CAUT LegalUpdate

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Recent COVID-19 Labour Decisions

The following four cases touch upon COVID-19 protocols in unionized workplaces.

In the first case, the Ontario Labour Relations Board (OLRB) dismissed a complaint that the union failed in its duty of fair representation. The employee who filed that complaint was found to have demonstrated blatant disregard for the health and safety of his colleagues. This case illustrates the difficulties union and association staff and volunteers have with members who choose to disregard necessary COVID-19 safety precautions. The second two cases address COVID-19-related policies unilaterally imposed by the Employer. In one decision, the Employer's policy was deemed to be too ambiguous to ensure proper compliance, whereas in the other the Employer's policy clearly conflicted with language in the sick leave provisions in the collective agreement. The fourth case involves an Employer who refused to put all reasonable COVID-19 precautions in place for employees.

Mujkanovic v. ATU, Local 113, 2021 CanLII 96190 (ON LRB)

Facts

Mujkanovic was employed by the Toronto Transit Commission (TTC). On January 7, 2021, the TTC terminated his employment for blatantly disregarding the Employer's directions regarding COVID-19 protocols and misleading the Employer with respect to symptoms and testing. The Employer instituted several policies in order to control the spread of COVID-19 at the workplace, including prohibiting employees from attending work if they or their family members were experiencing symptoms, or if they were awaiting the results of a COVID-19 test. These policies were communicated to all employees. Every employee who attended work had to complete screening questions about their health, testing status and recent contacts.

Early in November 2020, Mujkanovic and his wife began experiencing symptoms associated with COVID-19, including a scratchy throat and cough. Mujkanovic assumed it was merely "seasonal allergies" and he continued to attend work. On November 10, 2020, Mujkanovic went for a COVID-19 test. While awaiting test results, Mujkanovic attended work on November 12 and 13. At the entrance to the workplace, he was asked the screening questions, and he responded no to all of them. He did not disclose to his supervisors that he and his wife were experiencing some COVID-19-like symptoms. On the morning of November 13, 2021, Toronto Public Health called Mujkanovic to inform him that he had tested positive for COVID-19.

In a December 10, 2020 investigatory meeting, Mujkanovic continued his dishonesty until his union representatives informed him privately that the Employer had already been contacted by Public Health. Only then did he admit the truth.

Subsequent to this meeting, the Employer suspended Mujkanovic with pay.

On January 7, 2021, the Employer met with Mujkanovic and his union representative. Mujkanovic denied that he was aware of the policies on COVID-19, and blamed public health for confusing him. The Employer terminated his employment.

The respondent union grieved the termination but did not take the matter all the way to arbitration. At each internal step of the grievance process, Mujkanovic was "ably" represented by his union. They pushed him to obtain relevant documentation about what he was told and about his health history, and they argued that the Employer had not followed progressive discipline. At a mediation meeting, the mediator informed the Union that the Employer would not reinstate Mujkanovic, and that he did not think the grievance would succeed at arbitration.

After the failed mediation, the Union considered all the facts. They reviewed the numerous instances of dishonesty, and how Mujkanovic's actions put the health and safety of the public and his co-workers at risk. The Union also considered the mediator's opinion that the grievance would be unsuccessful.

Decision and Analysis

The OLRB provided Mujkanovic with two opportunities to provide further facts and evidence to support his complaint. The only documentation he provided was a generic note from his doctor that he had a history of seasonal allergies. Most of his arguments alleged that his union representatives were not working hard enough, were conspiring with the Employer and did not conduct their own investigation.

On the issue of differing versions of events, the OLRB made a helpful statement for unions defending against DFR complaints. At paragraph 19, the OLRB wrote: "It is immaterial that the applicant and the union do not agree on every fact concerning what happened leading up to the applicant's discharge from employment. The union was entitled to draw its own conclusions regarding the facts so long as it did so on a non-arbitrary and non-discriminatory basis and was not motivated by bad faith." Moreover, the OLRB did not state that a union must conduct its own investigation in order to discharge its duty to the member.

The duty of fair representation does not presume that unions have infinite resources. Unions are allowed to rely on facts as disclosed by the Employer and the member. Unions are allowed to consider the consequences of the member's actions and make their own findings as to credibility. In this case, Mujkanovic had been dishonest on multiple occasions. Mujkanovic also failed to provide any supporting documentation to help his case.

The OLRB ruled that the Union fulfilled its duty. The Union did everything it could short of acting as a mouthpiece for Mujkanovic's non-credible and casual perspective of the pandemic.

Teal-Jones Group and USW, Local 1-1937 (Fothergill), 2021 CarswellBC 3087

Facts

The Grievor and his father worked at the same lumber facility. They both lived at the family home in a nearby town. The Employer operated the lumber facility during the COVID-19 pandemic. As with many workplaces, the rules and policies were changing as cases, advice and circumstances were in flux. The Employer sought the advice of the local public health office in a general manner.

