Between:

Caressant Care Nursing & Retirement Homes

and

Christian Labour Association of Canada

Covid Testing Grievance

AWARD

Before: Dana Randall

For the Employer:
Thomas Stefanik, Counsel
Wanda Sanginesi
Ireme Kara
Lisa Vaughan
Janette Langford

For the Union:
Peter Vlaar, Counsel
Trish Douma
Rebecca McColgan
Jessica Pittao

Hearings in this matter were via Zoom on September 24 and 30, 2020. A conference call was convened on September 21, 2020.

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AWARD

The Grievance

This is a group grievance filed by CLAC, Local 303 on behalf of a number of its members working at a Caressant Care retirement home located in Woodstock, Ontario.

The grievance challenges the reasonableness of a unilaterally imposed policy requiring all staff at the Home to be tested for COVID-19 every two weeks.

It is unnecessary to set out the policy in its entirety. Essentially, the Employer took an Ontario government request or recommendation for retirement homes and converted it into a mandatory requirement, the elements of which are as follows:

1. All staff are to participate in ongoing COVID-19 surveillance testing conducted by nasal swab.
2. Testing will be done every two weeks and include all individuals working in the retirement home (e.g., front-line workers, management, food service workers, contracted service providers, basic aids and guest attendants).
3. Medical accommodations will be addressed on a case by case basis.
4. A refusal to participate in the testing would result in the employee being held out of service, until such testing was undertaken.

Other aspects of the policy, including roll out, will be set out in my reasons below.

The Facts

The parties proceeded by way of an Agreed Statement of Fact. It provides as follows:

1. Caressant Care Nursing and Retirement Homes Limited (Woodstock Retirement Home) ("CCRH Woodstock") is a retirement home located in Woodstock, Ontario providing rental accommodation with care and services to residents who can live independently with minimal to moderate support. CCRH Woodstock is owned by Caressant Care Nursing and Retirement Homes Limited, a for-profit corporation that owns and operates 25 retirement and long-term care homes throughout Ontario. Specifically, CCRH Woodstock has a capacity of serving 150 residents and currently is serving 100 residents. Out of these 100 residents, the unionized employees takes care of 85 residents and 15 transitional residents (i.e. residents that directly come from hospitals and are awaiting admission in long term care or nursing homes).

2. CCRH Woodstock is attached to its nursing home which is connected through a double door to its retirement home. Employees of CCRH Woodstock are responsible for doing laundry for 139
   Residents of the nursing home. Specifically, an employee from nursing home drops off laundry at CCRH Woodstock retirement home, following which an employee of CCRH Woodstock is responsible for doing laundry.

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3. As a retirement home, CCRH is provincially regulated by the Retirement Homes Regulatory
Authority (RHRA), a regulator mandated under the *Retirement Homes Act, 2010, S.O. 2010, c. 11.*

4. CCRH Woodstock is connected to a nursing home and the nursing home is regulated under *Long Term Care Act, 2007.* Accordingly, CCRH has to follow the directives outlined under Directive #3 for Long-Term Care Homes under the *Long Term Care Homes Act, 2007*, issued under Section 77.7 of the *Health Protection and Promotion Act (HPPA), R.S.O. 1990, c. H.7.*

5. CLAC Local 303 currently holds bargaining rights for approximately 60 staff at CCRH pursuant to a Collective Agreement in effect from April 1, 2018 to March 31, 2021.

6. In or around March, 2020, CCRH Woodstock implemented a PPE policy requiring all staff to wear masks.

7. In addition to this requirement to wear masks, CCRH Woodstock also required all staff and management to change their clothes and shoes at the beginning and end of their shifts.

8. On or around May 19, 2020 CCRH Woodstock arranged for the EMS to come into the home and conduct COVID testing of all residents, staff and management. All residents, staff and management complied.

9. On June 17, 2020 CCRH Woodstock management hosted a "Huddle" meeting for staff wherein they advised staff that bi-weekly COVID testing would be conducted and proof of having the test done would need to be provided to management.

10. On June 24, 2020 CCRH Woodstock management held a Huddle meeting wherein they advised staff that COVID testing was a directive set out by Ontario Health.

11. A memo from management to all staff was sent on June 29, 2020. Each staff also received the memo in their mailbox. Union steward, Ivana Pirsline also received a copy of this memo.

