

DISMISSAL NO. 2447
Case No. 51/22/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An Application by

X.F.,

Applicant,

- and -

Winnipeg Police Association,

Respondent,

- and -

WINNIPEG POLICE SERVICE,

Employer.

BEFORE: K. Pelletier, Vice-Chairperson

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

SUBSTANTIVE ORDER

Introduction

1. 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 has breached its duty of fair representation. Specifically, the Applicant alleges that, by failing to grieve the Employer’s COVID-19 policies, the Winnipeg Police Association (the “Association”) breached its duty of fair representation.

2. The Association and Employer have filed detailed Replies, requesting that the Application be dismissed for failing to disclose a *prima facie* breach of the *Act*. This decision grants that request for the reasons set out below.

Background

3. The Applicant has been employed as Constable of the Winnipeg Police Services since 2011, and is a member of the Association and governed by the terms and conditions of a collective agreement between the Association and the Employer, effective December 24, 2016 to December 31, 2021.
4. In September and October 2021, the Employer implemented a number of policies to address COVID-19 pandemic-related concerns, including policies regarding proof of vaccination status or confirmation of a valid exemption, failing which employees would be required to undergo regular COVID-19 rapid antigen testing prior to reporting to work effective November 15, 2021. The Employer also implemented policies regarding entering vaccination information in an electronic database, and masking requirements for unvaccinated service members. These are collectively referred to as the “COVID-19 policies” in this decision.
5. The Association filed a number of grievances in response to the Employer’s COVID-19 policies. All but one of these grievances was resolved through the grievance process. The grievance relating to the masking requirement for unvaccinated service members remains active, and the Association continues to represent the interests of members affected by this policy.
6. As a result of the introduction of the COVID-19 policies, the Applicant advises that a group of members, composed of either unvaccinated or individuals refusing to disclose their vaccination status, was formed. Between October 2021 and January 2022, the Applicant advises that an employee purporting to represent the interests of this group of members contacted the Association President, D.G. On various occasions, the representative expressed her concerns regarding the Employer’s COVID-19 policies. D.G. responded to an email of November 5, 2021, advising that, based on legal advice received, a grievance would likely be unsuccessful in overturning the policy that requires vaccination or a reasonable testing option. In this email, D.G. advises that members have diverse views on the issues, and that the Association is “fully committed to ensuring the interests and collective agreement rights and terms of the WPA members are respected”. D.G. added that the decision to proceed with a grievance was not being made regarding the efficacy or any personal views on vaccinations. Rather, the decision was based on legal advice obtained, having regard to an “objective review of the facts and an examination of the likelihood of success a grievance would bring”.

7. On November 15, 2021, the Applicant explains that he showed up to work as a “healthy fit-for-duty employee” and was unilaterally placed on an unpaid leave of absence, in light of the fact that he did not disclose his vaccination status. He was placed on leave for an eight day period, and suffered a diminution of income and benefits. While he does not provide any specificity in terms of his losses, he requests both compensation for lost wages and an additional \$2,000 as damages. He is also seeking payment under *The Employment Standards Code*, which does not have any application in this case.
8. On February 14, 2022, the Applicant filed the within Application before the Board, requesting that the Board instruct the Association to “represent [him] in a fair manner against the WPS to put an end to the discrimination based on vaccine status”.
9. In his application, the Applicant takes issue with the necessity and legitimacy of the COVID-19 policies, and with the Association’s response to the Employer’s COVID-19 policies. In particular, the Applicant argues that the Association breached its duty of fair representation in not filing a grievance about the Employer’s vaccination policy prior to union members being placed on unpaid leave of absence for non-compliance with the policy.
10. The Applicant further argues that the Association was unresponsive to queries and concerns expressed by the group of members opposed to the Employer’s COVID-19 policies. The Applicant also says that the Association has discriminated against certain members in favouring a subset of the membership who accept the Employer’s COVID-19 policies.
11. The Applicant submits that the COVID-19 policies are a violation of his privacy rights and that the testing mandate requires the Applicant to submit to invasive medical testing and that the Collective Agreement does not require employees to subject themselves to medical treatments.
12. The Association contends that the Applicant has failed to establish a *prima facie* violation of the *Act*. The Association advises that it reached the decision not to proceed with filing a grievance on behalf of the group of employees opposed to the COVID-19 policies following a thoughtful and thorough canvassing of the issues. This included the receipt of a number of legal opinions, which reviewed in detail the recent arbitral, and civil authorities concerning challenges brought throughout the country regarding vaccination policies. The Association claims that its decisions were founded on a reasonable belief that an arbitrator would likely not successfully overturn a vaccination policy with a testing option.

13. The Association also submits that the Applicant has brought forward complaints about the Employer's policies which fall outside of the scope of this Application. The Association advises that it has not provided a response to these arguments as a result.
14. The Employer argues that the Application is without merit and should be dismissed without the need for a hearing.

The Duty Of Fair Representation

15. 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,

...

- (b) in any other case, acts in a manner which is arbitrary, discriminatory or in bad faith;

commits an unfair labour practice.

16. 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".
17. As this case does not involve a dismissal, clause (b) of section 20 of the *Act* is applicable. The onus is on the Applicant to establish a violation of section 20 of the *Act*.
18. 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.
19. 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.

