



**Manitoba Labour Board**  
Suite 500, 5<sup>th</sup> Floor - 175 Hargrave Street Winnipeg, Manitoba, Canada R3C 3R8  
T 204 945-2089 F 204 945-1296  
[www.manitoba.ca/labour/labbrd](http://www.manitoba.ca/labour/labbrd)  
[MLBRegistrar@gov.mb.ca](mailto:MLBRegistrar@gov.mb.ca)

**DISMISSAL NO. 2493**  
**Case No. 16/22/LRA**

**IN THE MATTER OF: *THE LABOUR RELATIONS ACT***

**- and -**

**IN THE MATTER OF: An Application by**

**S.C.L.,**

**Applicant,**

**- and -**

**Manitoba Government and General Employees' Union,**

**Respondent,**

**- and -**

**PRAIRIE MOUNTAIN HEALTH,**

**Employer.**

**BEFORE: C.S. Robinson, Chairperson**

**This Decision/Order has been edited to protect the personal information of individuals by removing personal identifiers.**

**SUBSTANTIVE ORDER**

**A. Procedural History**

1. On January 21, 2022, the Applicant filed an Application with the Manitoba Labour Board (the "Board") under section 20 of *The Labour Relations Act* (the "Act"), alleging that the Respondent breached the duty of fair representation. The Applicant says that the Respondent refused to represent her or file a grievance. She requested

several remedies including, but not limited to, an order that she be returned to work and compensated for lost income.

2. On February 8, 2022, the Respondent, through counsel, filed its Reply, submitting that the Application did not include any factual allegations that constitute arbitrary, discriminatory or bad faith conduct. The Respondent requested that the Application be dismissed without any further proceedings.
3. On February 14, 2022, the Employer, through counsel, filed its Reply, submitting that the Application should be dismissed without a hearing as the Applicant failed to establish a *prima facie* case.
4. On February 22, 2022, the Applicant filed a Response to the Replies.
5. On May 16, 2022, the Board wrote to the parties to advise that the Chairperson, pursuant to subsection 29.2(2) of the *Rules of Procedure*, was satisfied that exceptional circumstances existed warranting an extension of time for the Board to issue its final decision in this matter.

## **B. Background**

6. The Applicant is employed by the Employer as a Home Care Attendant and is one of the Respondent's members.
7. The Respondent represents approximately 32,000 individuals including approximately 8,600 who work in the public health sector.
8. The Employer is a health care organization that provides health care services to Manitobans.
9. The Respondent and the Employer are parties to a collective agreement which establishes terms and conditions of employment that apply to the Applicant.
10. In March of 2020, a worldwide pandemic was declared as a result of the communicable disease known as COVID-19.
11. In August of 2021, the Province of Manitoba announced that it would introduce a Public Health Order requiring designated persons, including, but not limited to, health care personnel, to be fully vaccinated or undergo regular testing for COVID-19. A comprehensive memo issued on August 24, 2021 to all health care workers by the Chief Nursing Officer, Shared Health, and Manitoba's Chief Public Health Officer, explained to whom the Public Health Order would apply and the requirement to be fully vaccinated by October 31, 2021. The memo indicated that in order "to be fully

vaccinated by the end of October, individuals must receive their second dose of the COVID-19 vaccine no later than October 17, 2021". Individuals who, for medical reasons are unable to be vaccinated or who chose not to be vaccinated, were advised that they would be required to undergo regular COVID-19 testing and provide proof of a recent negative test.

