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Arbitrator Upholds Employer's Right to Impose Mandatory COVID Testing on Employees

By Thomas A. Stefanik and Shreya Patel

Everyone in society has been affected in different ways by the COVID-19 pandemic. Employers in particular have faced difficult challenges and have been required, in many cases almost immediately, to make decisions that potentially impact employees' privacy and other rights while attempting to ensure that the health and safety of their employees, their clients and those that they provide services to, are adequately protected. A common question that has arisen over the last few months for employers is simply this - can they require their employees to take a COVID test as a condition of working in order to satisfy their employer they can safely attend the workplace?

A very recent labour arbitration decision dated December 9, 2020, dealt squarely with this latter question. In *Christian Labour Association of Canada v Caressant Care Nursing & Retirement Homes*, an arbitration in which our firm represented Caressant Care, arbitrator Dana Randall was presented with the union's challenge to the employer's policy that all staff at its retirement home in Woodstock, Ontario be tested for COVID-19 once every two weeks. The policy being challenged involved the nasal swab test.

The union argued that the policy was an unreasonable exercise of management rights, and in essence amounted to mandatory surveillance testing. The union took the position that the test, in and of itself, does not accomplish its purpose as it only measures potential infection at one point in time and that an employee who tests negative today can be infectious tomorrow. The union further argued that the testing was not required given the fact that the employer had put into effect substantial safety procedures (including PPE) and there was no evidence of any positive cases in the home. Finally, the union argued that as residents of the home were not required to be tested, the testing itself was of limited utility and did not prevent infection for the employee being tested.

The arbitrator rejected these arguments and dismissed the grievance, adopting Caressant Care's position that the rule was reasonable given all the facts and circumstances that the employer faced. The test was different from many alcohol and drug testing policies which have been found to be unreasonable, as intoxicants are not infectious. Importantly, in weighing the privacy breach against the safety goals of the policy, the arbitrator considered it important that, while public health authorities are still learning about

COVID's symptoms, its transmission and its long-term effects, it is not in dispute that COVID-19 is highly infectious and often deadly for the elderly who live in contained environments.

Ultimately, the arbitrator, in weighing the intrusiveness of the test (a swab up the nose every fourteen days) against the problem to be addressed (preventing the spread of COVID-19 in the home), found the policy to be a reasonable one. He agreed with Caressant Care's position that even though the home had not had an outbreak, given the potential serious consequences of such event, waiting for an outbreak to happen was not a reasonable option.

It is important to note that the decision was made in the context of a retirement home, not a long term care facility. In a retirement home, residents are more independent and, arguably, less vulnerable to infectious diseases than residents in long term care. This however did not cause the arbitrator any difficulty in his conclusion that the policy was reasonable.

It remains to be seen if such tests, if mandatorily imposed by employers, will be challenged in non-health care settings by unions at arbitration or non-union employees in civil actions. With the upcoming winter months, and probable continuing high cases of COVID-19 in the community, and still likely months away from significant numbers of vaccinations, employers will be faced with continuing challenges as to how to manage the health and safety of their employees and workplaces.

Authors



Thomas A. Stefanik
Partner

Tel: 416 777 5430
tstefanik@torkinmanes.com



Shreya Patel
Associate

Tel: 416 777 5453
spatel@torkinmanes.com

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