



**Manitoba Labour Board**  
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**DISMISSAL NO. 2486**  
**Case No. 18/22/LRA**

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

**- and -**

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

**L.M.,**

**Applicant,**

**- and -**

**Manitoba Nurses Union,**

**Respondent,**

**- and -**

**WINNIPEG REGIONAL HEALTH AUTHORITY,**

**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 24, 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 maintains that the Respondent was obligated to represent her or file a grievance on her behalf but that it refused to do so. She requested several remedies including, but

not limited to, an order that she be paid unused vacation time and compensated for her losses.

2. On February 22, 2022, following an extension of time, the Employer filed its Reply requesting that the Board dismiss the Application without a hearing as the Application did not establish a *prima facie* violation of section 20 of the *Act*.
3. On March 2, 2022, following an extension of time, the Respondent filed a Reply denying the allegations and maintaining that the Applicant failed to establish a *prima facie* case. The Respondent submitted that the Applicant was attempting to secure a remedy against her Employer. The Respondent also submitted that the Applicant is on paid medical leave, not unpaid leave for failing to comply with a Public Health Order. Therefore the remedy requested is not required, this Application is moot and serves no labour relations purpose. The Respondent requested that the Application be summarily dismissed.
4. The Applicant did not file a response to the Replies.
5. On May 19, 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 as a nurse in the River East Community Area with the Employer.
7. By letter dated October 18, 2021, the Employer advised the Applicant that she was being placed on an unpaid leave of absence as she failed to provide proof of compliance with a Public Health Order applicable to both her and the Employer. On November 12, 2021, the Applicant provided the Employer with a note from a health care professional indicating that she would be required to be off work for approximately three months for medical reasons, with an effective date of October 15, 2021. The Employer submitted that the Applicant is on a medical leave of absence, retroactive to October 15, 2021.
8. The Respondent represents approximately 12,000 nurses in the Province of Manitoba and is the bargaining agent for nurses employed by the Employer, including the Applicant. The Respondent and the Employer are parties to a collective agreement which establishes terms and conditions of employment that apply to the Applicant.

9. The Employer provides health care services to Manitobans.
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 comply with the vaccination or testing requirements, or as permitted by the Chief Public Health Officer.
14. The Employer communicated with employees regarding the PHO and the requirement to provide proof of vaccination against COVID-19 or to engage in rapid testing. Employees were told that if they chose not to provide proof of full vaccination against COVID-19, they would have to participate in regular COVID-19 rapid testing as required by the PHO. Employees were further advised that they would be

immediately placed on an unpaid leave of absence if they failed to comply. The Employer notes that the Applicant's manager had a discussion with her on October 15, 2021 regarding the requirements of the PHO.

15. The Applicant states that she contacted the Respondent after being directed by her Nursing Resource Coordinator that she had to complete a COVID-19 Vaccination Status Disclosure form. She says that she left voicemail messages for the President of her local, but did not receive a response. In its Reply, the Respondent states that the President received no calls or voicemails from the Applicant. Indeed, the Respondent maintains that the only communication that it received about the Applicant was a copy of the letter sent to her respecting being placed on a leave of absence.
16. As noted above, on October 18, 2021, the Employer advised the Applicant that she was being placed on an unpaid leave of absence as she failed to provide proof of compliance with the PHO.
17. On November 1, 2021, the Respondent obtained a legal opinion regarding the PHO and whether the Respondent could successfully grieve if an employee was placed on an unpaid leave of absence for failing or refusing to be fully vaccinated (or to reveal their vaccination status) and refusing to undergo COVID-19 testing as required under the PHO. The legal opinion concluded that a grievance would not be successful.
18. On November 24, 2021, the Respondent received a document (dated November 19, 2021) addressed to a number of individuals including its President and Director of Labour Relations. The document purports to be on behalf of a number of individuals including the Applicant. It states: "In consultation with a lawyer, we are giving you 1 (one) last opportunity to respond to our requests for a grievance and arbitration process against our employer.". The letter asserts that the signatories' conditions of employment and collective agreement "have never included invasive medical procedures, and as unpaid leave of absence is indistinguishable from dismissal (according to the lawyers), our union has an obligation to represent its members and file grievances on our behalf with the employer". Noting that an application to this Board had already been drafted, the letter threatens that it would be filed if the Respondent did not provide a "favourable response" by November 30, 2021.
19. The Respondent replied on November 26, 2021. That response noted that nurses are designated persons under the PHO and are therefore required to either provide proof of full vaccination or submit to regular COVID-19 testing and, further, that the Employer was obligated under the PHO to not allow designated persons to work unless they complied. Making clear its position, the Respondent concluded by stating:

Based upon the legal advice we have received, MNU will not be in a position to file a grievance on your behalf, nor seek your reinstatement from leave, as an arbitrator would undoubtedly support and recognize the legal obligation on your employer to comply with the Public Health Order and the law in Manitoba.

The Public Health Order was not negotiated by MNU and health care employers, and arises outside of the collective agreement.

**C. Positions of the Parties**

20. The Applicant states in her Application that the complaint is about “MNU failing to respond, represent or file a grievance”. She contends that the Respondent acted in an arbitrary and discriminatory manner and, further, that it failed to exercise reasonable care in representing her interests. It is her position that the Employer had no ability under the collective agreement to place an employee on an unpaid leave of absence, that it was contrary to law for the Employer to demand her to provide personal health information, and that the Employer’s actions were contrary to workplace safety and health legislation.
21. The Applicant maintains that the Respondent “refused to conduct any meaningful investigation to obtain the data to justify a refusal to file a grievance” and acted in a discriminatory manner by refusing to represent members who “are exercising their legal rights to privacy and protection and the doctrine of informed consent”. She referred to the “reasonable care” standard and noted that being placed on unpaid leave “created undue hardship in being able to provide for myself”. She expressed the view that the PHO “violates the Canadian Constitution” and claimed that there “is no law for these mandates”.
22. The Respondent denies having violated the *Act* as alleged or at all and requests that the Application be summarily dismissed. The Respondent contends that the Application does not establish a *prima facie* case as it 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 further contends that it represented the Applicant diligently, fairly, reasonably and in good faith. The Respondent added that the Applicant is attempting to secure remedies against the Employer through her Application. The Respondent also submitted that the Applicant is on paid medical leave, not unpaid leave for failing to comply with a Public Health Order and therefore, the remedy requested is not required, the application is moot and it serves no labour relations purpose.
23. The Employer also submitted that the Application should be dismissed without a hearing as the Applicant failed to establish a *prima facie* violation of section 20 of the *Act*.

**D. Analysis**

24. 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.

25. The Board may decide a matter without conducting a formal hearing pursuant to the provisions of 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”.

26. The onus is on the Applicant to establish a violation of section 20 of the *Act*.

27. 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.

28. 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.

29. 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.
30. 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.
31. 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.
32. The Board has determined that this matter can be addressed without the necessity for a hearing on the basis of the material filed.
33. The Applicant has not pled any facts that establish that the Respondent acted in manner that was arbitrary, discriminatory or in bad faith. To the contrary, it is clear that the Respondent took the Applicant’s concerns seriously and fully considered the merits of the issue. It diligently sought legal advice regarding the Applicant’s concerns and acted in accordance with that advice. Moreover, the Respondent did not act in a hostile or dishonest manner towards the Applicant. Rather it provided a frank and professional assessment of the matter without any suggestion of bad faith. 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.
34. Although there is a suggestion that an individual acting on behalf of the Respondent failed to respond to the Applicant, it is clear that the Respondent did provide a detailed written reply to the letter to which the Applicant was a signatory. Even if the Board was satisfied that the Respondent failed to respond to the voicemails purportedly left by the Applicant, that would not, standing alone, constitute a *prima facie* breach of section 20 of the *Act*.

35. 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.
36. 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*.
37. Indeed, having carefully considered the material filed, the Board is satisfied that the Respondent acted reasonably and diligently.
38. 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 L.M. on January 24, 2022.

**DATED** at **WINNIPEG, Manitoba** this 7<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**