12. The Chief Public Health Officer of Manitoba issued a Public Health Order ("PHO") under *The Public Health Act*, C.C.S.M. c. P210 on September 24, 2021, requiring COVID-19 vaccination or testing for designated persons. The PHO indicated that "the pandemic caused by the communicable disease known as COVID-19 is creating public health challenges in Manitoba that will continue to evolve and that require urgent action to protect the health and safety of people across Manitoba". The Chief Public Health Officer determined that, as a result of the pandemic, there was a "serious and immediate threat to public health" that "cannot be prevented, reduced or eliminated without taking special measures". In accordance with the legislation, the PHO was approved by the Minister responsible.
13. The Applicant is a "designated person" and the Employer is an "administrator of a designated person" as those terms are defined in the PHO. The PHO states that a "designated person must not attend their workplace" unless they have provided "proof of vaccination to their administrator" or comply with the testing requirements set out in the PHO. Furthermore, the PHO imposed a legal requirement on the administrator to prevent designated persons from attending their workplace unless they complied with the vaccination or testing requirements, or as permitted by the Chief Public Health Officer.
14. The Employer communicated with employees regarding the implementation of the PHO and the requirement to provide proof of vaccination against COVID-19 or to engage in rapid testing.
15. The material filed indicates that the Applicant and persons acting on behalf of the Respondent communicated on several occasions between August 21, 2021 and November 26, 2021.
16. At a meeting held on October 15, 2021, the Applicant advised the Employer that she would not disclose her vaccination status and was concerned about COVID-19 testing methods. A representative of the Respondent attended the meeting with the Applicant (via videoconference). The Respondent provided information to the Applicant regarding testing methods following research which was conducted by the Respondent's Health and Safety Specialist.
17. Ultimately, the Applicant refused to comply with the PHO. Given that the Employer has a legal obligation to comply with the PHO, it placed the Applicant on an unpaid

leave of absence effective on or about October 18, 2021. The Applicant was not disciplined and remains an employee of the Employer.

18. The Applicant asked the Respondent to file a grievance on her behalf respecting the Employer's action. The Respondent refused and provided her with an explanation for its refusal. The Respondent's refusal to grieve was based upon the material facts and legal advice which it received which indicated that the PHO, and its application to the Applicant in the circumstances, did not violate the Applicant's rights under the legislation or the collective agreement. In other words, the Respondent did not believe that the grievance that the Applicant wanted it to file would be successful based upon legal advice which it received and reviewed. The Respondent further acknowledged that it supported the PHO from a public policy standpoint, particularly as it applies to its members, like the Applicant, who work with people who might be vulnerable to experiencing significantly detrimental health consequences if they contract COVID-19.

### **C. Positions of the Parties**

19. The Applicant contends that the Respondent acted in an arbitrary and discriminatory manner and, further, that it failed to exercise reasonable care in representing her interests. She asserts that representatives did not communicate with her as quickly as they promised at certain times and failed to file a grievance on her behalf.
20. The Respondent denies having violated the *Act* as alleged or at all and requests that the Application be dismissed. The Respondent contends that the Application fails to allege any fact which, even if proven to be true, would establish a breach of section 20(b) of the *Act*. The Respondent maintains that the Application merely consists of actions or inactions with which the Applicant does not agree and that such disagreement does not constitute a violation of section 20(b) of the *Act*.
21. The Employer submitted that the Application failed to establish a *prima facie* case and that it should be dismissed without a hearing.

### **D. Analysis**

22. Section 20 of the *Act* establishes the duty of fair representation:

#### **Duty of fair representation**

20 Every bargaining agent which is a party to a collective agreement, and every person acting on behalf of the bargaining agent, which or who, in representing the rights of any employee under the collective agreement,

- (a) in the case of the dismissal of the employee,

- (i) acts in a manner which is arbitrary, discriminatory or in bad faith, or
- (ii) fails to take reasonable care to represent the interests of the employee; or
- (b) in any other case, acts in a manner which is arbitrary, discriminatory or in bad faith;

commits an unfair labour practice.