The Grievor missed two and a half days of work when he was sent home without pay on November 18, 2020. The day before, the Grievor's father was experiencing flu-like symptoms. His father stayed home from work in order to self-isolate and get tested for COVID-19. The Grievor was asymptomatic, and he attended work that day. His supervisor sent him home in accordance with the Employer's policy not to allow attendance at work by those with family members experiencing symptoms.

On November 20, 2020, the Grievor's father tested negative for COVID-19, and they were both allowed to return to work.

The Union grieved the decision to send the Grievor home from work. It had not been made clear to him at the time that an asymptomatic person had to miss work when someone in their family or household displayed symptoms. The Employer's policies were changing, and not every nuance was communicated to all staff. The policies were also not necessarily in line with what public health required for workplaces.

Decision and Analysis

Arbitrator J. Gregory found that the Employer's policy was ambiguous at the time of the incident. The policy itself was not reasonable because it failed to consider ways to mitigate the financial loss to employees. She followed the "KVP"[1] analysis for whether or not an employer policy is reasonable.

During November 2020, the Employer's policies on COVID-19, including when employees were required to stay home, changed. As of November 18, 2020, the policy directed asymptomatic employees with symptomatic family members to contact their local public health office for guidance. A provincial guideline stated that self-isolation was only necessary if one was contacted by public health.

It was not until November 26, 2020 that the Employer's policy clearly indicated that employees were not to attend work if they or anyone in their household experienced symptoms, were seeking to get tested, or were waiting for test results.

A lack of clarity and precision can render a policy unreasonable under the KVP analysis. But there are other parts of that analysis that the Employer's policy also failed.

The major flaw in the Employer's policy was that it did not consider the financial impact on employees. A reasonable employer policy should balance the interests of the employer — health and safety of the workplace, in this case — with the interests of the employees to earn a living. Where there are less intrusive or disruptive ways of achieving the employer interest, then the policy should take that route.

The Arbitrator found that the Employer's policy should have included a step involving discussions of options for mitigating the financial impact on workers. The Grievor was asymptomatic, and physically capable of working. It was clear from the policy and the evidence that there was no consideration of options that would have allowed the Grievor to remain at work. In her decision, the Arbitrator noted that the Employer found ways to accommodate other workers (crane operators) so that they could avoid close contact while at the workplace.

This decision does not mean that any employer policy that requires absence from work pending a COVID-19 test would be found unreasonable. A reasonable policy is one that balances employer control with employee interests. This balancing will be dependent on the facts and the moment in time during the pandemic. It is possible that the Union would have lost this case had this taken place during the earlier, more uncertain part of the pandemic. In this case, the Grievor could have still been forced to stay at home, but only after the Employer had explored ways to have him work or soften the financial blow.

NLTA and Newfoundland and Labrador School Boards Assn., 2021 CarswellNfld 153, 148 C.L.A.S. 318

Facts

The Newfoundland and Labrador Teachers' Association filed a policy grievance against all school boards in the province. Each school board required teachers to use their accumulated sick leave if they were experiencing any COVID-19-like symptoms but were still well enough to work. If a teacher did not have any sick time remaining, then they would have to take unpaid sick leave. The Department of Education created this policy — not the Department of Health.

The collective agreement specifically defined paid sick leave as time when a teacher was unable to perform duties because of illness, injury or disability. Teachers accumulated additional sick leave days based on years of employment. The collective agreement also provided for other forms of paid leave, such as parental leave. The Employer created a special category of paid leave for those who were identified by public health as a confirmed or probable COVID-19 case.

The Union did not take issue with a COVID-19-positive teacher being forced to take sick leave. The Union's position was that sick leave was not for the purposes of merely having symptoms or awaiting a test result, but otherwise being capable of working.

1. So called because it was first articulated in the decision in *Lumber & Sawmill Workers' Union, Local 2537 v KVP Co Ltd*, (1965) 16 LAC 73. The test for a reasonable employer policy involves six factors. A reasonable policy must: be consistent with the collective agreement, be clear and unequivocal, balance the employer and employee interests, be brought to the employee's attention, make it clear to the employee that failure to comply will result in discipline or discharge, and be consistently enforced.

The Union provided evidence that it is a regular hazard of the job to come down with mild symptoms without becoming too sick to work.

Decision and Analysis

The three-person arbitration panel found in favour of the Union. They agreed that the collective agreement did not allow the Employer to force employees to use sick time when they were still physically capable of working in some way.

The basis for their decision was that the collective agreement was clear — the illness must be what is causing them to be unable to go to work. The evidence showed that, prior to the pandemic, teachers with mild symptoms and who were otherwise fine would have attended work.

