SICK, LIES, AND QUESTIONNAIRE: ARBITRATORS UPHOLD TERMINATIONS OF EMPLOYEES WHO BREACHED COVID-19 SAFETY PROTOCOLS

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As the COVID-19 ("**COVID**") pandemic continues to turn many workplaces upside down, employers have implemented COVID protocols to facilitate a safe return-to-work. Employers should have COVID screening measures for employees to self-report any symptoms before entering the workplaces (in most jurisdictions in Canada, employers are legally required to implement such screening measures).

Employers expect their employees be honest when completing the screening questionnaires and stay at home when experiencing COVID symptoms or awaiting COVID test results. Many employers have implemented workplace rules to enforce that expectation. The question is, if an employee disregards the workplace COVID protocols, what are the consequences?

Two recent labour arbitration decisions from Ontario have found that attending work in breach of employer COVID protocols and/or lying during employer COVID screening is serious misconduct that can lead to termination for cause.

Recent Labour Arbitration Decisions

The employer in *Garda Security Screening Inc.*[1] implemented a policy requiring employees to self-isolate and not attend work if they were awaiting the results of a COVID test. The employer communicated the new policy to all employees, including the grievor. Despite the policy, the grievor reported to work on the same day she went for testing because she "did not feel sick". Upon becoming aware that the grievor attended work in breach of the employer's COVID policy, the employer dismissed the grievor for cause.

The arbitrator upheld the grievor's termination because of her "clear violation of the employer's and public health guidelines". In reaching this conclusion, the arbitrator noted that by refusing to follow the employer's policy, the grievor put "countless others at risk of illness or death". Further, the arbitrator noted that the girevor's claim of not feeling sick was "absolutely irrelevant".

Similarly, in *Aecon Construction Group Inc*,[2] the arbitrator upheld the grievor's termination for breaching the

employer COVID policy. The grievor experienced COVID symptoms, including diarrhea and runny nose, and was instructed, on multiple occasions, not to report to work until he was cleared by the employer's nurse. The grievor nonetheless attended work for his next scheduled shift despite not hearing back from the nurse, and denied exhibiting any COVID symptoms on the employer screening questionnaire.

The arbitrator held that this was a "deliberate attempt to circumvent his instructions with total disregard to the risks he posed", which created a "dangerous situation" for everyone involved. The arbitrator noted that "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".

Takeaways for Employers

Both decisions should provide employers with confidence when taking required disciplinary action for breach of COVID protocols to protect health and safety of their employees, customers, and the public.

While each case will turn on its own facts, employees who do not follow employer COVID protocols and deliberately mislead the employer during the screening can be subject to discipline, including termination for just cause. However, in order to justify disciplining the employees, public health guidelines and employer COVID protocols must be clearly communicated to all employees to avoid confusion or misunderstanding.

Finally, all employers should keep their COVID protocols regularly updated to ensure compliance with the latest public health guidelines and/or legislative requirements.

If you have any questions relating to the above, please do not hesitate to contact a member of the Employment & Labour Relations Group.

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[1] [ps2id id='1' target='/][2020] OLAA No 162.
[2] [ps2id id='2' target='/]2020 CanLII 91950.

A Cautionary Note