Case In Point

Arbitrator Upholds Employers' Mandatory COVID-19 Testing Program

Date: July 5, 2021

In *Ellisdon Construction Ltd. v Labourers' International Union of North America, Local 183*, Arbitrator Kitchen recently upheld the Abbott Panbio Rapid COVID-19 Antigen Screening Program implemented by EllisDon, a construction and building services company, at many of its worksites. Arbitrator Kitchen stated that "[w]hen 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." Verdi, a contractor to EllisDon, was also named in the grievance.

In late February of 2021, EllisDon implemented a Rapid COVID-19 Antigen Screening Program (Policy) as part of a pilot program led by the Ontario Ministry of Health. The Policy required that all individuals attending certain job sites be required to submit to screening in order to gain access to the workplace.

The Abbott Panbio COVID-19 Antigen Screening Test (AP Test) is not administered through a nasopharyngeal swab (deeper into nasal cavity), but rather administered via a throat and bilateral lower nostril swab (less discomfort) twice weekly in accordance with Ministry of Health guidelines. EllisDon engaged three external nursing firms to provide healthcare professionals to administer the testing. The testing occurred on site, did not require shipping the specimen to a lab for processing, and took approximately 15 minutes to yield results.

No personal health card information was taken or stored during the testing. Individuals being screened with the AP Test were required to provide their name, employer name, phone number, and email address for the purpose of notification in case of a positive result. The information collected was only disclosed and used by healthcare professionals and local public health units.

Individuals could refuse to submit to the AP Test, but anyone who refused to undergo testing would be denied access to the worksite. If a Verdi employee refused an AP Test and was therefore denied access to the worksite, Verdi would make best efforts to reassign that employee to a different site on which Verdi performs work. If no such site was available, the refusing employee would be laid off.

EllisDon had already implemented other safety measures related to COVID-19, including a screening questionnaire, handwashing, personal protective equipment (PPE), an enhanced cleaning and disinfection program, and taking employees' temperature before they accessed the worksite.

The risk of a COVID-19 spread at EllisDon worksites was not hypothetical or speculative. From December 27, 2020 to January 29, 2021, there were 69 cases of COVID-19 at an EllisDon worksite. As of May 14, 2021, there were four active workplace outbreaks at EllisDon worksites in Toronto.

In this policy grievance, the Union alleged that the Policy was an unreasonable exercise of management rights and an unreasonable company policy or rule. It relied on drug and alcohol testing cases to argue that the Policy was unilaterally imposed and did not meet the test of reasonableness as set out in *Lumber & Sawmill Workers' Union v. KVP Co.* (*KVP*). When analyzing a policy based on the *KVP* test, some of the factors to be considered are the nature of the interests at stake, whether there are less intrusive means available to achieve the objective, and the impact on employees. The Union submitted that the Policy was "inherently invasive and engages critical employee interests, including the right to privacy and bodily integrity."

The employers argued that "the main employer interest in the present case is the safety of not only its workforce, which

includes the workforces of various trades on site, but also the safety of the public. The interests of the employers in promoting health and safety and preventing the spread of COVID-19 not only in the workforce but in the public, far outweighs the interests of the employees in this case."

Arbitrator Kitchen weighed the factors and found that the Policy was reasonable. He noted the prevalence of the COVID-19 virus at the time the Policy was implemented: the City of Toronto had been in lockdown or subject to Stay-at-Home orders since November 20th, 2020 and the province had been in full lockdown since April 8, 2021.

The Arbitrator stated that the risk of COVID-19 spread is heightened by the nature of the construction industry where employees regularly move between job sites and employees of multiple subcontractors may be on site at any one time. These employees regularly worked side-by-side over extended periods of time in a manner where social distancing was not always possible.

The Policy also had privacy protection measures in place, which included swabbing in a manner that could not be observed by others and safeguarding screening results from unnecessary disclosure.

With reference to two other cases where unions have attempted to draw comparisons between drug testing and COVID-19 screening, Arbitrator Kitchen determined that drug testing is distinct on the basis that intoxicants are not infectious and, unlike intoxication, testing positive for COVID-19 is not culpable behaviour.

Arbitrator Kitchen ultimately found that the interests of the employers in promoting health and safety and preventing the spread of COVID-19 not only in the workforce but in the public far outweighed the interests of the employees in this case.

This decision is welcome news for employers seeking to exercise their management rights in a reasonable manner through the imposition of a mandatory COVID-19 screening policy.