The Arbitration Panel found that the teachers in question were forced to remain home by function of law. An illness did not render them incapable of performing their duties. Even though the Department of Health did not issue the policy, the Department of Education created it through its statutory authority. Being unable to attend work due to a legal reason was not, however, contemplated by the sick leave language in the collective agreement. This decision is a reminder that employer policies can be challenged through grievance arbitration if the policy conflicts with the collective agreement.

The Arbitration Panel did not direct the Employer to apply the other paid leave provision. They felt that doing so would usurp the Employer's discretionary authority. Instead, they directed the Employer to consider whether or not the other paid leave should apply to any particular case. The Panel was influenced in this regard by the fact that the Employer created a special paid leave for those contacted by public health through contact tracing.

The Panel also found that it was within the Employer's management rights to determine how teaching should take place, including the right to refuse requests for remote teaching. In post-secondary education, these kinds of pedagogical decisions belong to the Senate, department or individual academic staff member.

Considered together with the British Columbia decision above, unions play an important role in blunting the impact of the pandemic on workplace rights. Employers can no longer use the pandemic as an excuse for ignoring terms of the collective agreement or ignoring the impact of policies and procedures on their workers.

UFCW, Local 175 v. Farmer, 2020 CarswellOnt 19306

Facts

This is an appeal from the order of a workplace health and safety inspector.

The Employer runs a nursing home, Maplewood, in Brighton, Ontario. The Union requested a workplace inspection in May 2020. At that time, there was only one active COVID-19 case in Maplewood. Section 25(2) of Ontario's *Occupational Health and Safety Act* requires that an employer "take every precaution reasonable in the circumstances for the protection of a worker." The precaution sought by the Union was a plexiglass barrier at the nursing station similar to those installed at grocery stores and pharmacies.

The nursing station was where the nurses and personal support workers completed their reports, charting and any other administrative or desk work. It is located in an open area of the facility in order for staff to have a clear view down both hallways.

The nursing staff testified that while residents were required to wear masks when outside of their rooms, many did not wear them or wore them improperly. Residents often approached the nursing station, and the design of the counter did not permit a two-metre distance. Staff working at the nursing station kept two meters apart from each other. They wore masks and goggles throughout their shift.

Maplewood's joint health and safety committee issued a report to the Employer recommending that a plexiglass barrier be installed around the nursing station to create a physical separation. The Employer refused, arguing that the residents were more at risk than staff.

The Ministry of Labour health and safety inspector conducted a "field visit" **by phone**. The inspector's report stated that the personal protective equipment (PPE), hand hygiene, COVID-19 symptom checks, and countertop of the nursing station were sufficient. The inspector did not order that any changes be made to the workplace.

Decision and Analysis

The OLRB allowed the appeal and ordered Maplewood to install a plexiglass barrier. The Employer argued that the real risk for COVID-19 was the residents contracting it from staff, and that having a plexiglass barrier would make the residents feel isolated and less 'at home'. There was no public health or Ministry of Health direction to install such barriers at nurses' stations in long-term care homes. The Employer did not cite cost concerns.

The OLRB distilled the essence of section 25(h) as follows: employers must take every reasonable precaution, but not every precaution. In determining what is reasonable, the employer must consider the circumstances, the cost, the effect on the work and the seriousness of the risk. The only risk that the employer is allowed to consider under this section is the risk to the worker. The health and safety of residents is similarly paramount, but that responsibility comes from other legislation. The *Occupational Health and Safety Act* imposes a duty of care on employers for their workers only.

The OLRB member found that the plexiglass barrier was a reasonable precaution, given that physical distancing and masks for staff were still necessary. The fact that staff were already using PPE did not negate the need for this additional precaution. Precautionary steps can layer on each other to cumulatively reduce risk.

In response to the Employer's argument that the barrier was not recommended by the Ministry of Health and that it would negatively impact the residents' experience of the facility, the OLRB member found that a temporary plexiglass barrier was less intrusive than many other precautions that were already implemented. To illustrate this, the OLRB member noted that barriers were installed to separate residents when in the dining hall; but there was no ministerial directive requiring them.

It is important to note that the decisions coming out of administrative tribunals on issues of workplace precautions during the pandemic are inconsistent. Any application for an order to change the workplace will be highly fact-dependent and specific to its moment in time.

A more recent decision (June 2021) from the OLRB illustrates the waning appetite to order changes. In ATU, Local 113 v. Toronto Transit Commission (2021 CarswellOnt 8867), the OLRB declined to order the TTC/Employer to block off the first two seats of public buses, or to create a larger buffer zone between the bus driver and passengers. That decision considered that there were no documented cases of a bus driver contracting COVID-19 while at work.