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Testing 1-2-3 Another Arbitrator Upholds Mandatory COVID-19 Rapid Testing in the Workplace

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With more and more employers using rapid COVID-19 testing to reduce the risk of workplace transmission of the virus, many employers are asking: *can we require an employee to undergo a COVID-19 test as a condition of work?*

In a recent Ontario arbitration decision, *Ellisdon Construction Ltd./ Ellisdon Corporation and Verdi Structures Inc.*[1] Arbitrator Kitchen held that a general contractor's mandatory COVID-19 testing policy is reasonable. The decision is good news for employers looking for an additional way to protect workers.

The legal context

Occupational health and safety legislation typically requires an employer to take every precaution reasonable in the circumstances to protect its workers.

Rapid COVID-19 testing can be an effective way to help prevent the spread of COVID-19. However, mandatory testing requires a worker to undergo a medical test which may raise issues of personal privacy and bodily integrity.

For **non-unionized employees**, an employer can implement a mandatory testing policy, subject to human rights considerations. For example, if an employee is not able to comply with the policy due to a disability (a protected ground under human rights law), the employer must demonstrate the requirement is *bona fide* and reasonable in the circumstances, and accommodate the employee to the point of undue hardship[2]. If a non-unionized employee refuses to comply with the policy due to personal choice, they may be placed on an unpaid leave or their employment may be terminated. Whether this termination is with or without cause will depend on the policy and workplace.

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For **unionized employees**, if the collective agreement does not prohibit COVID-19 testing, an employer may unilaterally institute a policy under its management rights (subject to the same human rights considerations noted above). If the union grieves the policy on the basis it violates the collective agreement, the employer is required to demonstrate the policy is a reasonable workplace standard. Generally, this means that the policy is necessary and there is no less intrusive way to achieve the desired result.

What happened in *EllisDon*?

EllisDon implemented a rapid antigen testing policy in February 2021, as part of a pilot program with the Ontario Ministry of Health (the "Testing Policy"). Initially, the Testing Policy applied to select sites based on an assessment of COVID-19 risk factors. On May 3, 2021, EllisDon expanded the Testing Policy to apply to additional job sites. The Testing Policy required every individual working on a job site to participate in COVID-19 testing twice a week, consistent with recommendations of the Ministry of Health. An individual who refused testing was denied access to the site.

So that testing would be less invasive and cause less discomfort, rapid antigen testing was conducted by a throat and bilateral lower nostril swab, not a nasopharyngeal swab. To protect an individual's privacy, the test was observed, and results were read and recorded, only by a healthcare professional, and the information collected was used and disclosed by the healthcare professional and EllisDon management only to communicate results to the individual and public health, as required.

The union grieved the Testing Policy, arguing it was unreasonable because it was invasive, violated privacy rights and bodily integrity, and there were less intrusive means available to reduce COVID-19 workplace transmission.

Testing Policy is reasonable

Upon balancing the objective of the rapid test as against its intrusiveness, Arbitrator Kitchen found the Policy to be reasonable:

> … 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.

Arbitrator Kitchen relied on several key factors which supported EllisDon's position that the Policy was reasonably necessary, and there was no less intrusive and effective way to limit transmission of the virus:

- The risk of COVID-19 spread was not hypothetical or speculative; EllisDon had experienced numerous outbreaks at its job sites in Toronto.
- Given the nature of construction work, it is difficult and impractical for workers on a site to maintain physical distance.
- Construction work is transitory with workers regularly moving between job sites and employers; this inherently increases the risk of COVID-19 spread.
- The type of testing performed is minimally invasive compared to the laboratory-based PCR test.
- EllisDon had made significant efforts to protect privacy and dignity during the testing process.

What this means for employers

In the right circumstances, a well designed and implemented rapid testing policy can be an effective tool to help stop the spread of COVID-19. Particularly in high-risk work environments, such as construction, food processing and healthcare, rapid testing may be key.

As always, the devil will be in the details and it is important to design a testing protocol that meets its objective and is legally compliant.

To learn more, and for assistance regarding any COVID-19-related policy or protocol, contact the team at Sherrard Kuzz LLP.

[1] *Ellisdon Construction Ltd./Ellisdon Corporation and Verdi Structures Inc. v. Labourers' International Union of North America, Local 183* 2021 CanLII 50159 (ON LA)

[2] In the case of a COVID-19 test, it is unlikely an employee could justify non-compliance on the basis of a protected ground under human rights legislation.

DID YOU KNOW?

Canada has introduced a new federal statutory holiday for September 30, known as the **National Day for Truth and Reconciliation**. Created to commemorate the tragic legacy of residential schools in Canada, the statutory holiday applies to the federal government and federally regulated workplaces.

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Employee's mitigation efforts unreasonable because she aimed "too high" in job search – Court reduced notice period by two months

In *Lake v La Presse (2018) Inc*,[1] the Ontario Superior Court of Justice ruled that a dismissed employee's mitigation efforts were unreasonable because she waited too long to begin her job search, applied for too few jobs and unreasonably limited her search by aiming "too high". The court reduced the notice period from eight to six months.

