June. Shortly thereafter, the Union filed the grievance alleging that the policy constituted an unreasonable exercise of management's rights in that it was

both an intrusion of the members' privacy and a breach of their dignity without a sufficiently compelling justification. In particular, the Union supported its arguments by referencing the allegedly invasive and painful nature of COVID-19 nasal swab testing, as well as its view that the COVID-19 surveillance testing regime did not actually accomplish what it purported to accomplish given its alleged deficiencies – that is to say, that it would only indicate whether an employee was infected with COVID-19 at the specific moment of testing and that it was not coherently applied to others in the workplace, including specifically the residents. The Union further argued that the policy was overbroad and unnecessary given that the Employer had adopted all other recommended mitigation strategies, that employees had so far been compliant with said strategies and finally, that there had yet to be an outbreak of COVID-19 at CCRH Woodstock. The Union conceded that COVID-19 surveillance testing would be appropriate where an employee is symptomatic.

For its part, the Employer argued that COVID-19 surveillance testing was a reasonable and important tool, recognized by both reputable medical professionals as well as the Ministry of Health and Long-Term Care, in controlling and tracking outbreaks. To that end, the Employer explained that it had implemented the COVID-19 surveillance testing policy in all of its long-term care homes and in ten (10) of its retirement homes, representing a total of approximately 1900 unionized employees. It noted that none of the numerous other unions representing these employees had challenged the reasonableness of the policy.

Given that one of the potential consequences of a failure to comply with the COVID-19 surveillance testing policy – being removal from service – was disciplinary in nature, Arbitrator Randall determined that the policy had to be examined in light of the criteria set out in *KVP Co. Ltd. and Lumber & Sawmill Workers' Unions, Local 2537* (1965) and adopted by the Supreme Court of Canada in *C.E.P., Local 30 v. Irving Pulp and Paper Ltd.* (2013). More specifically, the decision in KVP holds that a rule unilaterally imposed by the employer without union assent will give rise to discipline only where:

1. It is consistent with the collective agreement,
2. It is reasonable,
3. It is clear and unequivocal,
4. It was brought to the attention of the employee(s) affected before the employer attempts to act on it,
5. Where the rule is invoked to justify discharge, the employee was notified that a breach of the rule could result in discharge, and
6. The employer has enforced the rule consistently since its introduction.

Arbitrator Randall held that in CCRH Woodstock's case, the policy was consistent with the collective agreement in that it was a reasonable exercise of the Employer's management's rights. He further held that there was no dispute that the policy was clear and unequivocal, had been brought to the attention of the employees affected before the Employer attempted to act on it, and

had been enforced consistently since its introduction. Going on to note the presence of a generous accommodation provision, as well as the fact that the policy allowed employees to be tested by third parties outside of regular working hours while still receiving compensation for their time, Arbitrator Randall ultimately preferred the Employer's position on the issue. He noted that although much remains unknown about the symptoms, transmission and long-term effects of COVID-19, experts do know that it is highly infectious and often deadly for the elderly, in particular those that live in contained environments. He further noted that he disagreed with the Union's view that the COVID-19 surveillance testing regime did not actually accomplish what it purported to accomplish given its alleged deficiencies. Rather, he noted the high value of a positive test result as it would presumably lead to identification, isolation, contact tracing and the whole assortment of other tools available to the Employer to prevent the transmission of the virus.

Weighing 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*"), Arbitrator Randall ultimately found the Employer's policy to be reasonable, despite the fact that there had not yet been an outbreak in the facility. In his view, waiting for such an outbreak to occur before mandatory COVID-19 surveillance testing could be implemented was simply not a reasonable option, given the potential and even likely consequences of an outbreak in the home.

In Our View

In the CCRH Woodstock case, the Union attempted to draw comparisons with arbitral jurisprudence addressing the issue of monitoring the workplace for intoxicants. However, Arbitrator Randall explicitly rejected the comparison in light of what he viewed to be the vast factual differences between COVID-19 and intoxicants (e.g., intoxicants are not infectious to others in the workplace; unlike testing positive for COVID-19, consumption of intoxicants involves culpable conduct). We are now beginning to see arbitral jurisprudence emerge that is specific to the COVID-19 context which provides valuable insight as to what arbitrators will deem to be appropriate and reasonable in various sectors and circumstances.

For more information on your rights and obligations as an employer dealing with COVID-19 or other matters, please contact Lynn Harnden at 613-940-2731, Vicky Satta at 613-940-2753, Porter Heffernan at 613-940-2764 or André Champagne at 613-940-2735.