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# Hospital worker fired after not declaring COVID-19 symptoms

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**Ontario worker had persistent cough but didn't indicate it on daily form; later tested positive**



By [Jeffrey R. Smith](#)

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Failing to follow a safety policy can be grounds for dismissal, regardless of the employee's intention, if the safety risk is significant.

That's an important takeaway from a recent Ontario arbitrator's decision upholding a hospital worker's firing for not following COVID-19 policy, says Rishi Bandhu, an employment lawyer in Oakville, Ont.

“Provided that they've established these policies, and they're clear and they're unambiguously communicated to employees, arbitrators and adjudicators are going to take them seriously.”

## COVID policy

The worker was employed with Johnson Controls Canada, a maintenance services company that provided such services at the Humber River Hospital in Toronto. At the outset of the COVID-19 pandemic in March 2020, the hospital implemented infection control policies that required workers to report if they were exhibiting symptoms of COVID-19. The policy was posted throughout the hospital, including in the dispatch area for Johnson Controls employees. Johnson Controls adopted the policies for its own employees.

The hospital's daily attestation form outlined COVID-19 symptoms and stated that staff with any symptoms should inform the hospital as soon as possible. The worker reported for work on March 20, 21, 23, and 25, and completed the attestation form each day indicating that he had no symptoms.

On each of these days, the worker was observed repeatedly coughing at work — one of the symptoms on the attestation form — while not wearing personal protective equipment (PPE). The worker described it as a throat clearing related to his allergies, but co-workers felt it was a heavy cough and spoke to him about it. On March 23, he told a co-worker that he had had the cough for a while and it was on-and-off, but the co-worker said that if the worker continued to sign the attestation form, he would report the worker to management.

Workplace health and safety is a big concern when employees [don't follow COVID-19 policies](#), says a lawyer.

The worker's belief in the cause of his cough and any good intentions that came with reporting for work were offset by his failure to follow instructions on the attestation form, says Bandhu.

“He didn't intend to get anybody sick, but the problem is that the attestation that he was required to sign was very specific. It wasn't ‘I attest that I don't have COVID-19.’ It's ‘I attest that I don't have symptoms of COVID-19, so I don't have a cough.’ He had the symptoms, and yet he was checking the box to say, ‘I don't have them.’ His subjective attribution of the causes of those symptoms were not relevant — he needed to just attest the fact that he had those symptoms, and I think that's where the misconduct is.”

On March 26, the worker reported for work and signed the attestation form, but he told a co-worker that he was feeling tired and there was a build-up in his sinus and chest. He also felt chills, but he still completed his shift.

Screening practices once thought to be too invasive of privacy may become essential in the [post-pandemic workplace](#), according to an expert.

## Worker tests positive

The worker called in sick on March 26 after the nature of his cough changed. He subsequently tested positive for COVID-19.

Johnson Controls investigated and the worker said that he didn't specifically recall reading the full policy, but he confirmed that he understood the requirements outlined on the daily attestation form. He reiterated that he thought the cough was due to his allergies and the chills were related to him normally feeling cool on the night shift.

The worker also claimed that he visited his cardiologist before his March 26 shift and his symptoms were described as consistent with allergy. He later provided a letter from the cardiologist supporting the claim.

Johnson Controls determined that the worker repeatedly, intentionally, and improperly attested that he wasn't exhibiting COVID-19 symptoms, which violated the hospital's infection control policies. It terminated his employment on June 24, 2020.

"I think if I think if it happened once and then he realized his error in judgment, then that may have granted him in a reprieve," says Bandhu. "But he did it over several days."

The union grieved the dismissal, arguing that the worker reasonably believed that his symptoms were related to his allergies. It added that when he realized that he might actually be sick, he called in sick and got tested. These factors, along with the worker's long record of service, meant that termination was excessive, the union argued.

## 'Extremely serious breach'

The arbitrator noted that the worker exposed co-workers and members of the public who were in the hospital to the risk of COVID-19. Although he may have not believed that he was sick and his cardiologist supported his allergy theory, the worker committed "an extremely serious breach of a critical health and safety measure implemented in response to what was then the early days of an emerging pandemic," by not disclosing his symptoms, the arbitrator said.

The attestation form was critical to health and safety in the hospital and it was designed to root out risks from possible symptoms rather than give employees the discretion to decide if they had the virus or not. When the worker didn't report his symptoms, he deprived Johnson Controls and the hospital of the opportunity to objectively assess whether the symptoms were related to his allergies or COVID-19, and he also forced several co-workers to

isolate themselves and undergo testing – “significant impacts on those employees and on the functioning of the workplace,” the arbitrator said.

The fact that the workplace was a hospital heightened the safety concerns and increased the seriousness of the worker’s misconduct, says Bandhu.

“This is a hospital, highly safety-sensitive, and he can pass this on to others, he can cause serious illness, even deaths,” he says. “That goes into the severity of the misconduct and tilts the arbitrator towards dismissal as opposed to a lesser penalty.”

The arbitrator determined that the misconduct was serious enough to warrant termination, regardless of the worker’s service, noting that the worker had prior instances of discipline related to breaches of health and safety rules.

Any dismissal case is going to depend on the specific facts – particularly with the issue of vaccine mandates looming for many employers – but safety is going to be taken seriously when determining the level of discipline for not following safety policies during the pandemic, says Bandhu.

“[Before the pandemic,] who could have imagined someone losing their job because they showed up to work with a cough? Things have changed so much that it’s quite the opposite – if you come to work with a cough, you may be putting everybody at risk because of the peculiar risk and dangers associated with COVID-19.”

See *Johnson Controls Canada LP and TC, Local 419 (Williams)*, Re, 2022 CarswellOnt 6.

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