

IN THE MATTER OF AN ARBITRATION

BETWEEN

HYDRO ONE INC.

(“Hydro One”)

and

POWER WORKERS’ UNION

(the “PWU”)

GRIEVANCE NUMBER: HO-P-136

CHIEF ARBITRATOR: John Stout

APPEARANCES:

For Hydro One:

Daniel McDonald, Norton Rose LLP
Samantha Black, Norton Rose LLP

For the PWU:

Donald K. Eady, Paliare Roland LLP
Lauren Pearce, Paliare Roland LLP

HEARING HELD BY VIDEOCONFERENCE ON NOVEMBER 21, 2021

AWARD

Introduction

[1] This matter concerns a grievance (HO-P-136) filed by the PWU challenging some aspects of Hydro One's COVID-19 Vaccination Policy (the "Policy"). The PWU is not challenging the overall reasonableness of the policy. Instead, the PWU has raised a number of concerns that it believes must be addressed to ensure that the Policy meets the requirements under *KVP Co. v. Lumber and Sawmill Worker's Union, Local 2537*, [1965] 16 L.A.C. 73 (the "KVP test").

[2] Hydro One is of the view that they have engaged in a collaborative consultative approach that reasonably and fairly balances the competing interests. It is their strongly held view that the Policy meets the *KVP* test.

[3] The parties filed extensive written briefs prior to the hearing that was held on November 21, 2021. Counsel made oral submissions at the hearing to supplement their written material. It was agreed that I could issue a bottom line award to resolve the dispute.

[4] Before addressing the concerns raised by the PWU, I wish to commend Hydro One for how they have addressed this very serious and delicate issue. Hydro One has acted reasonably by engaging the PWU in a consultative manner to formulate a Policy that carefully balances Hydro One's legitimate interests in providing a safe and healthy workplace and privacy rights. I also wish to applaud the PWU for supporting Hydro One's efforts in addressing this issue. These parties have both acted in good faith and in accordance with good labour relations by working together to resolve the vast majority of their differences. These parties have set an example that others ought to replicate as it saves time, costs and most importantly makes for peaceful and harmonious labour relations.

Decision

[5] Therefore, after carefully considering the parties submissions, I find, and order as follows:

I. Testing Costs

[6] I find that the award of Arbitrator Murray in *Ontario Power Generation and Power Workers Union (OPG-P-185)* dated November 12, 2021, provides guidance and is eminently reasonable. There are some individual considerations that must be taken into consideration based on Hydro One's operations. Therefore, I order as follows:

- Employees who have not confirmed that they are fully vaccinated are required to self-administer the rapid antigen test, and the cost of providing such tests is to be borne by Hydro One. This order is without prejudice to Hydro One being able to bring this issue back before me on 30-days' notice.
- Employees are required to self-administer rapid antigen tests on their own time, prior to reporting to work, and are not entitled to compensation for the time spent in the administration of the test or in the reporting of the results. Hydro One will consider reasonable compensation, on a case by case basis, for those granted a medical or religious exemption for administering the rapid antigen tests. In addition, Hydro One will consider reasonable compensation, on a base-by-case basis, for those employees who are required to travel to obtain a PCR test. Any individual situation where the parties cannot agree on the reasonableness of how Hydro One has treated an individual employee may be brought before me at the monthly arbitration hearing.

II. Religious exemption

[7] Hydro One has advised that they have made the following amendments to the Policy:

REQUIRED; Please describe below the belief(s) based on your religion and/or creed that preclude you from being vaccinated. Your response below should address the following questions:

- 1) What creed/religion do you belong to?
- 2) How long have you practiced your creed/religion?
- 3) Why does your belief in this creed/religion prevent you from being vaccinated against COVID-19?
- 4) Have you been vaccinated against any other illnesses? If so, why were those vaccinations permissible under your creed/religion?

Please also provide any documentation that may support your position that you are unable to be vaccinated due to your creed/religion. This could include, for example, an excerpt from your religious text, or a letter from your religious leader.

[8] I am satisfied that Hydro One's amendment clarifies and resolves any concerns raised by the PWU.

