



**Manitoba Labour Board**  
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**ORDER NO. 1713**  
**Case No. 58/22/LRA**

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

**- and -**

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

**H.M.,**

**Applicant,**

**- and -**

**Salem Home Support Association,**

**Respondent,**

**- and -**

**SALEM HOME INC.,**

**Employer.**

**BEFORE: Blair Graham Q.C., Vice-Chairperson**

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

**INTERIM SUBSTANTIVE ORDER**

**A. Procedural History**

1. On February 23, 2022, the Applicant filed an Application with the Manitoba Labour Board (the "Board") seeking a remedy for an alleged unfair labour practice contrary to section 20 of *The Labour Relations Act* (the "Act").

2. On March 29, 2022, following an extension of time, the Respondent, through counsel, filed its Reply submitting that the Application fails to establish a *prima facie* case of an unfair labour practice under subsection 20(b) of the *Act*, and so should be dismissed without a hearing.
3. On March 31, 2022, following an extension of time, the Employer, through counsel, filed its Reply submitting that the Application is devoid of any facts which, even if true, could lead to the conclusion that the Respondent breached its duty to represent the Applicant contrary to section 20 of the *Act*. The Employer submits the Application should be dismissed without a hearing.
4. The Applicant did not file a response to the Replies.

**B. Facts**

5. The Employer is a long-term care facility located in Winkler, Manitoba.
6. The Respondent and the Employer are parties to a collective agreement effective from April 1, 2019 until March 31, 2022 (the "Collective Agreement").
7. The Applicant is an employee of the Employer and is represented by the Respondent with respect to labour relations matters.
8. On or about August 24, 2021, the Manitoba Government announced that it would be requiring all provincial employees who work with vulnerable populations to be fully immunized for COVID-19 by October 31, 2021, or to undergo regular testing for COVID-19. A Public Health Order was issued including those requirements, the purpose of which was to protect Manitoba citizens against a further spread of COVID-19.
9. As a result of the issuance of the Public Health Order, the Employer implemented a vaccination policy (the "Policy") requiring its employees to be fully immunized against COVID-19 by October 31, 2021, or to undergo regular testing thereafter. The Policy also provided that employees who failed to abide by its terms would be placed on leaves of absence. The Policy was issued by the Employer on or about October 18, 2021. The Respondent was not consulted by the Employer with respect to the Policy before it was issued.
10. The Applicant and other employees who are members of the Respondent raised concerns about the Policy. On September 28, 2021, a three-and a-half-page letter was written to the Employer on behalf of "Concerned Staff of Salem Home", articulating the concerns of many staff members with respect to the Policy.

11. The Applicant was one of the employees who did not comply with the Policy. She was placed on an unpaid leave of absence by the Employer on October 18, 2021.
12. On November 17, 2021, a letter signed by B.W., a member of the Respondent, was provided to the Respondent. The letter was addressed to the Employer and described as an "Employee Grievance Notice" on behalf of B.W. and twelve other employees of the Employer. The letter referred to several alleged violations of the Collective Agreement.
13. The letter was received by a representative of the Respondent while she was on a medical leave of absence, which resulted in some delay in submitting the letter to the Employer. The letter of November 17, 2021 was submitted as a Grievance (the "Grievance") to the Employer on January 11, 2022.
14. The Grievance was denied by the Employer on January 25, 2022.

**C. Positions of the Parties**

*Applicant*

15. The Applicant asserts that by issuing the Policy, the Employer effectively imposed a new condition of employment upon the employees within the bargaining unit, without amending the Collective Agreement, and that the Respondent acquiesced in that position "without any input from its members".
16. The Applicant also asserts that the Respondent did not take reasonable steps to follow the grievance procedures in the Collective Agreement on behalf of the Applicant and other affected members of the Respondent and did not pursue the Grievance diligently or at all. Furthermore, the Applicant says that the Respondent did not report back to the affected members of the Respondent with respect to how the Grievance was being handled.
17. By way of remedy, the Applicant wishes to be returned to work immediately, and to be compensated for her loss of income since being placed on a leave of absence.

*Respondent*

18. The Respondent says that it fully considered the issues raised by the Grievance and decided not to advance the Grievance to arbitration, because in its opinion the Grievance had no merit. The Respondent concluded that the Employer's policy was consistent with its legal obligations and reasonable in its terms.

19. The Respondent says that the Application fails to establish a *prima facie* case of an unfair labour practice under section 20 of the *Act*. The Respondent asserts that the Applicant has not set out any material facts in support of that claim.
20. The Respondent submits that the Application should be dismissed without a hearing.

*Employer*

21. The Employer observes that the allegations in the Application are directed primarily towards the alleged acts of the Employer. The Employer contends that there are no facts pled or materials filed by which the Board could conclude that the Respondent breached its duty to the Applicant or breached section 20 of the *Act*.
22. The Employer submits that the Application should be dismissed without a hearing.

**D. Legislation**

23. The Application alleges a breach of section 20 of the *Act*. That provision reads as follows:

**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.

24. Subsection 140(8) of the *Act* provides that if the Board is satisfied that an application is without merit, it may dismiss it at any time. In addition, subsection 30(3)(c) of the *Act* permits the Board to decline to take further action on an unfair labour practice complaint. The Board has consistently found that an application that does not

establish a *prima facie* case should be dismissed without a hearing in accordance with those provisions.