23. The Board may decide a matter without conducting a formal hearing pursuant to subsection 30(3)(c) of the *Act* which states that it may “at any time decline to take further action on the complaint”. Similarly, subsection 140(8) of the *Act* permits the Board to dismiss a complaint at any time if it is of the opinion that the complaint is “without merit or beyond the jurisdiction of the board”.
24. The onus is on the Applicant to establish a violation of section 20 of the *Act*.
25. As this case does not involve a dismissal, clause (b) of section 20 of the *Act* is applicable. The standard of care under section 20(b) of the *Act* is expressed in the negative. Bargaining agents must not represent employees in a manner that is arbitrary, discriminatory or in bad faith.
26. A summary of the meaning ascribed to the terms “arbitrary”, “discriminatory” and “bad faith” by the Board appears in *J.H.B. v. Canadian Union of Public Employees* (2009), 164 C.L.R.B.R. (2d) 182 at page 190:

“Arbitrary” conduct has been described as a failure to direct one’s mind to the merits of the matter, or to inquire into or to act on available evidence, or to conduct any meaningful investigation to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles, or displaying an attitude which is indifferent, summary, capricious, non-caring or perfunctory. Flagrant errors consistent with a non-caring attitude may also be arbitrary, but not honest mistakes, errors of judgment, or even negligence. “Bad faith” has been described as acting on the basis of hostility or ill-will, dealing dishonestly with an employee in an attempt to deceive, or refusing to process the grievance for sinister purposes. A knowing misrepresentation may constitute bad faith, as may concealing matters from the employee. The term “discriminatory” encompasses cases where the union distinguishes among its members without cogent reasons.

27. Unions have the discretion to determine whether a grievance or complaint shall be filed, referred to arbitration, withdrawn, or settled with or without the consent of the employee(s) concerned.

28. When a union secures an opinion from legal counsel as to the merits and likelihood of the success of a grievance or potential grievance as part of its decision-making process, the Board has consistently held that following the advice of legal counsel is a potent defence to a duty of fair representation complaint.
29. The Board has also previously noted that it would be unreasonable to impose upon unions a standard analogous to that expected of the professions, or to second-guess excessively the decision-making in which they engage. While it is expected that the decisions of unions in representing the rights of employees under a collective agreement will be made honestly, conscientiously and without discrimination, within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent.
30. The Board has determined that this matter can be addressed without the necessity for a hearing on the basis of the material filed.
31. The Applicant has not pled any facts that establish that the Respondent acted in manner that was arbitrary, discriminatory or in bad faith. The Respondent took the concerns of the Applicant seriously and fully considered the merits of the issue. It sought legal advice regarding the concerns and acted in accordance with that advice. Moreover, the Respondent did not act in a hostile or dishonest manner towards the Applicant. Furthermore, there is no suggestion that the Applicant was treated in a discriminatory manner. She was clearly not treated differently from other members without cogent reasons.
32. As noted above, section 20 of the *Act* does not require unions to file any and all grievances requested by members, or to advance all grievances to arbitration. There is no question that unions may (and should) evaluate potential grievances to determine whether or not they have any chance of success. Nothing in the *Act* requires a union to file a grievance (or proceed to arbitration) if there is little chance of success. To do so would be a waste of a union's time and resources (as well as the time and resources of employers). Moreover, in making such decisions, it is open to a union to consider whether a grievance is in the interests of the membership as a whole.
33. The Board is satisfied that the Application does not disclose any fact that would constitute a *prima facie* breach of section 20(b) of the *Act*.
34. Indeed, having carefully considered the material filed, the Board is satisfied that the Respondent acted reasonably and diligently.
35. Accordingly, the Application is without merit and is dismissed in accordance with subsections 30(3)(c) and 140(8) of the *Act*.

**T H E R E F O R E**

The Manitoba Labour Board **HEREBY DISMISSES** the Application filed by S.C.L. on January 21, 2022.

**DATED at WINNIPEG, Manitoba**, this 20<sup>th</sup> day of September, 2022, and signed on behalf of the Manitoba Labour Board by

*“Original signed by”*

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**C.S. Robinson, Chairperson**

CSR/st/acr/rp-s