



ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **1822-21-U**

Halyna Pasternak, Dubravka Peles, Ajka Ejupovic, Pauline Selseotes, Joelle Maloney, Marija Lozancic, Julie Majkut, Mirjana Peso, and Svitlana Magal, Applicants v Service Employees International Union, Local 1 Canada, Responding Party

BEFORE: Lindsay Lawrence, Vice-Chair

DECISION OF THE BOARD: January 26, 2022

1. This is an application filed under section 96 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). The applicants allege that the responding party, Service Employees International Union, Local 1 Canada (the "union") breached its duty of fair representation in relation to matters arising out of their employment with Hotel Dieu Shaver Health and Rehabilitation Centre (the "employer").

2. The applicants take issue with the COVID-19 vaccine and with the union's response to the employer's COVID-19 vaccination policy.

3. The union has filed detailed submissions, requesting among other things, that this application be dismissed for the failure to make out a *prima facie* case. This decision grants that request for the reasons set out below.

The Application

4. The application is sparse. It consists primarily of the following paragraph under the section of the application form requesting a description of the material facts:

The company has issued written notices advising us that we will be put on unpaid leave if we don't share our medical information with them. When we approached Mr. Cook he

refused to commence the grievance procedure as demonstrated by his email dated Nov. 15 2021. (see attachment A) In this email Mr. Cook tries to dissuade us by saying the legal team thinks this will be upheld. This demonstrates the union's lack of will to negotiate on behalf of the members rights and protections under the OHSA and the Canadian Charter of Rights and Freedoms. While the temporary Emergency Measures are in place they are temporary, the Employer is requiring us to undergo a permanent treatment against our wishes. Clearly a violation.

5. The email in "attachment A" is from one of the union's representatives. It reads as follows:

As discussed on Dec. 5 and noted in an email to you on Nov. 15, SEIU recommends getting the COVID-19 vaccination unless you have a medical or other human rights based exemption. SEIU will file an individual grievance on your behalf should you be placed on an unpaid leave or terminated for not receiving the COVID-19 vaccine and place the grievance in abeyance pending case law development. Our legal advice is that mandatory vaccination policies will likely be upheld and the grievances will not likely succeed.

6. In terms of remedy, the applicants request as follows: "We are asking the Board to order the SEIU union to implement grievance process to protect our rights to bodily autonomy and ensure freedom from coercive action for refusing to be a part of clinical trial." The applicants then refer to provisions of the collective agreement.

7. The rest of the application consists of statements of two of the applicants, which relate primarily to their experience of being unvaccinated in the workplace and to various comments alleged to have been made by co-workers, occupational health staff and managers. With respect to the union's conduct, these statements say very little, but they include complaints which can be summarized as follows: (i) the union has given answers that are vague and/or discouraging; (ii) the union has said a grievance is unlikely to succeed, and that the applicants "should not expect a quick resolution" to grievances; (iii) the union president did not reply to a group letter; and (iv) the union has not "promoted[d] unity between colleagues".

Dismissal on a *Prima Facie* Basis

8. Section 74 provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

9. The Board defined "arbitrary", "discriminatory" and "in bad faith" as follows in the often cited *Chrysler Canada Ltd.*, [1997] O.L.R.D. No. 2605, at para. 37:

a) "arbitrary" means conduct which is capricious, implausible or unreasonable, often demonstrated by a consideration of irrelevant factors or a failure to consider all the relevant factors;

b) "discriminatory" is broadly defined to include situations in which a trade union distinguishes between or treats employees differently without a cogent reason or labour relations basis for doing so; and,

c) "bad faith" refers to conduct motivated by hostility, malice, ill-will, dishonesty, or improper motivation.

10. Rule 39.1 of the Board's Rules of Procedure sets out the approach of the Board in determining whether an application discloses a *prima facie* breach of the Act. The Rule reads as follows:

39.1 Where the Board considers that an application does not make out a case for the orders or remedies requested, even if all of the facts stated in the application are assumed to be true, the Board may dismiss the application without a hearing or consultation. In its decision, the Board will set out its reasons.

11. The Board will not dismiss an application for failing to make out a *prima facie* case unless it is clear, or plain and obvious, that it has no reasonable chance of success for establishing a violation of the Act based

on the allegations made. In making this determination, the Board assumes all of the facts set out in the application to be true and provable, and it does not consider contradictory facts or defences put forward by the responding party.

Analysis

12. The applicants have not asserted any facts that could establish arbitrary, discriminatory or bad faith conduct.

13. The bulk of the applicants' complaints are not about the union's conduct. As this Board has previously concluded, a duty of fair representation application is about a union's conduct in the representation of its members and 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": *Tina Di Tommaso v Ontario Secondary School Teachers' Federation*, 2021 CanLII 132009 (ON LRB). The duty of fair representation is equally not the forum for complaints about comments alleged to have been made by co-workers or employer representatives, or about the experience of being unvaccinated or unwilling to disclose vaccination status. To the extent that the applicants seek to challenge the employer's policy and/or to litigate the workplace climate, a section 74 complaint is simply not the right forum and remedies to those ends are not available.

14. There is nothing on the face of the pleadings which is arbitrary, discriminatory or in bad faith about the message communicated by the union. This is the same union and the same union message as in *Tiffany Bloomfield, Danielle Hurding, Mel Lewis, Lexi L, Bezzo, and Jaclyn Wagner v Service Employees International Union*, 2022 CanLII 2453 (ON LRB). The Board's conclusions at para. 22 of that decision apply equally here:

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. [...] 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.

15. The union's decision to hold the grievances in abeyance for some period of time, and to wait for some jurisprudence to develop, is not, on its face, arbitrary, discriminatory or in bad faith. This is particularly true in cases such as this one where the time between the implementation of the employer's policy and the filing of the instant application is relatively short, such that any other conclusion would be premature. Here, as in *Tiffany Bloomfield, supra*, at para. 26, the Board concludes: "On its face, a decision to watch "pending case law" (particularly on an emergent issue and at a time when many arbitration cases are known to be proceeding on vaccination policies across the province) is anything but arbitrary, discriminatory and/or in bad faith."

16. There is also nothing arbitrary, discriminatory or in bad faith about a union warning the applicants that they should not expect a quick resolution through the grievance process and/or giving answers which do not guarantee an outcome. It was fair and prudent for the union to communicate with its members about the process and any limitations, including what one can and should reasonably expect in terms of timing.

17. The statement that the group did not receive a reply from the union president to a group letter does not make out a *prima facie* breach of the duty of fair representation. Union members are not entitled to a reply from a specific union representative; they are entitled to a reply from the union. In this case, from the email filed with the application, it is clear that, whether or not the union responded directly to each and every email, the union communicated clearly and effectively with members in response to the employer's policy.

18. The remainder of the application consists of bald allegations, accusing the union, for example, of not "promoting unity between colleagues". Bald allegations, unsupported by material facts, do not make out a *prima facie* case of a breach of the duty of fair representation. Moreover, the duty of fair representation does not require that a union "promote unity" or for that matter to remain "neutral" on the question of vaccination. From a duty of fair representation perspective, there is nothing wrong with a union promoting vaccination and/or concluding that an employer's vaccination policy is in the best interests of its membership as a whole - provided that the union does not act in a manner that is arbitrary, discriminatory or in bad faith.

19. There is nothing else in the application about the union's conduct and upon which a breach of the Act could be found.

Determination

20. For the reasons set out above, the application is dismissed.

21. Any mediation or other dates scheduled in this application are hereby cancelled.

"Lindsay Lawrence"
for the Board