12. Staff that participated in the testing were paid for one hour of work and parking fees were waived at the hospital.

13. Several staff members communicated their unwillingness to participate in the surveillance testing. On or around July 3, 2020, management at CCRH Woodstock advised staff that if they chose not to comply with the surveillance testing policy they would be required to don full PPE for the entirety of their shifts.

14. CLAC filed a grievance pertaining to the surveillance testing on July 8, 2020.

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15. No positive cases of COVID-19 among staff, management or residents have been identified in CCRH Woodstock to date.

Additional Evidence

The Union filed the Will Say statement of Rebecca McColgan. Her statement is appended to this Award as Appendix A. Ms. McColgan adopted her "will say" and was subject to cross-examination.

The Employer filed the Will Say statement of Lisa Vaughan. Her statement is appended to this Award as Appendix B. Ms. Vaughan adopted her "will say" and was subject to cross-examination re same.

Evidence of Rebecca McColgan

Ms. McColgan is an RPN at the Home, and has been for almost ten years, first as part-time and then full-time. She is one of the group of employees for whom this grievance is filed.

She confirmed all of the preventative measures the Home had undertaken to prevent the spread of the virus, commencing in March, 2020 and continuing into May, 2020. She has participated in those measures, and, presumably, had endorsed them as reasonable.

For instance, Ms. McColgan did not object when EMS conducted COVID-19 nasal swab tests in the entire Home on May 26, 2020. "Although it was uncomfortable, Rebecca agreed to the testing because it was being done on all staff, residents, and rnanagement in order to determine whether anyone in the building had COVID-19 at the time".

Paragraph 11 of her will say sets out her objection:

> The reasons for her refusal are that she considers the bi-weekly testing to be invasive, it is painful, it causes her nose to bleed, it is indefinite, and does not accomplish what it is purported to accomplish in that it only indicates that you don't have COVID-19 at that moment in time of testing and residents are not being tested along with them.

Prior to the introduction of the mandatory policy at issue, Ms. McColgan had, after suffering from potential symptoms associated with the virus, elected to be tested by a third party unrelated to the Employer. The test was negative but caused her to suffer from a multi day nose bleed.

In keeping with her own practise, Ms. McColgan submits that the Employer's policy is over broad. She submits that testing is only reasonable in circumstances where an employee is symptomatic.

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Evidence of Ms. Vaughan

Ms. Vaughan oversees the Caressant Care's infection control program and has been the corporate lead in developing policies and procedures during the COVID-19 pandemic. She has been responsible for developing and implementing the policy at the Woodstock retirement home that is the subject of this grievance.

Ms. Vaughan, in addition to outlining the various measures taken by the Employer to control the spread of the virus, outlined the rationale for surveillance testing. Put simply, the surveillance testing "is an important tool", recognized by both medical professionals and the Ministry, in controlling and tracking outbreaks.

> She testified that that the Ministry's recommendations in June, 2020 of surveillance testing was followed by a memorandum issued by the Employer on June 29, 2020 advising all employees that the Employer had decided to impose mandatory testing. Ms. Vaughan's "will say" sets out in some detail the steps taken by the Employer to notify employees of the introduction of the surveillance testing and the potential ramifications of an employee's refusal to participate in same.

The Ministry's recommendation of surveillance testing was discussed in staff meetings in June, 2020, same was followed up by a memorandum issued by the Employer on June 29, 2020 advising employees that while the direction from the government was a recommendation, it was the Employer's decision to impose mandatory testing.

A copy of this policy was provided to all employees. It was placed in their mail boxes, posted at nursing stations, at their staff room, and on webpal.

The Employer's policy was implemented at its long term care homes and ten retirement homes.

All of these Homes are unionized, representing approximately 1900 employees. None of these employees, who are represented by numerous unions, have challenged Caressant Care's policy requiring mandatory COVID-19 testing.

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The Law

The parties relied on the following authorities:

