

**IN THE MATTER OF AN EXPEDITED ARBITRATION UNDER  
THE LABOUR RELATIONS CODE, SECTION 104**

BETWEEN

**FINNING (CANADA), A DIVISION OF FINNING INTERNATIONALS INC.**

Employer

AND

**INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS  
VANCOUVER LODGE 692**

Union

**(COVID-19 Vaccination Disclosure Policy Grievance)**

ARBITRATOR:

Lisa Southern

COUNSEL:

Jessica Thomson

(for the Employer)

Melissa VanderHouwen

Mary Thibodeau

(for the Union)

DATE OF HEARING:

March 3, 2022

DECISION:

March 31, 2022

## AWARD

### I. BACKGROUND

1 On January 18, 2022, I was appointed as arbitrator under s. 104 of the B.C. *Labour Relations Code* (the “Code”). The parties were able to agree on the facts and provided me, in advance of the hearing, with a written statement of the facts (the “Agreement Statement of Facts”), as well as relevant documents. The process was narrowed to oral argument and the hearing was held on March 3, 2022. I am providing this decision to the parties within 30 days of the date of hearing, as is required under s. 104 of the Code.

2 Given the expedited nature of the process, my reasons are brief.

### II. ISSUES

3 The Employer implemented a COVID-19 Vaccination Disclosure Policy (the “Policy”), which took effect on November 22, 2021.

4 The Policy requires employees either to disclose that they have been fully vaccinated against COVID-19 or to show proof of a negative Rapid Antigen Test (a “Rapid Test”) at least 72 hours prior to entering the Employer’s premises.

5 Among other things, the Policy stipulates those employees requiring a Rapid Test must pay the expense of the test, conduct the test on their own time and use a specific provider.

6 The Union says the Policy is unreasonable and inconsistent with the *Collective Agreement between Finning (Canada), A Division of Finning International Inc. and the International Association of Machinists and Aerospace Workers Vancouver Lodge 692* (the “Collective Agreement”) for two reasons. First, the Union takes issue with employees paying the cost of obtaining the Rapid Test. Second, the Union takes issue with employees administering the Rapid Test on their own, uncompensated, time.

7 The Employer disagrees with the Union and says it is reasonable for employees to pay for the testing and to attend to testing on their personal time, especially given the “no cost alternative” of vaccination.

8 The very narrow question before me is whether the application of the Policy, in its current form, is a reasonable exercise of management rights which accords with the Collective Agreement.

### III. AGREED FACTS

9 The following details are taken from the Agreed Statement of Facts.

10 The Employer is an authorized dealer for Caterpillar equipment in Alberta, British Columbia, Saskatchewan, Yukon and part of the Northwest Territories. It is in the business of selling, renting and providing customer support services for Caterpillar construction and mining equipment and engines.

- 11** The Employer operates 27 branches / facilities throughout British Columbia. Some branches are smaller, with as few as four employees, while others have as many as 150 employees. The Employer also has employees who work directly on client sites.
- 12** The Employer employs 4,202 employees in Canada, including 1,218 in British Columbia and Yukon. A total of 746 employees are members of the Union.
- 13** The unionized members are subject to the Collective Agreement.
- 14** Throughout the COVID-19 pandemic, Governments of British Columbia, Alberta, Saskatchewan, Northwest Territories and Yukon have deemed the services provided by the Employer to be essential in ensuring critical infrastructure and support services remain safe and fully operational.
- 15** In the fall of 2021, the Employer emailed employees an introduction to the Policy. The Policy included a multi-phased COVID-19 Vaccination Disclosure Program, which consisted of:
- a. Phase 1 – Employee Communication on October 18, 2021
  - b. Phase 2 – Employee Communication from October 19 to November 1, 2021
  - c. Workday Self-Disclosure Communication on November 1, 2021
  - d. Go Live of Policy and Program on November 22, 2021
- 16** The Employer’s stated purpose in implementing the Policy, *inter alia*, is to take “every precaution reasonable in the circumstances for the protection of the health and safety of our people from the hazard of COVID-19.”
- 17** The Policy provides that, as of November 22, 2021, employees are “requested to disclose that they are Fully Vaccinated” or can produce a negative Rapid Test taken within 72 hours “before entering Finning Premises, attending an in-person business-related event, conducting Finning business in person with third parties or travelling on business on behalf of Finning.”
- 18** The Policy provides the following with respect to employee responsibilities:
- “All employees are responsible to: (i) ensure fitness to safely perform work; (ii) minimize and prevent absenteeism due to COVID-19; and (iii) reduce the risk of transmission of COVID-19 to other employees, customers, and other third parties. As part of these responsibilities, all employees must be able to provide proof of either their vaccination status or the result of a Rapid Antigen Test prior to entering a Premise in accordance with this policy.”
- 19** Employees who work from home are exempt from the requirement to either disclose vaccination status or to provide a negative Rapid Test result prior to beginning work.
- 20** The Policy also includes a mechanism for employees to seek a Policy exemption or an accommodation.

