Testing for COVID-19 in the workplace – Arbitrator holds compulsory rapid testing reasonable at construction site

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Employers considering measures to ensure workplace safety and business continuity through the COVID-19 pandemic should take note of a recent arbitration decision. In *Ellisdon Construction Ltd. v Labourers' International Union of North America, Local 183* (June, 2021), Arbitrator Kitchen dismissed the union's grievance and held that EllisDon's mandatory Rapid COVID-19 Antigen Screening Program was reasonable.

EllisDon implemented a Rapid COVID-19 Antigen Screening Program in February 2021 as part of a pilot program led by the Ontario Ministry of Health (the "Policy"). The objective of the pilot was to assess the value of the Abbott Panbio COVID-19 Antigen Screening Test as a screening tool to support employee safety and business continuity. Participation in the pilot was not mandatory. The test is approved by Health Canada, and, unlike PCR testing, involves throat and bi-lateral lower nasal swabs administered by qualified health professionals. Test results are generally available within 15 minutes, and a positive test is considered preliminary, not diagnostic, such that further confirmatory lab testing is required.

EllisDon elected to participate in the pilot and decided which job sites would be subject to rapid testing based on a number of criteria, including: community spread and case counts, hot-zone locations, size of the project, risk level for workplace transmission, critical infrastructure projects, and client requirements. One such job site was a mid-rise residential construction project in Toronto. Because residential construction was designated by the province as an "essential service," EllisDon's operations were permitted to continue, even while the province was in lockdown.

Pursuant to EllisDon's Policy, all individuals attending at the site, whether direct hires or employees of subcontractors (such as Verdi Structures Inc., a contractor engaged by EllisDon) were required to submit to the test twice per week. Any individual who refused to take the test was denied access to the site. Verdi employees who refused to take the test and were therefore denied access to the site were either relocated to a different site, if possible, or laid off. If the test yielded a negative result, the individual was permitted to access the site and work. If the test result was positive, it was considered a presumptive positive, and the individual was required to attend a COVID-19 Assessment Centre within 24 hours to undergo a confirmatory laboratory test. Such individuals, and any workers that were in close contact with them, were required to self-isolate until the confirmatory test results were available.

In addition to the Policy, EllisDon implemented several other health measures related to COVID-19 at worksites where testing was conducted, including:

- requiring individuals attending the sites to complete a screening questionnaire;
- the provision of hand sanitizer and hand-washing facilities;
- appropriate Personal Protective Equipment, including masks;
- prohibiting non-essential visitors and guests on job sites;
- scheduling work and start times to avoid overcrowding at site entry points and to maintain two-meter social distancing;
- tracking and monitoring employees who self-isolated or who had COVID-19 symptoms or positive COVID-19 test results, and requiring subcontrators to do the same for their employees; and
- enhanced cleaning and disinfection measures.

The union grieved the implementation of the Policy, claiming that it was unreasonable and contrary to the applicable collective agreements. It submitted that the evidence did not demonstrate that the testing would mitigate the risk of COVID-19 transmission at the job site. The union noted that the risk of transmission at the site was at the lower end of the spectrum given the open-air setting and the other safety measures implemented. The union argued that the testing was a disproportionate response to the pandemic, given the inherently invasive nature of the testing.

EllisDon argued that the mandatory testing was justified given the serious nature of the pandemic. It claimed that its interests were not limited to protecting its workforce, but also extended to protecting the safety of the public, which interests it claimed far outweighed the interests of the employees opposed to the testing.

Arbitrator Kitchen noted that any policy unilaterally adopted by an employer must be considered with reference to the following factors set out in *Lumber & Sawmill Workers' Union v. KVP Co.*:

1. It must not be inconsistent with the collective agreement.
2. It must not be unreasonable.
3. It must be clear and unequivocal.
4. It must be brought to the attention of the employee affected before the company can act upon it.
5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used for a foundation for discharge.
6. Such rule must be consistently enforced by the company from the time it was introduced.

Of these factors, the sole issue before Arbitrator Kitchen was whether the policy was reasonable, which involved a "balancing of interests".

In applying this balancing, Arbitrator Kitchen considered two arbitral decisions involving mandatory testing in the context of COVID-19 – *Caressant Care Nursing and Retirement Homes* (2020), discussed in a previous Focus Alert, and *Unilever Canada Inc.* (2021). In each case, the respective unions challenged the reasonableness of the employer's decision to mandate COVID-19 testing in

the workplace. In both cases, the arbitrators weighed the interests of the employees and the intrusiveness of the test against the seriousness of the pandemic, the importance of curbing transmission, and the benefits of the testing. In both cases, the arbitrators concluded that the mandatory testing was reasonable.

In his consideration of the case at hand, Arbitrator Kitchen noted that EllisDon's Policy was implemented in a minimally intrusive way and included several measures to protect employee privacy.

Arbitrator Kitchen noted that, notwithstanding the open-air environment, given the nature of the work, employees were not always able to physically distance themselves from others, and highlighted that employees were often required to travel between worksites. The risk of COVID-19 spread was also not hypothetical or speculative: EllisDon had numerous outbreaks at its residential construction project in Toronto – nine individuals at the project had contracted COVID-19, despite existing protocols; there had been two apparent cases of transmission in the project itself; and the project had been declared an outbreak worksite by Toronto Public Health. Other EllisDon worksites had also been affected.

Given these factors and the arbitral jurisprudence, Arbitrator Kitchen determined that the testing policy was reasonable. In dismissing the grievance, he stated:

In conclusion, COVID spread remains a threat to the public at large and those working at EllisDon construction sites. When one weighs the intrusiveness of the rapid test against the objective of the Policy, preventing the spread of COVID-19, the policy is a reasonable one.

In Our View

This decision is one in a growing body of arbitral jurisprudence standing for the proposition that compulsory workplace testing for COVID-19 can be reasonable in the right circumstances. It should be noted, however, that EllisDon's testing regime was implemented during the "third wave," when COVID-19 cases were approaching unprecedented levels. This fact goes to the seriousness of the problem that Policy targeted. Should cases of COVID continue to decline, the seriousness of the problem will be reduced, and the balance in favour of testing may begin to shift.

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