TAB	DESCRIPTION
1	*Lumber & Sawmill Workers' Union, Local 2537, v KVP Co.* (1965), 16 L.A.C. 73
2	*IWA-Canada v. Weyerhaeuser Co* 2004 CarswellBC 2040, [2004] B.C.C.A.A.A. No. 164, 78 C.L.A.S. 316
3	*Peace Country Health v. U.N.A.* 2007 CarswellAlts 2612, [2007] A.G.A.A. Mp/ 17, 89 C.L.A.S. 107
4	*Imperial Oil Limited and Communications, Energy & Paperworkers Union of Canada, Local 900*, Michel G. Picher, Roy C. Filion and John More 2008 CanLII 6874 (ON SCDC)
5	*Federated Cooperatives Ltd. v. Teamsters, Local 987* 2010 CarswellAlta 1087, [2010] A.W.L.D. 3129, [2010] L.V.I. 3896-1, 101 C.L.A.S. 399, 194 L.A.C. (4th) 326
6	*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.* [2013] 2 S.C.R.
7	*Sault Area Hospital and Ontario Hospital Assn. (Vaccinate or Mask),* Re 2015 CarswellOnt 13915, [2015] O.L.A.A. No. 339 124 C.L.A.S. 224, 262 L.A.C. (4th) 1
8	*Participating Nursing Homes and Ontario Nurses' Association*, 2020 CanLII 3663 (ON LA)
9	*Royal Group Inc. v. Carpenters' District council of Ontario, United Brotherhood of Carpenters and Joiners of America* 2020 CanLII 39899 (ON LA)
10	*United Steelworkers Local 2251 v. Algoma Steel Inc.*, 2020 CanLII 48250 (ON LA)

General Observations

The parties argued this matter in the context of KVP (see KVP Co. Ltd. and Lumber & Sawmill Workers' Union, Local 2537 (1965), 16 L.A.C. 72 (Robinson). And, more specifically, the Union's argument is guided by the Supreme Court of Canada's endorsement of KVP in C.E.P. Local 30 v. Irving Pulp & Paper Ltd., 2013 SCC 34, which was an alcohol testing case.

KVP holds that a rule introduced by the employer without the Union's assent will give rise to discipline only if the rule meets the following criteria:

1. it is consistent with the collective agreement;
2. it is reasonable;
3. it is clear and unequivocal;
4. it was brought to the attention of the employee(s) affected before the employer attempts to act on it;

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5. where the rule is invoked to justify discharge, the employee was notified that a breach of the rule could result in discharge and;
6. the employer has enforced the rule consistently since its introduction.

In this case, the policy is consistent with the collective agreement, if it is a reasonable exercise of the Employer's management rights as set out in article 3 of the collective agreement.

Criteria 3-6 were not contested. I have no doubt that the policy is clear and unequivocal. Nor do I have any difficulty in concluding that it was brought to the attention of the employees affected before the Employer attempted to act on it.

For our present purposes, I find that the consequence for an employee's failure to participate in the testing: being held out of service, is disciplinary and therefore attracts the KVP analysis.

I note that with respect to the sixth KVP criterion, the Employer agreed, pending an arbitrator's award, to allow objecting employees to continue to work if they donned additional PPE.

The policy has a generous accommodation provision. Challenges to a nasal swab are addressed on a case by case basis. One employee, who could not tolerate the nasal swab, was deemed to be in compliance with the policy by taking a throat swab.

In addition to the above, the Employer's policy allowed employees to be tested by third parties, outside working hours with compensation for same.

Union Submissions

The Union's central submission is that the policy, at its core, is an unreasonable exercise of its management rights. While addressing COVID is obviously both a serious and significant matter, the Employer's powers to manage the rights of employees have limits and those limits have been breached, in this case, with the introduction of mandatory COVID surveillance testing.

The submission relies on CEP, Local 30 v. Irving Pulp & Paper Ltd, *supra*. Simply put, the Supreme Court endorses KVP and particularly the requirement that a policy be consistent with the collective agreement and be reasonable. More particularly, the majority found that the employer could only impose a rule with disciplinary consequences if the need for the rule outweighs the impact on employees privacy rights.

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In that case, the rationale for random alcohol testing by means of a breathalizer: alcohol abuse in the workplace, was not sufficiently made out so as to outweigh the harmful impact on employees' privacy rights.

The Union relies particularly on the Supreme Court's remarks in paragraph 50 and 51 of that decision:

> The conclusion is unassailable. Early in the life of the *Canadian Charter of Rights and Freedoms*, this Court recognized that "the use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of human dignity" *(R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 431-32). And in R. v. Shoker, 2006 SCC 44, [2006] 2 S.C.R. 399, it notably drew no distinction between drug and alcohol testing by urine, blood or breath sample, concluding that the "seizure of bodily samples is highly intrusive and, as this Court has often reaffirmed, it is subject to stringent standards and safeguards to meet constitutional requirements" (para. 23).
>
> In the end, the expected safety gains to the employer in this case were found by the board to range " from uncertain ...to minimal at best", while the impact on employee privacy was found to be much more severe. Consequently, the board concluded that the employer had not demonstrated the requisite problems with dangerousness or increased safety concerns such as workplace alcohol use that would justify universal random testing. Random alcohol testing was therefore held to be an unreasonable exercise of management rights under the collective agreement. I agree.