**21** Under the Policy, the unvaccinated employees who have not been granted an exemption or an accommodation under the Policy must arrange for the Rapid Test at their own cost and on their own time without compensation.

**22** The Employer considered available government programs for “at-work point of care testing” but determined that these programs were inappropriate for its operations. With respect to the option of free Rapid testing kits provided by Health Canada, the Employer says it “weighed privacy concerns and administrative requirements against employee control to choose their schedule and a decision was made not to utilize this program.”

**23** The Policy stipulates that the Rapid Tests must be administered by a government approved testing facility or, alternatively, that employees can engage in “self-testing” through approved organizations, such as “Acculab” or “Switch Health,” which use certified health practitioners to validate the time, date and negative result of a given test.

**24** The costs associated with self-testing through Acculab or Switch Health include the costs for the actual Rapid Test (approximately \$30 to \$55 per kit, including shipping) as well as the costs of a “Zoom” or “telehealth” appointment with a certified test observer, which for Acculab charges approximately \$39 per appointment. The Rapid Test administration appointments last approximately 15 to 20 minutes each time, and the employee typically receives the results of the Rapid Test within an hour of their appointment.

**25** The self-testing can be performed from an employee’s home or a location of their choosing.

**26** Approximately 700 of the 749 unionized employees have been verified as fully vaccinated under the Policy. Of the remaining 49 bargaining unit members, 27 are in British Columbia and are required to provide proof of a Rapid Test prior to attending the Employer’s premises.

**27** The Parties acknowledge in the Agreed Statement of Facts that the Policy is temporary in nature and that the Employer continues to monitor the changing conditions surrounding COVID-19 as they relate to the Policy.

#### IV. ARGUMENT

##### UNION ARGUMENT

**28** The Union says that the Employer’s discretion to introduce rules and policies must be exercised fairly and reasonably. The Union cites the decision in *Lumber & Sawmill Workers’ Union, Local 2537 v. KVP Co.*, 1965 CarswellOnt 618, [1965] OLAA No 2, 16 LAC 73 (“KVP”) as the seminal case on the topic. The “KVP Test” requires that for an employer policy or rule to be considered as a legitimate exercise of management rights, the following factors must be met:

- a. The policy must be consistent with the collective agreement;
- b. The policy must be reasonable;
- c. The policy must be clear and unequivocal;

- d. The policy must be brought to the attention of employees;
- e. Employees must be informed that a breach of the policy can lead to discipline; and
- f. The policy must be consistently enforced.

**29** The Union says that the only issues it has about the Policy are with the first two factors of the *KVP Test*, namely that it is inconsistent with the Collective Agreement, and unreasonable, insofar as it requires employees to pay for Rapid Tests and to take the Rapid Tests on their own time.

**30** To support its assertions, the Union advances arguments regarding “costs” and arguments regarding “time.”

**31** With respect to its arguments regarding “costs,” the Union says that because the Policy imposes a financial burden on one option (i.e. Rapid Tests) and makes the other free of cost (i.e. vaccination), there is not a true choice between the options. They argue that where a policy purports to allow for employees to freely choose between different options, it is unreasonable to, in effect, impose a fine on one choice.

