Leading Questions: COVID Case Law Update

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Agenda

1. Just Cause in the COVID Era
2. Mandatory COVID Testing
3. Collective Agreement Paramountcy during the Pandemic
4. Duty of Fair Representation + COVID
5. Single Site Policies
6. Arbitration and the Emergency Regulations
7. PPE for Health Care Workers
8. Reprisal Under the OHSA
9. Appeals of Inspectors Orders at OLRB
10. Questions

Just cause in the COVID era

***Garda Security Screening Inc. v. IAM, District 140* – Arbitrator Keller**

- Discharge grievance dismissed
- Grievor attended work pending results of a COVID test she got because she was symptomatic (headache)
- Claimed that she did not know that she was required to self-isolate pending results from test
- Showed no remorse

Garda Security Screening Inc.

"Given how notorious the situation was, and given the wall-to-wall reporting of the situation, I cannot conclude that the grievor was unaware of the consequences of spreading the virus if she was infected…. The grievor put at risk, by returning to work, her colleagues. She also put at risk other persons working at the airport with whom she came into contact. She also put at risk the general public flying from Pearson and, in turn, persons with whom those passengers would have had contact at their destination."

Just cause in the COVID era

***LIUNA Local 183 and AECON* – Arbitrator Carrier**

- Employee terminated for reporting to work after exhibiting COVID symptoms and being instructed not to do so until contacted by company nurse
- 5 days had passed and he had not heard from Company – claimed that he feared he would be disciplined for not attending work
- Answered screening questionnaire with all negative answers even though he had a runny nose at the time

LIUNA Local 183 and AECON

"Taking into consideration those two earlier safety issues, the Grievor's deliberate and cavalier attitude toward the COVID safety risks he represented both to his co-workers and in turn to the Company's obligations to protect the workplace was unconscionable, unreasonable and totally unacceptable. In all the circumstances, I am satisfied that the Grievor here could not be trusted to avoid engaging in unsafe conduct in the future."

Mandatory COVID testing reasonable

- 3 different industries, 3 distinct workplace settings, 3 grievances dismissed
  - Mandatory twice monthly PCR testing in retirement home (***Caressant Care***)
  - Mandatory weekly rapid testing in food processing plant (***Unilever****)*
  - Mandatory twice weekly rapid testing at construction site for workers in outdoor setting (***EllisDonlVerdi***)

Collective Agreement still paramount

- ***Participating Nursing Homes and ONA*** – Arbitrator Stout
  - 1 of the issues raised in the grievance was entitlement to pay/benefits for an asymptomatic employee who does not test positive and is absent from work because they are self-isolating
  - No entitlement to sick pay because employees were not absent due to “personal illness or injury”

Collective Agreement still paramount

"…[A]ny entitlement to compensation for employees other than full-time employees who are symptomatic or test positive, must be found within the four corners of the language found in the Collective Agreements or in a statutory entitlement."

Collective Agreement still paramount

- ***Hamilton-Wentworth District School Board v ETFO*** – Arbitrator Stewart
  - Kindergarten to Grade 3 teachers in remote learning program not being relieved by another teacher during their prep periods
  - Union argued this caused an increase in teachers' workloads because they were responsible for delivering the entire curriculum without the support of a replacement teacher during their prep periods

Collective Agreement still paramount

"The pandemic has wreaked havoc throughout the world and the education sector in this province has not been exempt from its profound effects. Indeed, the education sector has been at the forefront of the challenge and its efforts to adapt and to fulfill its important public trust have been nothing short of herculean…. **My obligation as an arbitrator is to interpret and apply the provisions of this Collective Agreement and the existence of a pandemic does not relieve me from that responsibility**."

- Arbitrator Stewart

Duty of Fair Representation

Complainant v Retail, Health Care and Service Employees Union, CLAC Local 301, 2021 CanLII 22023 (AB LRB)

- Employee travelled to the United States.
- Allegedly did not self-isolate upon his return and did not disclose international travel to his employer on its COVID questionnaire.
- The Employee tested positive. Alberta Health Services contacted the employer and disclosed that the Employee had travelled internationally.
- Employee was terminated.
- Union filed grievance but withdrew it.

Duty of Fair Representation

Complainant v Retail, Health Care and Service Employees Union, CLAC Local 301, 2021 CanLII 22023 (AB LRB)

- Complaint dismissed. No violation of the Duty of Fair Representation.
- Union conducted an adequate investigation. It reasonably concluded that the grievor's offence would justify termination.

Single Site Policies

Canadian Union of Public Employees, Local 3513 v Breton Ability Centre, 2020 CanLII 93886 (NS LA)

[75] I think it is fair to say that as a general rule, and subject to any express or implied provision in a collective agreement, **an employer is not entitled to dictate what an employee does in their spare time**. T**here are of course exceptions, such as where an employee's off-duty conduct threatens the reputation or operations of their employer**. But absent these limited exceptions an employee is free to do what they like outside of work—including working for another employer. That being the case the Employer's April 8th directive would in ordinary course be outside the scope of its powers under the Collective Agreement.