The thrust of the Union's case is that the Employer's policy, which mandates a nasal swab every two weeks, is both an intrusion on their privacy and a breach of their dignity. Certainly, having a swab stuck up your nose represents both of those things and certainly more so than merely undergoing a breathalizer test.

The Union submits that the Employer has to provide a compelling justification against which the intrusion can be weighed. And the Union submits that is missing.

The Union makes numerous arguments in that regard. In the first place, the policy is unnecessary. The evidence shows that the Employer has adopted all the recommended mitigation strategies and the employees have cooperated regarding same. Those strategies have been successful. There has been no outbreak. In fact, as I understand the evidence, there has not been a case at the Home.

The Union argues that the policy is both unfair and incoherent because the majority of people in the Home are the residents, and they are not being tested. The Union submits that is a relevant consideration regarding reasonableness even if the Employer has no authority to make such an order with respect to residents.

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While the Union argues, or at least concedes, that the Employer would be justified in testing an employee that was symptomatic, which is consistent with Ms. McColgan's view of the matter, the policy has no such trigger.

Finally, Ms. McColgan also asserts that the policy does not accomplish what it purports to accomplish in that it only indicates that you don't have COVID at the moment in time of testing. Put differently, an employee who tests negative today can be infectious tomorrow.

In sum, the Union submits that the policy is a serious invasion of employee privacy which is not justifiable. It has not been established by the Employer that the testing policy is even required, given all the safety measures in place and the absence of even one case in the Home. The policy is unfair and incoherent and can't achieve its purpose given that residents are not tested. Testing is mandatory without the requirement of symptoms as a triggering event. Testing is, itself, of limited utility. It does not prevent infection for the employee tested.

Decision

For the reasons which follow, which essentially track the submissions of Employer counsel, I am dismissing the grievance.

While the Union's reliance on drug and alcohol testing cases is a reasonable starting point for the analysis – weighing the privacy breach against the goals of the policy – clearly controlling COVID infection is not the same as monitoring the workplace for intoxicants and I so find. They are different in kind. Intoxicants are not infectious. COVID testing reveals only one piece of information: the employee's COVID status. Being intoxicated is culpable conduct; testing positive is not.

But, most importantly, while the privacy intrusion is arguably comparable, in both cases, the factors to be taken into account in order to determine the weight to be given to the need for COVID testing as compared with drug and alcohol testing, is not. COVID is novel, thus its name. Public health authorities are still learning about its symptoms, its transmission and its long-term effects.

What is known is that it is highly infectious and often deadly for the elderly, especially those who live in contained environments.

In my view, when one weighs the intrusiveness of the test: a swab up your nose every fourteen days, against the problem to be addressed – preventing the spread of COVID in the Home, the policy is a reasonable one. While the Home had not had an outbreak, I agree entirely with the Employer that, given the seriousness of an outbreak, waiting to act until that happens, is not a reasonable option.

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I would say something similar with respect to the Union's and Ms. McColgan's submission that the policy would be reasonable or, at least, more reasonable if the test was only triggered by an employee being symptomatic. Anthony Fauci had this to say about that.

> If you just test people who are symptomatic, you're going to miss a very large contingent of the spread of the infection in the community.

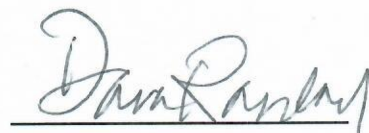
I agree with the Union that the testing policy is not perfect and not a panacea. Obviously, testing has innate shortcomings as outlined by Ms. McColgan. And not testing residents, given that they make up the majority of people in the Home, negatively effects the utility of the mandatory employee testing.

However, I strongly disagree with the Union and/or Ms. McColgan characterizing testing as a limited surveillance tool. That is not accurate. A negative test may be of limited value to the individual employee tested but it is of high value to the Home; and a positive test is of immense value to both the employee and the Home. A positive test leads to identification, isolation, contact tracing and the whole panoply of tools used in combatting the spread of the virus. Arguably, the only way the testing could be improved is to increase its frequency, but that is not a proposal likely to have legs in the bargaining unit.

Conclusion

For the reasons set out above, I am dismissing this grievance.

DATED THIS 9TH DAY OF DECEMBER, 2020 IN BARRIE, ONTARIO.



Dana Randall, Arbitrator

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