**E. Analysis**

25. The Applicant has not been dismissed from her employment. Therefore this Application is to be determined pursuant to the provisions of subsection 20(b) of the *Act*. This requires the Applicant to establish that the Respondent acted in a manner which is arbitrary, discriminatory or in bad faith.
26. It is not the function of the Board to assume the role of a surrogate arbitrator under a collective agreement and decide whether an Applicant would have succeeded on a grievance or potential grievance at arbitration.
27. The legal principles applied by the Board in respect of subsection 20(b) are well established and may be summarized as follows:
  - a) The onus is on an Applicant to establish a violation of section 20 of the *Act*.
  - b) 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.

- c) Perfection is not the standard established by the Legislature under section 20 of the *Act*. The fact that a union has committed an error or that the Board concludes that, with the benefit of hindsight, it might have acted differently in a particular

circumstance, is not sufficient to sustain a violation of the provision. The Board has 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 must 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. The Board has consistently indicated that a complaint will not be allowed merely because the union was wrong, could have given better representation, or did not do what the member(s) wanted.

- d) 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 concerned. Provided that its discretion is exercised in a manner which is not inconsistent with the union's obligations under the *Act*, the Board does not interfere with such decisions.
  - e) The decision-making process regarding whether to file, or to proceed to arbitration with, a grievance or complaint may involve the union securing an opinion from legal counsel as to the merits and likelihood of success. The Board has consistently held that following the advice of legal counsel is a potent defence to a duty of fair representation complaint. That said, it is not necessary for a union to obtain legal advice in order to meet its obligations under section 20 of the *Act* in every case.
  - f) Section 20 of the *Act* relates to the obligations of unions in representing the rights of any employee under the collective agreement. A section 20 application is not an appropriate avenue for employees to advance complaints about their employer, members of management, or fellow employees.
28. In determining whether a *prima facie* case exists in respect of section 20 of the *Act*, the Board has consistently held that there must be more than a bare allegation or assertion. Rather, there must be a sufficient factual foundation (assuming the facts alleged to be true) to enable the Board to draw reasonable conclusions therefrom, which, at a minimum would call for an answer from the Respondent. Unsupported allegations, without sufficient factual underpinnings, entitle the Board to conclude that a *prima facie* case has not been established.
29. The Application states that the Respondent was provided with the request to act on the Applicant's behalf in relation to her concerns about the Employer's vaccination policies. The Respondent took some steps to do so by forwarding the letter of

November 17, 2021 as a Grievance to the Employer. The only other factual particulars referred to in the Application are that the Respondent did not follow the grievance process outlined in the Collective Agreement, did not provide her with “representation against my Employer”, did not take the matter seriously and “has not gotten back to us regarding our Grievance letter...”.

30. Those factual particulars are very sparse. However, if they are assumed to be true, those facts may amount to arbitrary conduct in the sense that the Respondent did not direct its mind to the merits of the matter and did not inquire into the matter sufficiently to justify a decision not to proceed to arbitration.
31. The Respondent, in its Reply, states that it “carefully considered the issues raised in the Grievance” and concluded that the Grievance had no merit. The Respondent indicated that the Employer’s Policy was “consistent with its legal obligations and reasonable in its terms”. However the Respondent has not provided any other basis for not pursuing the Grievance, beyond forwarding it to the Employer. The Respondent has not specified what aspects of the Policy it considered, nor has it indicated whether it considered arguments relating to any potential deficiencies in the Policy, or any arguments which the Applicant could advance that the Policy should not apply to her.
32. Given the lack of detail in both the Application and in the Respondent’s Reply, the Board is unable to properly determine whether the Applicant has established a *prima facie* case that the Respondent has breached subsection 20(b) of the *Act* and has thereby committed an unfair labour practice.
33. Therefore the Board will afford the parties an opportunity to make further oral submissions to the Board to address the narrow and specific issue of whether there is evidence available to establish a *prima facie* case that the Respondent has breached subsection 20(b) of the *Act*.
34. Specifically, the Board is interested in receiving oral submissions from the Applicant with respect to whether it has further particulars with respect to the allegations that the Respondent engaged in arbitrary conduct, whether by failing to inquire into or to act on available evidence, or otherwise. The Board is also interested in receiving oral submissions from the Respondent providing more specific information with respect to the issues which it considered and further elaboration of the basis for its conclusion that the Grievance had no merit.

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

The Board shall conduct a preliminary hearing to hear the oral submissions of the parties in this regard. A case management conference shall be scheduled in advance of the preliminary hearing.

Following the preliminary hearing, the Board will determine whether the Applicant has established a *prima facie* case. Should the Board determine that a *prima facie* case has been established the matter shall proceed to a hearing on the merits. If it is determined that a *prima facie* case has not been established, the Application shall be dismissed.

**DATED at WINNIPEG, Manitoba**, this 30<sup>th</sup> day of June, 2022, and signed on behalf of the Manitoba Labour Board by

*“Original signed by”*

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**Blair Graham, Q.C., Vice-Chairperson**

ABG/dh/lo/amb-s