

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ONTARIO POWER GENERATION

AND

THE POWER WORKERS UNION

**RE: OPG-P-185**

John C. Murray  
Arbitrator

APPEARANCES:

On behalf of ONTARIO POWER GENERATION:

Tom Moutsatsos - Counsel

On behalf of Power Workers' Union:

John Monger- Counsel  
Jessica Latimer - Counsel  
Chris Dassios - Counsel

Hearing held via teleconference on November 8, 2021.

While the parties have worked diligently to resolve the issues raised by this grievance, some issues were remitted to arbitration for resolution. The outstanding issues are:

1. Should the cost of covid testing for unvaccinated employees be paid for by the employer and should such testing occur during working hours.
2. Treatment of employees who do not agree to undergo COVID-19 testing.
3. Terms of the COVID-19 testing consent form; and
4. Gym access for employees who are unvaccinated or choose not to disclose their vaccination status.

### **Issue # 1**

#### **Should the cost of covid testing for unvaccinated employees be paid for by the employer and should such testing occur during working hours.**

The factual context within which this issue arises has been clearly set out in the OPG's brief (at p.6). The following is the essence of these submissions:

OPG intends to provide employees in the testing program with two tests per week. Employees will be required to self-administer the tests, video-record themselves (or have a third-party record them) administering the test and take a picture of the test result. Employees will then be required to upload the video and photo through DriverCheck's online portal or an agreed upon IT portal if not DriverCheck, all on their own time. Both the video and photo are necessary for OPG to confirm that the employees are actually conducting the tests on themselves and that the results are their own, given that the kits and samples will not be collected or retained.

Employees who are not vaccinated will be required to pay OPG the amount of \$25 per week, which covers the cost of DriverCheck running and administering the testing program and portal. Employees will need to agree to have this amount deducted from their regular pay. If employees do not wish to agree to have this amount deducted from their pay, the employees will be required to procure their own test kits (two tests per week) through local community testing centres (i.e. pharmacies, COVID-19 testing clinics, big box stores,

laboratories, or other pop-up style testing facilities, etc.) or purchase them directly from Maple or DriverCheck. The same procedure for self-administering the test and uploading the accompanying video and photo would apply.

The PWU takes issue with OPG for the following reason:

It is not reasonable for the costs (expense and time) of COVID-19 testing to now be placed upon the Employee. Requiring the employee to pay for tests required by the Company, in fulfillment of its obligation to provide a safe workplace as it has determined is necessary, inflicts a disproportionate and unreasonable financial burden upon the affected employees. In particular, if the rapid antigen tests are no longer provided by the province, the cost to the employee could amount to hundreds of dollars per month, in addition to their time spent performing and video recording the test. In all of the circumstances, including the purpose of the testing (to ensure a safe workplace) and the employer's statutory responsibility, this burden should not fall to individual employees, but should continue to be borne by the Company in accordance with its statutory obligations and prior commitment.

### **Award**

The Ontario Government reports that since January 15, 2020, there have been in excess of 600,000 cases and close to 10,000 deaths related to the Covid virus. The company and the PWU each want a safe workplace. Each wish a reasonable approach to achieving that objective in a difficult time where the challenges in dealing with Covid-19 are a practical reality for all Ontarians.

The *Occupational Health & Safety Act* in section 25 (2)(h) requires an employer to take every precaution reasonable in the circumstances for the protection of a worker. Testing unvaccinated employees is prima facie reasonable. The PWU does not object to testing in the current circumstances of this pandemic. As set out above, it argues that the time involved in test administration and the expense of such testing should be borne by the employer. The employer requires testing and verification of results. It is a cost reasonably borne by the employer.

With respect to self-administered rapid antigen testing, there are benefits to having this performed by employees on their own time. The employer will know before the employee reports to work if there is a positive test result. This fact favours self-administered testing because a positive result can lead to immediate employer action to isolate the employee prior to entry into the workplace. It is also more efficient. The time involved in rapid antigen testing process is minimal. Results can be obtained in 15 minutes by employees who are not in the workplace. In contrast it takes approximately 30 to 45 minutes on average for an employee to leave their post, take the test, and return. Additionally, to compensate employees for the time involved in self-administered tests (outside the workplace) may act as a disincentive for such employees to get vaccinated. This would not be consistent with OPG's rational objective to have as many employees vaccinated as is possible.