20. The determination of whether an applicant has established a *prima facie* case is required to be made on the basis of the material facts pled by the applicant. The Board cannot draw an inference of the presence of arbitrary, discriminatory or bad faith conduct from the tone and context of the facts as they are outlined.
21. 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. Any breach of the duty of fair representation arises not from the fact that the union elects (or not) to file a grievance, but the reasons for and the manner in which the choice was made. It is this decision-making process that the Board will consider in determining whether there has been a violation of the *Act*.
22. When a bargaining agent secures an opinion from legal counsel as to the merits and likelihood of success as part of the 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.
23. The Board has also previously noted that it would be unreasonable to impose upon trade 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.
24. The Board was provided a number of authorities from various Canadian jurisdictions, in which labour boards have considered the issue of the duty of fair representation in the context of employer vaccination policies. In *Tiffany Bloomfield, Danielle Hurding, Mel Lewis, Lexi L. Bezzo, and Jaclyn Wagner v Service Employees International Union*, 2022 CanLII 2453, the Ontario Labour Relations Board considered the issue

of union communication to its members, and concluded that it was not considered to be a violation of the Ontario Act for a union to advise its members that it would hold grievances in abeyance while the jurisprudence develops. At para. 22, the board concluded:

The union made clear to its members the legal advice that it had received and what it had determined to do in response. The applicants clearly disagreed with the union's message, and indeed may have found that message discouraging, but it cannot be said that the union did not communicate and/or was unresponsive to member inquiries about the policy. One of the applicants said that she sent an email inquiry to the union to which she did not receive a reply. Whether or not the union responded directly to each and every email, there is no doubt that the union communicated clearly and effectively with members in response to the policy. The union was not required to provide its unvaccinated members with encouragement or a rosy outlook; indeed, it was fair and prudent for the union to provide a clear and frank assessment of the situation based on legal advice received.

25. The fact that members did not receive individual responses, or a reply from a specific individual was not sufficient to ground a duty of fair representation complaint. Further, the Ontario board noted that a union is not required to "promote unity" or to remain neutral on the issue of vaccinations, and that it was able to encourage and promote the employer's policy to serve the best interests of its membership as a whole. In so doing, the board determined that the union did not act in a manner that was arbitrary, discriminatory or in bad faith.
26. In *Tina Di Tommaso v Ontario Secondary School Teachers' Federation*, 2021 CanLII 132009 (ON LRB), the board set out that the inquiry in a duty of fair representation complaint is focused on the union's conduct and not on the employer's policy *per se*. At paragraph 10, the board noted:

A duty of fair representation complaint at the Ontario Labour Relations Board is about a union's conduct in the representation of its members. The Board is not the forum for debating or complaining about vaccination in general, this vaccine in particular, scientific studies, the government's directions, and/or a particular employer's policy.

27. The board determined that the applicant's mere assertion that the union had represented the interests of only certain members was not in and of itself a breach of the Act. The board repeated that there was nothing inherently unlawful about a union making a decision that favours one group of employees over another.

Analysis

28. The Board has determined that this matter can be addressed without the necessity for a hearing on the basis that it is without merit and does not disclose a *prima facie* case.
29. The crux of the Applicant's case is that he believes that the Association has capitulated to the Employer's allegedly unreasonable COVID-19 policies, without providing recourse and without exception. In so doing, the Applicant argues that the Association acted discriminatorily, arbitrarily and in bad faith.
30. Before turning to the merits of what he alleges, the Board has taken note that the Employer's masking policy remains a live issue for the Association, as the matter is making its way through the grievance process under the Collective Agreement. The Board will not inquire further into this issue which is premature, with the Applicant's rights yet to be fully decided.
31. The bulk of the remaining concerns relate to the Employer's policies regarding proof of vaccination status or confirmation of a valid exemption, failing which employees would be required to undergo regular rapid testing prior to reporting to work effective November 15, 2021. As noted earlier, the factual underpinnings of his beliefs regarding COVID-19 mandates are not considered in the context of a section 20 analysis. The Board will only consider whether the Union's conduct is considered to be in violation of the *Act*.
32. In the present case, the Applicant has not pled any facts that establish that the Union acted in manner that was arbitrary, discriminatory or in bad faith. In fact, the Board accepts that the Association did what it could be expected to do in the circumstances: it remained in communication with members regarding the Employer's COVID-19 policies, providing information as it became available. It filed grievances on behalf of its members, working in representing the rights of its members to address some of the concerns that it noted. It sought out various legal opinions, as the jurisprudence on the issue was developing, which included a thorough canvassing of the issues. The Association communicated widely its decision not to challenge the Employer's policy regarding the requirement for vaccination, specifically in light of the testing option available to its members. As noted in *Tina Di Tommaso, supra*, the Association was not required to remain neutral on the issue of vaccine mandates. The Board does not accept that it was required to debate the virtues of vaccine mandates with individual employees. It was reasonable, from the Board's perspective, for the Association to provide a clear and frank assessment of the merits of the issues to its members, on the basis of the legal information it obtained.

33. As noted earlier in this decision, a union is not required to file a grievance on behalf of all members, provided that it has made that decision in a manner that does not offend section 20 of the *Act*. In deciding whether a grievance should be filed, the Association was entitled to consider the legal advice it received, and to consider the interests of the membership as a whole. In electing not to file a grievance, the Board finds that the Association acted reasonably and thoughtfully.
34. In these circumstances, the facts pled by the Applicant do not establish that the Union acted in a manner that can be considered arbitrary, discriminatory or in bad faith.

T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the Application filed by X.F. on February 14, 2022.

DATED at **WINNIPEG, Manitoba**, this 11th day of May, 2022, and signed on behalf of the Manitoba Labour Board by

“Original signed by”

K. Pelletier, Vice-Chairperson

KP/dh/lo/lo-s