IN THE MATTER OF A GRIEVANCE DATED APRIL 16, 2021

B E T W E E N:

UNILEVER CANADA INC.

– and –

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 175

ARBITRATOR JULES B. BLOCH

Appearances:

Counsel for the Employer: Brett Christen

Counsel for the Union: Georgina Watts

This matter was heard by teleconference on April 24, 2021.

Decision

1. The Employer owns and operates a plant in the town of Simcoe, Ontario where it manufacturers ice cream, water ice products and novelty desserts. The hourly paid employees in the plant are represented by the United Food and Commercial Workers. From September to January, there are approximately 278 full-time employees in the plant. However, starting in January each year, the Employer hires seasonal employees to supplement the regular workforce with the result that the employee complement in the plant recently increased to approximately 310 employees.

2. Since the start of the COVID-19 pandemic, the Employer has had comprehensive masking and social distancing measures in place at the plant as well as other measures to reduce the transmission of the virus within the facility. On April 18, 2021, the Employer announced that, starting April 19, 2021, it would be introducing mandatory COVID-19 testing for all employees working at the plant, including the members of the bargaining unit. Due to rising case numbers in the community the Employer had no opportunity to roll out the testing program with much advance notice. This didn't allow for detailed discussion with the Union with respect to the terms of the program being introduced. The Union was given a few days advance notice of the employer's intention to introduce mandatory testing. Some employees raised concerns regarding the implementation of the COVID-19 testing policy and the Union filed a grievance dated April 16, 2021 alleging that the policy was unreasonable and a breach of the collective agreement and/or Ontario Human Rights Code. The employer denied the grievance.

3. The parties filed extensive briefs. The hearing was held on April 24, 2021. The only evidence tendered is found in the submissions submitted by the parties. At the end of the hearing, I reserved my decision. In arriving at my decision, I have reviewed the evidence, jurisprudence, and submissions that the parties have submitted. I will refer only to the facts and arguments that are necessary in making my decision.

4. The employer's announcement of mandatory testing, entitled "Mandatory Testing at Simcoe", commences "Due to increase in the number of cases in Haldimand-Norfolk County, we are moving forward with **mandatory** testing." (original emphasis). The document then provides detailed information concerning the testing to be conducted and the testing process.

5. At the time of the policy's introduction, and the writing of this award, Ontario is experiencing a "third wave" of the COVID-19 pandemic. The town of Simcoe is in Haldimand-Norfolk County which is dealing with rapid community spread of the virus occasioned by the third wave. Since the onset of COVID some employees who work at the plant have tested positive for COVID-19 because of this increased community spread (there is no evidence that these employees contracted the virus in the workplace).

6. The COVID testing is conducted on-site by Workplace Medical Corp, a third-party contractor. The test is a rapid antigen test which involves taking a swab from the employee's nose. The test is conducted once a week at the end of the employee's shift and is conducted in a manner which ensures the privacy of the employee's health information including the destruction of the testing swab in the employee's presence following the administration of the test. No sample is retained, no further testing is conducted upon such sample and no DNA or other material recorded from the sample. The sample collected is used to test for COVID-19 and for no other purpose and then disposed of in front of the employee.

7. The nasal swab is less invasive and less uncomfortable than the nasal swab test used in the PCR COVID-19 test and the rapid antigen test provides results within approximately two hours of the

test being taken. Any employee that tests positive will be notified of the result when the test results are obtained. Employees who refuse to undergo the mandatory testing are not permitted to work and are placed on unpaid leave of absence. Such employees are not subject to discipline nor are such absences counted against the employee in the Employer's Attendance Management program.

8. Employees who test positive are reported to Public Health, as required, and sent home to isolate pending further COVID-19 testing. If confirmed as positive, such employees are placed on sick leave, in accordance with the sick leave provisions of the collective agreement. If the rapid test turns out to be a false positive, the employee is returned to work and paid for time spent away from work. Similarly, if an employee is held out of work due to concerns regarding exposure that employee will be paid for time spent away from work.

9. If an employee has a demonstrated medical condition that impacts their ability to undergo nasal swab testing, accommodation will be provided through the provision of an alternate form of testing. Several employees initially refused to undergo the mandatory testing because of an objection to the wording of the consent form that they were asked to sign prior to the testing taking place. The Employer and the Union have reached substantial agreement on the amendment to the consent and issues concerning the consent form have largely been resolved by the parties. I remain seized to deal with any remaining consent issues between the parties.

10. I understand that there are outstanding grievances in respect of the consent form. The parties have asked that I retain jurisdiction to deal with all issues relating to the consent form including jurisdiction over any grievances that have been filed or will be filed in relation to the consent form.

11. On the first two days of testing, two positive test results were obtained.

12. Notwithstanding that the policy does not attract direct disciplinary consequences for an employee who refuses the test, the parties agree that I have jurisdiction to hear and determine the grievance and that the proper test to be applied is that contained in the well-known KVP decision. The parties also agree that all elements of the KVP test are met save and except the parties seek a determination with respect to the reasonableness of the policy.

13. The parties referred me to the following authorities: 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, (M. G. Picher) 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. (4 th) 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. 339124 C.L.A.S. 224, 262 L.A.C. (4 th) 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); UFCW and Maplewood Nursing Home 2020, CanLii 104942 (ON LRB); Caressant Care Nursing & Retirement Homes and CLAC, 2002 CanLII 100531 (Randall).

14. Having regard to the submissions of the parties and the authorities submitted, I find the Employer's policy to be reasonable in all the circumstances and hereby remain seized of any issues, on the agreement of the parties, arising from the implementation of this award or any further issue arising from the Employer's mandatory testing policy. In finding the policy to be reasonable, I have had regard to the following factors:

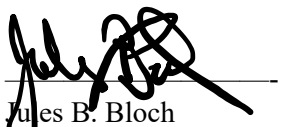
    a. There are many employees in the facility many of whom work on one or more of the Employer's production lines. The employees work in a food manufacturing facility which is governed by a variety of food safety regulations designed to ensure the safety of the food manufactured.

    b. Several employees have contracted the virus in a relatively short period of time. Although there is no evidence of transmission within the facility, given the rise of the COVID-19 variants in Ontario and in this community, it seems prudent to err on the side of caution and ensure that the Employer is permitted to take reasonable steps to reduce the risk of COVID transmission in the workplace. I find the testing policy, introduced by the Employer to be one such reasonable step.

    c. In balancing the interests of employees who are opposed to the mandatory testing and the well documented benefits of a testing program in preventing the spread of COVID in the workplace to other employees, and because several employees have tested positive, I view the policy to be a reasonable attempt to protect the health and safety of employees in the plant.

15. Both parties also requested that I expeditiously issue my decision without the need for detailed reasons which I have done. For the foregoing reasons, the grievance is hereby dismissed. I remain seized of any issues, on the agreement of the parties, arising from the implementation interpretation and application of this award or the Employer's mandatory testing policy.

Dated in Victoria, BC this 25th day of April 2021.



Jules B. Bloch
Arbitrator.