In sum, the legitimate interests of both parties are balanced by granting the PWU an order that the tests for the unvaccinated shall be paid for by the employer and by refusing an order that OPG compensate employees for the time spent outside normal working hours in self-administering the rapid antigen test.

The grievance is allowed in part.

### **ORDER**

Employees who have not confirmed that they are fully vaccinated are required to self-administer the rapid antigen test, and the cost of such testing is to be borne by the employer.

Employees are required to self-administer 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.

This order and accompanying reasons are intended to be without precedent or prejudice to other PWU represented employees or employers in other workplaces, and without precedent at this workplace, as they flow from the unique circumstances at this time. Counsel for both parties agreed to this caveat being expressed in the award.

During these proceedings, the Company confirmed to the PWU that it will continue its commitment in relation to necessary PCR testing in accordance with P-178, for individuals who require such testing (this would typically be people who are vaccinated, but symptomatic, or people who have positive or inconclusive Rapid Antigen Tests, who are required by the company to get PCR testing).

## **Issue #2**

### **Treatment of employees who are unvaccinated or who refuse to disclose their vaccination status) and who do not agree to undergo COVID-19 testing.**

OPG, in its written submissions, outlines the decision-making which has led to this issue being the subject of grievance. OPG states as follows:

OPG has implemented OPG-INS-08115-0001: OPG COVID-19 Response Instruction (the “Instruction”). The purpose of this Instruction is to assist OPG in mitigating the risk of harm from, or transmission of, COVID-19 in the workplace. The Instruction applies to all OPG staff, including all PWU members, and the Vaccination Standard incorporated within the Instruction took effect on September 23, 2021. ....

Pursuant to the Instruction, unvaccinated individuals (i.e., those who identify as unvaccinated and those who decide not to disclose their vaccination status) are required to participate in Rapid Antigen Testing once per week for an initial orientation period, followed by twice per week, with forty-eight (48) hours between tests. An employee who refuses to participate in the testing program will be placed on an unpaid leave of absence. If the employee does not change their mind and agree to participate in the testing program after a period of six (6) weeks, that employee’s employment will be terminated for cause.

The PWU asserts that Article 2A.3 of the Collective Agreement expressly provides that “Disciplinary penalties resulting in a suspension without pay will not be imposed until a final decision, (agreement between Union and Management, or an arbitrator’s judgment) has been reached. Accordingly,

the Company is not permitted to place employees on an unpaid leave of absence pending completion of the discipline process as described above.

### **Award**

As noted above, OPG has indicated its intention to place some employees on an unpaid leave of absence. Those potentially affected are unvaccinated employees (i.e., those who identify as unvaccinated and those who decide not to disclose their vaccination status) who refuse to participate in the Rapid Antigen Testing program.

The Union asserts that sending those unvaccinated employees who refuse to participate in Rapid Antigen Testing is a violation of Article 2A.3. I do not agree. In this situation, where most employees have been vaccinated, and virtually all the rest are willingly participating in the reasonable alternative of Regular Rapid Antigen Testing, employees who refuse to do either can be sent home on an unpaid leave pending completion of the discipline process.

The employees who will be placed on an unpaid leave of absence are refusing to take the necessary and reasonable step of taking a minimally intrusive test that would demonstrate that they are fit to work and do not present an unnecessary risk to their co-workers during a global pandemic that has cost 29,000 lives in this country and at least 5 million world-wide. Given this refusal, the Company is sending them home on an unpaid leave pending completion of the disciplinary process. Unlike other occasions when the Company sends someone home pending potential discipline, in these circumstances, it is completely within the control of the employee to decide when to come back to work. All they need to do is to agree to participate in the Rapid Antigen Testing programme which is designed to reduce the risk they present to their fellow employees by remaining unvaccinated –a test that has been endorsed by the Chief Medical Officer of Health and other appropriate authorities as being safe and effective. I view this as sensible and necessary part of a reasonable voluntary vaccination and testing program.