**32** The Union further argues that the case law, applicable legislation and the Collective Agreement all support its position that the Employer is obligated to bear the cost of ensuring a safe workplace.

**33** The Union cites the decisions in *Power Workers Union v Ontario Power Generation*, November 12, 2021 (Murray) (“*Power Workers #1*”) and in *Power Workers Union v Hydro One Inc*, November 22, 2021 (Stout) (“*Power Workers #2*”) as examples in which an arbitrator determined that “an employer’s statutory duty to provide a safe workplace should not fall on employees” and determined that Rapid Tests were “a reasonable cost to be borne by the employer.” In both of these cases, the Arbitrator also found, however, that the time taken to get tested was not paid time for the employees.

**34** The Union also cites the decision in *Aramark Remote Workplace Services Ltd. and UNITE HERE, Local 27*, 2015 Carswell Alta 2388, 263 LAC 4<sup>th</sup> 422 (Arbitrator Sims) (“*Aramark*”) as an analogous example to the present case whereby Arbitrator Sims found the employer’s policy in that case, which required employees to pay for their own fitness testing, to be unreasonable.

**35** The Union points to section 21 of the *Workers Compensation Act* to support its assertion that the Employer is required to “ensure the health of their workers.”

**36** The Union also points to Article 25 of the Collective Agreement as demonstrative of the Employer’s obligation to pay for safety items, such as hard hats, rain jackets, safety glasses, safety boots, gloves, protective clothing, custom earplugs, and back pack respirator / fresh air welding helmets. The Union says paying for the Rapid Tests is consistent with the Employer’s obligations under Article 25. It also references the wages section of the Collective Agreement, the costs associated with the tests, and the number of tests that would be required per shift, to demonstrate that the costs are not insubstantial to the employee.

**37** The sum of the Union’s arguments on “costs” are that the case law, Article 25 of the Collective Agreement and section 21 of the *Workers Compensation Act* all support the notion that because the Rapid Tests are, in effect, a required safety item, the Employer is obligated to bear the cost of paying for them.

**38** In support of its arguments on the “Time” issue, the Union says that “the time required to take the tests is work” and that the law “requires pay in exchange for work.” The Union cites the decisions in *Telus Communications Inc. and TWU (Volunteers)*, 2014 CarswellNat 888 and *Dominion Stores Ltd. and Retail, Wholesale, Local 1065* (1978), 20 LA.C. (2d) 118 (Teed) (“*Dominion*”) to support this general principle. For example, in *Dominion*, Arbitrator Teed found that the requirement to attend courses on the employee’s own time was a request for services outside of normal working hours and required compensation.

## EMPLOYER ARGUMENT

**39** The Employer argues that the Policy is, in fact, reasonable and that it accords with the Collective Agreement. The Employer says the Policy meets the requirements set out in the *KVP Test*.

**40** The Employer emphasizes that the case law relied upon by the Union, in particular the decision of *Power Workers #1*, flowed from “unique circumstances” and that it was expressly intended to be without precedent or prejudice. The Employer further points out that the “unique circumstances” were never actually identified, and in *Power Workers #2*, when Arbitrator Stout endorsed the findings of Arbitrator Murray, the “unique circumstances” were still not identified. The Employer says that because both decisions were based on unknown “unique circumstances,” they should not be relied upon in this case as support for employer-paid testing. The Employer also points to the change in global circumstances since the time of those decisions, citing the onset of the Omicron variant as a basis to further abstain from relying on those decisions.

