Arbitrator rules compulsory flu vaccinations of employees at chronic care facility is "an assault"

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The majority of an Ontario board of arbitration has held that a public hospital cannot enforce a requirement that its staff be vaccinated in the event of a flu outbreak among its patients. The case, *St. Peter's Health System v. CUPE, Local 778* (February 7, 2002) arose when the management of a chronic care geriatric facility adopted a policy that required that staff be vaccinated in the event of a flu outbreak among patients, with "outbreak" being defined to mean two or more patients having the flu. Employees who refused to be vaccinated were to be suspended without pay until the end of the outbreak. The suspensions were explicitly made non-disciplinary in nature.

Some 15 employees who refused to be vaccinated when an outbreak occurred were suspended for between seven and nine shifts. The union grieved the employer's rule.

UNION: NO BALANCING REQUIRED

Normally, when the issue at arbitration is the imposition by management of a work place rule not explicitly contained in a collective agreement, the reasonableness of the rule is assessed based upon a balancing of the interests of the employer and employees. In this case, however, the union asserted that, in the absence of either consent through the collective agreement or statutory authorization, the employer had no right to impose medical treatment on the employees, and that there can be no balancing of interests when an employer's policy amounts to an assault on employees.

In support of its position, the union produced a number of arbitration and court decisions to the effect that, in the absence of a contractual obligation or statutory authority, an employer cannot require an employee to submit to an unwanted medical examination. The cases dealing with imposed medical *treatment* were even more unequivocal in their stance, as can be seen in this extract from *Re Rodriguez and Attorney General of British Columbia*, a 1993 decision of the Supreme Court of Canada:

> "That there is a right to choose how one's body will be dealt with, even in the context of beneficial medical treatment, has long been recognized by the common law. To impose medical treatment on one who refuses it constitutes battery, and our common law has recognized the right to demand that medical treatment which would extend life be withheld or withdrawn."

The gist of the cases, the union submitted, was that enforced medical treatment was an assault. The union asserted that the consequences for non-compliance with the employer's policy were

serious even if they were not disciplinary, and it questioned why the policy had not been bargained for, or submitted to interest arbitration. Further, the union submitted, the employer could have proceeded by seeking an order for the vaccinations from the Medical Officer of Health under the *Health Protection and Promotion Act*.

EMPLOYER: A REASONABLE, NON-DISCIPLINARY RULE

The employer countered that the rule was a reasonable one, imposed in good faith for the purpose of protecting a high-risk population. The consequences of failure to comply were not disciplinary, but a finding that the refusing employees were not fit to work. It asserted that there was a long line of cases in which measures such as random drug and alcohol testing and employee searches had been assessed by arbitrators for their reasonableness, and urged the arbitrator to subject the mandatory vaccination policy to the same test.

BOARD: A "COMMON LAW RIGHT AGAINST FORCED MEDICAL TREATMENT"

The majority of the board held in favour of the union. It expressed the view that the cases relied upon by the employer did not persuade it to apply a test of reasonableness, because they did not involve forced medical treatment:

> "These cases are not comparable to mandatory medical treatment. Here, of course, we are faced with a different proposition, namely … not whether the rule is reasonable or unreasonable, but whether one can commit what the Supreme Court of Canada has said is an assault and force medical treatment on people that do not give consent. ... In all of the cases cited by the Employer, none of the cases involve medical treatment, and even when they involve merely medical reports and medical examinations, they can be conducted by the patients' own doctor, which is far less invasive than mandatory medical treatment."

In this case, the issue was the common law right against forced medical treatment - a form of assault, and no balancing need take place. The majority of the board noted the following factors to support its decision:

- the lack of statutory or regulatory authority for the policy,
- the failure of the employer to secure an order from the Medical Officer of Health,
- the fact that patients and visitors did not have to be vaccinated,
- the fact that the issue was never bargained for with the union, and
- the existence of a vaccination clause in the employer's collective agreement with the Ontario Nurses Association.

Noting that "[v]irtually all the court cases, including the Supreme Court of Canada and Ontario Court of Appeal, find that enforced medical treatment … is an assault if there is no consent", the board upheld the grievance.

In Our View

The employer had attempted to rely upon an Alberta arbitration decision, *Carewest v. Alberta Union of Provincial Employees*, which had involved similar facts, and in which the arbitration board had held the rule to be reasonable. However, the board in this case held that the *Carewest* decision was not persuasive, because that board had heard no argument as to whether forced medical treatment constituted an assault under the common law. Rather, it had simply balanced the issues and found in favour of the employer.

As noted in *St. Peter's*, one of the issues that weakened the employer's position was the absence of statutory or regulatory authority for the policy. Yet the board in *St. Peter's* made some reference to the fact that forced treatment is also a violation of section 7 of the *Canadian Charter of Rights and Freedoms*, the provision that guarantees security of the person. The validity under the *Charter* of a regulation passed under the *Ambulance Act* which requires that land ambulance paramedics either be immunized against the flu or provide evidence that immunization is contra-indicated, is currently at issue in an action launched by a paramedic at the North Bay General Hospital.

The paramedic, who is also grieving his indefinite suspension without pay, recently lost a bid to secure an interlocutory mandatory injunction reinstating him pending the outcome of his constitutional challenge to the legislation. However, the Court in *Kotsopoulos v. North Bay General Hospital* (February 19, 2002), in holding that the employee did not satisfy the tests for the granting of an interim injunction, noted that the issue raised is a serious one:

> "Whether … the selective approach to the compulsory immunization of certain caregivers is constitutional is clearly a matter requiring an in-depth hearing on the merits on all of the evidence available. These are not issues that can be dealt with at an interlocutory proceeding."

We will advise readers of further developments in this case.

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