In the specific context of this situation, and on a without precedent basis to any other situation, I find that Article 2A.3 does not apply. This conclusion is driven entirely by context, and nothing in this Award should lead any

party to believe that the traditional interpretation and application of Article 2A.3 should not continue to apply in all other circumstances.

The Company has given employees who are sent home without pay 6 weeks to consider whether they are willing to partake in the testing regime like so many of their colleagues. I think it is important for them to understand that, in my preliminary view, in the context presented by this global pandemic, when lives of co-workers are at risk, unvaccinated individuals who refuse to participate in reasonable testing are, in effect, refusing of their own volition to present as fit for work and reduce the potential risk they present to their co-workers. The Company has made it clear that termination of employment at the end of the 6-week period will typically occur. It is important for those individuals who are fired for choosing to not be tested to understand that they are very likely to find the termination of employment upheld at arbitration. Effectively, employees who refuse testing will likely will have made a decision to end their career with this Company.

The Union's grievance on this issue is dismissed.

### **ISSUE #3**

#### **Terms of the COVID-19 testing consent form**

This issue has been resolved by the parties and Minutes of settlement have been signed.

### **Issue # 4**

#### **Gym access for employees who are unvaccinated or choose not to disclose their vaccination status**

The factual background in which this issue arises is set out in the PWU brief.

The Company has gyms on-site for use by employees at each of the Darlington, Pickering and Kipling sites.

Some classifications of employees, such as Emergency Response Maintainers ("ERMs") and Nuclear Security Officers ("NSOs"), are subject

to physical testing mandated by regulation and policy. For employees in the armed NSO classification, a long-standing Mid-Term Agreement is in place which entitles the NSOs to use the gym during working hours, as follows (Mid Term NUC-R-1038, section 8):

Given the physical requirements of the position, all NRF qualified NSOs will have free access to the fitness facilities at Darlington and Pickering NGS. When operations permit, NRF qualified NSOs will be given one (1) hour per shift to use these facilities. This provision is non-grievable.

At the start of the COVID-19 pandemic, in March 2021, OPG closed the gym for all employees as a health and safety measure. In the fall of 2021, the Company re-opened the gym, with safety measures in place, for use by ERMs and NSOs. The gym has remained open for these two classifications.

In the Company's COVID-19 policy provided to the Union in mid-September 2021, employees who were unvaccinated but "use the gym as a license condition" (i.e., NSOs and ERMs) were entitled to use OPG's gym so long as they provided proof of a negative COVID-19 test within 48 hours before their usage each time.

In October 2021, the Company informed the Union that effective November 24, unvaccinated employees (including NSOs or ERMs) will be prohibited from using the gym.

The Union submits that unvaccinated ERMs and NSOs, for whom maintaining physical fitness is a term of their employment, should be permitted to continue using the gym in accordance with the conditions set out in OPG's initial policy (i.e., proof of negative COVID-19 test, and maintaining other appropriate safety protocols when using the gym). The Union seeks a declaration to this effect.

On October 12 OPG sent a letter to ERM's and NSO's giving advance notice of the change in policy re the gym. This letter stated:

Health and Safety is Ontario Power Generation's primary concern for our employees. We must remain vigilant with COVID protocols in the workplace to ensure worker Health and Safety. Vaccinations are our



strongest protection against COVID. To comply with Fitness Facilities Provincial COVID Vaccination protocol, the following process will be followed for OPG Fitness Facility access.

As of Wednesday, November 24th, 2021 at 06:00hrs. all employees in Security and Emergency Services who wish to use the gym will have to be fully vaccinated, having recorded the data in ESS and provide their supervisor with confirming documentation.

The November 24th date provides a six (6) week time frame to become fully vaccinated. If SES employees are not fully vaccinated or have chosen not to identify as being fully vaccinated, they will not be allowed to use the gym as of November 24th, 2021. If you choose to get vaccinated or disclose being fully vaccinated after November 24th, 2021, you can do so in ESS and provide the appropriate documentation to your supervisor for confirmation. You will not be considered fully vaccinated until 14 days after the administration of the second dose of an approved COVID vaccination.