**41** The Employer cites various cases in support of its position that it should not be responsible for bearing the cost (and time) associated with the Rapid Tests, including (*Vancouver (City) Fire and Rescue Services and Vancouver Fire Fighters’ Union Local 18 (Driver’s License Medical Exams)*, *Re Eyeglasses*, 2016 CarswellBS 624, *Protans BC Operations Ltd v BCGEU*, 2021 CarswellBC 1861, *Richmond Lions Manor v BCNU*, 1997 CarswellBC 3200, *Welland Chemical Ltd. v ECWU, Local 914*, 1993 CarswellOnt 5577, *Brandon General Hospital v MNU*, 1996 CarswellMan 641, and *CKF Inc. and TC, Local 213 (COVID Testing)*, *Re*, 2022 CarswellBC 198.

**42** The Employer says the Policy is reasonable because it “strikes a reasonable balance between the employer and employee interests” by enabling employees to choose between getting vaccinated, taking Rapid Tests or doing neither, which may include the employee being placed on an unpaid leave of absence.

**43** To illustrate the reasonableness of the Policy, the Employer points to other employers with policies requiring full vaccination with no alternatives, and which include serious consequences for failing to get vaccinated, such as being placed on unpaid leave or having employment terminated. The Employer says that it is taking a measured approach with the Policy, which allows for the personal choice an employee may make regarding vaccination. The Employer points to the fact that less measured “mandatory vaccination” policies have been upheld by arbitrators (for example, *TC, Local 847 and Maple Leaf Sports and*

*Entertainment (Wideman), Re*, 2022 CarswellOnt 180; *Power Workers' Union and Elexicon Energy Inc. (UTELE-P-2), Re*, 2022 CarswellOnt 1223; and *Bunge Hamilton Canada and UFCW, Local 175, Re*, 2022 CarswellOnt 25).

44 The Employer says that it “should not be in a worse off position for establishing a comparatively more measured Policy that allows for employees to exercise choice regarding COVID-19 vaccination and remain employed, instead of mandating that its employees be vaccinated or be placed on an unpaid leave of absence.” The Employer further argues that it should not have to bear the costs of the Rapid Tests when, for employees, the cost of testing is “much lower compared to the loss of income unvaccinated (or undisclosed vaccinated) employees would suffer if they were placed on an unpaid leave under a mandatory vaccination policy.”

45 Like the Union, the Employer points to the *Workers Compensation Act* to support its position. In particular, it points to section 22 of the *Workers Compensation Act* to highlight that employees also have an obligation to “take reasonable care to protect the worker’s health and safety and the health and safety of other persons who may be affected by the worker’s acts or missions at work.”

46 The Employer also makes arguments that the impact of compensating employees for the time it takes to obtain the Rapid Test would result in an enrichment of unvaccinated employees, which would be counter to the Employer’s aim of having as many employees vaccinated as is possible. The Employer cites *Power Workers #1* and *Power Workers #2* to support this argument, despite its assertions that reliance on these decisions should be discounted given they arose from undisclosed “unique circumstances.”

47 The Employer says a “COVID-19 rapid test (and compensation for time getting the test) is a monetary benefit which is not conferred by way of clear language in the Collective Agreement” and the Policy’s requirement for employees to pay for a test (on the employees’ time) is “not disproportionate or unreasonable because it’s one option, alternative to the preferred (and free) option of full vaccination status, which is available to an employee.”

48 The Employer’s argument can be distilled to say that the Policy is reasonable because it recognizes the interests of all employees to a safe workplace, and because it strikes a reasonable balance of those interests while being aligned with the Employer’s commitment to take every precaution reasonable in the circumstances to protect the health and safety of its employees from the hazards of COVID-19.

## V. AWARD

49 The narrow issue before me is whether the Policy is reasonable insofar as it requires employees to pay the cost of Rapid Tests and not be paid for the time it takes to administer the tests and obtain the results.

50 *Power Workers #1* and *Power Workers #2* address these exact issues. In both cases the Arbitrators found that the cost of the test should be borne by the Employer, but the time to take the test should not be paid time. Both Parties cited these cases, albeit for different reasons (the Union to support that the Employer should pay for the test; the Employer to support that the employee’s time taking the test should not be compensated). However, these cases contain no analysis, are brief, and cite unique circumstances that are not detailed.