III. Hydro One use of medical information and privacy concerns

[9] Hydro One has clarified that they do not store any individual employee's QR code in their systems. Once Hydro One verifies the vaccination status of an employee, they delete the QR code. The timing for verification of vaccination status is a relatively short period of time. The only information retained on Hydro One systems is the notation that an employee is either subject to testing or they are not subject to testing.

[10] Hydro One has also clarified that managers are only informed whether or not an employee may or may not attend the workplace. Managers have no access to any medical information. In their brief, Hydro One explains the following:

Practically speaking, on a day-to-day basis, this means that people managers only see the personal information of employees who report to them. Notably, the filtering function described in the User Guide for managers and Supervisors does not allow managers or supervisors to access the personal information of employees who do not report to them. The filtering function allows managers and supervisors to filter within their own teams so that they can narrow, for example, to solely view those employees who have submitted test results, rather than entire team list that

would also include vaccinated employees who do not need to submit to testing.

The Union's proposed limitations on the nature of information that may be accessed by managers and supervisors are unduly restrictive and would preclude Hydro One from ensuring the health and safety of the workplace. They are also without a foundation in law. The Union proposes that managers and supervisors solely require the following information: (i) whether the employee is in a testing program or not; and (ii) whether the employee is barred from the workplace on a particular day. However, this information is not sufficient. Managers and supervisors need to know that an employee's test results were negative to permit access to the workplace. Hydro One's policies and practices strike a reasonable balancing of interests in all the circumstances.

[11] I accept Hydro One's explanation in their brief as clarified at the hearing.

[12] Finally, Hydro One has acknowledged that they are not permitted to share any information they collect relating to this Policy externally, except as required by law.

IV. International access to medical information

[13] Hydro One has clarified that the security of employees' personal information is not compromised by Hydro One's relationship with its' service provider Qualtrics. Hydro One collects employees' personal information via a tracking tool, and this information is solely stored in Canada unless an employee decides to access their application outside of the country. Hydro One is not requiring employees to consent to the disclosure of their personal medical information to Qualtrics. Hydro One's international service providers do not have access to any medical information, the only information that they may have access to involving the Policy is the self-report of an employee and not the actual medical information or testing results. In addition, Hydro One has agreements in place with their external international service providers that protects information that may be shared with them.

[14] I am satisfied that Hydro One has generally taken reasonable measures to protect employee's personal medical information.

[15] Hydro One has undertaken to advise individual employees and the PWU if there is ever a data breach with respect to the information. In the event of such a situation arising and the parties cannot resolve the issue between them through the grievance procedure, then the matter may be brought before me.

V. Consequences for non-compliance

[16] Arbitrator Murray also addressed this very issue in his *Ontario Power Generation and Power Workers Union (OPG-P-185)*, *supra*, award. I agree with Arbitrator Murray that Article 2A.3 does not apply to this unique situation that has occurred during a global pandemic, the likes of which we have not seen in over 100 years. It could not have been contemplated by the parties that such a global pandemic would occur, resulting in the unprecedented event of employees being required to either be vaccinated or undertake testing in order to provide a safe and healthy workplace. Therefore, I also find that on a without prejudice basis Article 2A.3 does not apply to this unique situation and nothing in this award should lead anyone to believe that the traditional interpretation and application of Article 2A.3 should not continue and apply in all other circumstances.

[17] Similar to the cost of testing, there are some unique Hydro One issues that need to be clarified. In this regard, it has been agreed that Hydro One will maintain the *status quo* with respect to the six employees currently on unpaid leaves due to their refusal to confirm their vaccination status or have not completed testing as required by the Policy. These issues that need to be clarified shall be brought back before me on December 6, 2021. In the meantime, the PWU will speak to these six individuals and hopefully they will agree to comply with the Policy, rendering these issues moot.

[18] I remain seized to address any issue fairly raised by the grievance and not addressed in this award, including implementation of my award.

Dated at Toronto, Ontario this 22nd day of November 2021.

A handwritten signature in dark ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

John Stout- Chief Arbitrator