As can be seen from the letter, there is a period of 6 weeks leading up to November 24 during which OPG allowed gym access to those ERM's and NSO's who provided proof of vaccination or proof of a recent negative test.

The PWU argues that the new policy requiring patrons of the gym to be fully vaccinated is inconsistent with Mid Term NUC-R-1038, section 8 (reproduced above) and that that unilaterally imposed company rules cannot overrule specific contractual provisions. In this case, there is an agreement that certain employees will be given 1 hour per shift to use these facilities when operations permit. The company requirement for vaccinations has nothing to do with the releasability of employees for an hour but is a blanket prohibition against access for unvaccinated employees. The Union seeks a declaration that the rule is contrary to the Mid-term and is unreasonable and unenforceable.

### **Award**

Effective November 24, 2021, OPG employees will be required to provide proof of full vaccination in order to access OPG's on-site gym facilities

consistent with public health directives. Employees were provided notice of this change on October 21, 2021.

While the protocol during the 6-week period (from October 21 to November 24) is less restrictive than the policy after November 24, the reason for the delay in the change is to give notice to affected employees of the change in access requirements. This delay in implementation should not be construed as an admission by OPG that the status quo is acceptable.

The Union has recognized that access to the gym can be restricted. The Union agrees with requiring proof of vaccination or proof of negative testing as a prerequisite to access to the gym. However, Union argues that the new more restrictive policy is not the subject of agreement and therefore cannot be sustained because it is inconsistent with the Mid-Term (which is part of the collective agreement) and therefore does not satisfy the well-established KVP test which requires that a unilateral policy or rule established by an employer must not be inconsistent with the collective agreement. (See: *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co Ltd*, (1965)16 LAC 73)

There is little doubt that – in normal circumstances – the Union would be entitled to a declaration stating the company's requirement for vaccinations is contrary to Mid-Term NUC-R-1038 and is unenforceable. The circumstances here are not normal.

The parties agreed to Mid-Term NUC-R-1038 when there were no concerns about the global pandemic. The current circumstances were not in the contemplation of either party.

It is a matter of public record that gyms are high risk areas for transmission of COVID-19 due to high touch surfaces, the increased potential for close contact, and the greater range of respiratory droplets due to heavy breathing during vigorous exercise. In Ontario, Public gyms are required to have their patrons vaccinated in order to grant them access to their gym facilities.

The *Occupational Health & Safety Act* in section 25 (2)(h) requires an employer to take every precaution reasonable in the circumstances for the protection of a worker. This obligation trumps the Mid-Term. The gym, at least for employees covered by the Mid-Term, is part of the workplace and

the obligation to take every precaution reasonable in the circumstances applies. Although the gym operated by OPG is not public, the same logic that has informed the Ontario Government to require patrons of gyms to be fully vaccinated is applicable here. The high risk of covid transmission in gyms is a reality in private and public gyms. Requiring employees who use the gym to be vaccinated is reasonable and consistent with OPG's legal obligation under the the *Occupational Health & Safety Act*. It is a policy designed to protect the health and safety of all OPG employees who use the gym. Although unlikely, an override of the Mid-Term could happen in other circumstances. For example, if the gym facilities were found to be unsafe for structural reasons, the facilities would be closed until necessary repairs were made and the employer would be derelict in its duty to act otherwise.

The policy is not intended to be permanent.

There is no suggestion that unvaccinated NRF qualified NSOs will deprived of (1) hour per shift (when operations permit) to engage in physical exercise. That physical exercise will have to take place at a location other than the gym - perhaps at home or outdoors.

This aspect of the grievance is dismissed.

I would be remiss not to thank counsel for their assistance in this case.

Dated at Caledon Ontario this 12<sup>th</sup> day of November 2021.

A handwritten signature in black ink, appearing to read 'J. Murray', written in a cursive style.

Arbitrator.