[76] But the COVID-19 pandemic cannot be considered the ordinary course.

Single Site Policies

Alberta Union of Provincial Employees v Alberta, 2021 CanLII 36173 (AB GAA)

- Employer implemented single site policy without consulting union or considering how to mitigate the effects of such a policy on employees.
- Policy was reasonable, but not mitigating effects of policy unreasonable.
- Does not issue remedy: says in any event employer need not make employees whole but that the reasonability would have been to mitigate in some respect.

Single Site Policies/Human Rights

CKF Inc. v Teamsters, Local 213, 2021 CanLII 20876 (BC LA)

- Employer policy: employees who live together must work at the same plant.
- Grievor refused to move to her spouse's plant. The Employer responded that the grievor would be laid off if she did not live separately from her spouse.
- Result: no discrimination.

Family Status

United Steelworkers Local 2251 v Algoma Steel Inc.

- Cross-border 14 day isolation policy discriminatory.

Emergency Regulations/Arbitration

Scarborough Health Network v Canadian Union of Public Employees, Local 5852, 2021 CanLII 39023 (ON LA)

- Work Deployment for Certain Health Services Providers: “Health service providers…are authorized to …Suspend, for the duration of this Order, any grievance process with respect to any matter referred to in this Order.”

- **49** (1) Despite the arbitration provision in a collective agreement…a party to a collective agreement may request the Minister to refer to a single arbitrator, to be appointed by the Minister, any difference between the parties to the collective agreement arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

PPE for Health Care Workers

Ontario Nurses Association v. Eatonville/Henley Place, 2020 ONSC 2467

- Grievances filed at 4 Nursing Homes
- Injunction sought at the Superior Court
- Granted by the Court – Homes must comply with Directive #3 and #5

3 Steps to Test:

1. Serious question to be tried
2. Irreparable harm
3. Balance of convenience favours relief

"Under the circumstances, there is no prejudice to the Respondents which outweighs the irreparable harms that could ensue to the Applicants. Where the lives of nurses and patients are placed at risk, the balance of convenience favours those measures that give primacy to the health and safety of medical personnel and those that they treat."

PPE for Health Care Workers

Participating Nursing Homes v Ontario Nurses' Association, 2020 CanLII 32055 (ON LA)

- May 2020 "Central Rights Arbitration"
- Parties agreed to many items – obligations under OHSA
- Arbitrator orders compliance with Directive #5 (PPE for HCW) and Directive #3 (LTC Protocols)
- Homes must procure N95s and ensure availability and fit-testing
- Expedited processing of grievances

Reprisal Under the OHSA

Luis Gabriel Flores Flores v Scotlynn Sweetpac Growers Inc., 2020 CanLII 88341

- Migrant workers living in bunkhouses on the farm – 13 in an apartment
- In June 2020, there was a COVID-19 outbreak at the farm, infecting 190 workers, including Flores
- One roommate died in hospital from COVID-19
- Flores confronted his supervisor and told him that the farm should take better care of the workers.
- Owner of farm accuses Flores of talking to media and says he will send him back to Mexico

Migrant worker who took on boss and won is a 'very brave, exceptional man,' says lawyer

Luis Gabriel Flores Flores was fired after he spoke out about COVID-19 conditions at Norfolk farm

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Reprisal Under the OHSA

Luis Gabriel Flores Flores v Scotlynn Sweetpac Growers Inc., 2020 CanLII 88341

"I reject the employer's argument that Mr. Flores did not engage the protections of the Act. There are no magic words to engage the protections of the Act. A worker is not required to cite the Act or specific sections. The evidence is that Mr. Flores was speaking out in an effort to get the employer to improve the workplace conditions. This is indirectly invoking section 25(2)(h) of the Act, which requires the employer to take every precaution reasonable in the circumstances for the protection of a worker."

Appeals of Inspectors Orders at OLRB

Inovata Foods Corp. v A Director under the Occupational Health and Safety Act, 2020 CanLII 49519 (ON LRB)

- Appeal by an employer of an inspector's order requiring workers on a production line to wear masks as source control
- Workers standing shoulder to shoulder on the production line
- Appeal dismissed – Board finds the precautionary principle requires masks as the face shields do not provide source control and only protect the wearer not others
- July 2020 – the science very uncertain but some recognition of airborne at the time

Appeals of Inspectors Orders at OLRB

United Food and Commercial Workers Canada, Local 175 v Maplewood Nursing Home, 2020 CanLII 104942 (ON LRB)

Note on Interpretation of s. 25(2)(h):

“Section 25(2)(h), in particular, is sweeping in its scope and potentially goes beyond and in addition to any specific regulation because it is not possible to anticipate every circumstance in the wide variety of workplaces through Ontario. The purpose of the section is not to eliminate hazards but to take reasonable precautions to protect workers from them.”

Thank you!

Questions?