The Duty to Mitigate

When an employee is terminated without cause, they may be entitled to common law notice (which includes statutory notice). If so, the employee has a duty to mitigate whatever loss they suffer following the end of the statutory notice period by making a reasonable effort to secure replacement income. That income will reduce the former employer's liability. However, if the employee fails to take reasonable steps to mitigate their loss a court can reduce or even eliminate the former employer's liability.

When the duty to mitigate is a live issue (it isn't always), the former employer bears the onus of proving an employee's mitigation efforts were not reasonable and that, had the employee taken reasonable steps, they would have obtained replacement income sooner. The bar for an employer is high – but it is not out of reach, as the *Lake* decision shows.

What happened in *Lake*?

Merida Lake was employed as the General Manager for the Toronto division of La Presse. Previously, Lake spent 20 years working in sales and operations for various media companies. At La Presse, Lake's job was to manage the sales team and generate advertising revenue in Toronto. She reported to the Vice-President of Sales and Operations, based in Montreal. Although Lake was the most senior employee in Toronto, she did not attend executive meetings nor participate in setting strategic direction within the organization.

La Presse decided to close its Toronto office and advised Lake on March 25, 2019 that her employment would be terminated without cause effective May 30, 2019. Lake's employment ultimately concluded on April 30. At the time, she was 52 years old and had five and a half years of service.

Two years later, Lake remained without employment. She claimed she diligently looked for work, used the services of a career consultant (which La Presse provided) and spent time networking and attending conferences. She also claimed rampant ageism in the industry hindered her ability to find work.

La Presse asserted Lake's mitigation efforts were unreasonable because she focused on vice president positions – a position she never held – and industries where she had no experience.

The court shared the employer's concern:

> *…I have concerns that the plaintiff aimed her job search too high … had she broadened her expectations to include positions at the levels she had held previously, she would have been able to apply for additional jobs, including jobs she was more likely to be a serious candidate for.*[2]

The court made the following findings based on the evidence:

- Lake should have been ready to begin her job search by May 1, having had more than a month to adjust to her new circumstances.
- Lake did not utilize the career transitioning services La Presse provided her until nearly two months after her employment ended.
- Lake submitted her first job application more than four and a half months after she ceased working for La Presse.
- Six of the seven jobs Lake applied for during the reasonable notice period were positions which would represent a promotion over her prior role.

Despite the absence of direct evidence of other available positions to which Lake could have applied, the court inferred her chances of obtaining a position would have improved significantly had she expanded the parameters of her job search, searched earlier and applied for a greater number of positions:

> *…although there is no direct evidence in front of me of other positions that the plaintiff could have applied for, I find it is reasonable to assume that they existed. If vice president roles were available, more junior roles were also available. The plaintiff chose unreasonably to limit her job search, which had a corresponding impact on her ability to find work.*

The court reduced Lake's notice period by two months.

Best practices for employers

While the bar to success may be high, an employer can put itself in a stronger position to challenge a former employee's mitigation efforts by taking these steps:

- Offer the employee outplacement counselling.
- Throughout the anticipated notice period, search for available positions that would be suitable to the employee, and save evidence of the job postings.
- In appropriate circumstances, share available opportunities with the employee.
- Assess the reasonableness of the timing and breadth of the employee's search, as well as the nature of the positions to which the employee applied.

While some of these steps require an upfront investment of time and money, they can pay dividends if it becomes necessary to challenge a dismissed employee's mitigation efforts in future litigation.

To learn more and for assistance, contact a member of the Sherrard Kuzz LLP team.

[1] *2021 ONSC 3506 (CanLII) (Sup Ct J).*
[2] *Ibid* at para 23.
[3] *Ibid* at para 69.

Please join us at our next HReview Breakfast Seminar:

HReview
Seminar Series

Health & Safety:

Building a Culture of Safety As We Return To The Workplace

As Ontarians return to the workplace there will be a heightened appreciation for employers who go the extra mile to keep their people safe. Our objective is to keep you up-to-date.

Join us, and special guest **Ron Kelusky, Ontario's Chief Prevention Officer**, as we learn about Ontario's COVID experience and initiatives for the near term.

1. Ontario Update: Ron Kelusky, Chief Prevention Officer

- COVID-19: Lessons learned and next steps. The role of the Ministry of Labour, Training and Skills Development ("MLTSD").
- Non-COVID-19: MLTSD resources for employers and near-term compliance initiatives.

2. When The Worst Happens

- Despite your best efforts, an accident has happened, what now?
- The range of potential penalties.
- What circumstances give rise to the most severe penalties and imprisonment?

3. An Ounce of Prevention

- How to build a culture of safety.
- Risk assessments and safety plans.
- What policies and processes should an employer have in place now to reduce the potential of an accident or charge?
- Practical tips to skilfully handle a health and safety audit.

DATE: **September 22, 2021; 9:00 a.m. – 10:30 a.m.**
WEBINAR: **Via Zoom** (registrants will receive a link the day before the webinar)
COST: Complimentary
REGISTER: **Here by Wednesday September 15, 2021**

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