They are not precedent setting: the arbitrator in *Power Workers #1* specifically says the award is without precedential value.

**51** The Employer argues that, in effect, given that it could have *not* offered the testing option, the reasonableness of that option should not be judged. I do not agree. Whether a mandatory vaccination policy (without rapid testing options) in these particular circumstances would have been found to be reasonable is not the question I have been asked to decide. Once the Employer offered testing options to mandatory vaccination, it opened itself up to scrutiny of those options under *KVP*.

**52** The language of the Collective Agreement supports that when the Employer requires a measure to ensure the health and safety of the workplace, it pays for that measure. Although the examples listed in the Collective Agreement under Article 25 are in the nature of safety or protective equipment, and not testing, I do not see that as a distinction with a difference.

**53** I agree with the Union that the option of Rapid Testing differs too, from the authorities cited by the Employer that support that it is an employee's obligation to pay for a medical certificate to justify a paid absence, or from cases where the employer requires a particular certificate prior to hire. In this case, when it offered the option of Rapid Testing, but did so in such a specific manner in terms of the particular service provider that had to be used, the Employer created a requirement that was a barrier to those employees who did not wish to disclose their vaccination status from attending work, and did so by imposing the entirety of the cost associated with removing that barrier on the employee.

**54** The Employer argues that making the choice of taking the test a less desirable option (through the cost and time associated with taking it) is deliberate, as the Employer's goal with the Policy is to have the greatest number of employees possible get vaccinated. If this is what the Employer intended to do and deliberately created the Rapid Test option with that goal in mind, this is further support for my finding that it is an unreasonable term of the Policy. It is difficult to sustain that it is reasonable if the purported purpose of it is to dissuade and discourage employees from using it.

**55** Finally, I do not agree with the Employer's characterization of Rapid Tests being a "monetary benefit" if they are Employer paid. Regardless of who pays for the Rapid Tests, they do not confer any benefit to employees beyond enabling attendance at work. To the contrary, the Policy imposes specific providers through which the test could be taken, which bears with it a cost that I agree with the Union is not-insignificant, particularly over months of time.

**56** In sum, given that the Policy makes negative Rapid Test results a requirement to attend work, I prefer the Union's analogy of the Rapid Tests as being a required "safety item," which is directly aligned with the costs regularly borne by the Employer.

**57** However, I do not agree with the Union that the Employer must pay for the time it takes the employee to take the test as "time worked." Although there is reference to the Rapid Test taking 40 to 60 minutes, it was clarified that refers to the time it takes the service provider to administer the Rapid Test, and the employee is not actively engaged in that process for most of that time. With respect to "time," I find the time required of the employee to take the test is *de minimus*. They are able to take the test in the comfort and privacy of their home. I do not find it unreasonable, in all the circumstances, including factoring in that this is a choice they are making when another choice (being vaccinated and disclosing that) is also available to



them. I find that the time required of the employee for taking a Rapid Test is not significant enough to be considered a demand on an employee's personal time that would warrant compensation.

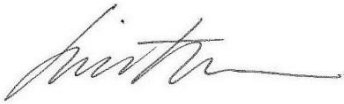
**58** Given the above, I find that the Policy is unreasonable in so far as it requires the employee to pay for the cost of the Rapid Test. I do not find that it is unreasonable that the Employer require the Rapid Test be taken by the employee on their own time.

**CONCLUSION**

**59** The Union's declaration is granted, in so far as I find that the requirement that employees cover the cost of rapid testing is unreasonable and therefore that aspect of the Policy is invalid. The Union's declaration with respect to paying wages for the time it takes for the employee to take the Rapid Test is not granted. That aspect of the Policy is reasonable.

**60** I order the Employer make whole any affected employees in British Columbia from November 22, 2021 until present with respect to the costs associated with the Rapid Tests. I leave it to the Parties to determine the appropriate quantum and remained seized should any issues arise with respect to quantum.

Dated at the City of North Vancouver in the Province of British Columbia this 31<sup>st</sup> day of March, 2022.



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Lisa Southern