ONTARIO LABOUR RELATIONS BOARD

Labour Relations Act, 1995

OLRB Case No: 1586-21-U
Duty of Fair Representation

Tiffany Bloomfield, Danielle Hurding, Mel Lewis, Lexi L. Bezzo, and Jaclyn Wagner, Applicants v Service Employees International Union, Local 1 Canada, Responding Party v CarePartners, Intervenor

COVER LETTER

TO THE PARTIES LISTED ON APPENDIX A:

The Board is attaching the following document(s):

Decision - January 10, 2022

DATED: January 10, 2022

Catherine Gilbert
Registrar

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OLRB Case No: **1586-21-U**

Tiffany Bloomfield, Danielle Hurding, Mel Lewis, Lexi L. Bezzo, and Jaclyn Wagner, Applicants v Service Employees International Union, Local 1 Canada, Responding Party v CarePartners, Intervenor

BEFORE: Lindsay Lawrence, Vice-Chair

APPEARANCES: Tiffany Bloomfield, Lexi Bezzo, Danielle Hurding, Mel Lewis for the applicants; Sukhmani Virdi and Judy Dearden for the responding party; Donna Walrond and Kristin Oster for the intervenor

DECISION OF THE BOARD: January 10, 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 respect of their employment with the intervenor, CarePartners (the "employer").

2. The union and the employer requested that the Board dismiss this application without holding a hearing, among other reasons, on the basis that the application does not disclose a *prima facie* case, i.e., does not disclose a breach of the Act even if all of the facts alleged by the applicants are true.

3. The Board held a consultation on January 5, 2022. The parties were advised, by way of a decision dated December 14, 2021, to come to the consultation prepared to make submissions on the request to dismiss this application for failure to disclose a *prima facie* case. They were also advised to consult Information Bulletins 11 and 12 as well as the recent decisions posted on the Board's website.

4. For the reasons set out below, the applicants have not established a *prima facie* case of a breach of the Act and the application is dismissed. Fundamentally, the applicants are unhappy about the employer's COVID-19 vaccination policy and are unhappy that the union has not insulated them from their decision to remain unvaccinated. This does not make out a breach of the duty of fair representation.

Attendance at the Consultation

5. One of the applicants, Jaclyn Wagner, did not attend the consultation. The employer advised that Ms. Wagner was at work and had not been placed on unpaid leave. The applicants in attendance at the consultation agreed that Ms. Wagner was at work and indicated that they did not believe she was pursuing this application. Given Ms. Wagner's non-attendance at the consultation, and the information from the parties, the Board proceeded in her absence. The consultation began at around 9:30 a.m. and ended around 11 a.m. The conclusions below apply to Ms. Wagner who, in her absence, presented no contrary facts or evidence.

Facts

6. For the purposes of a *prima facie* case determination, the Board relies upon the facts as set out by the applicants and assumes those facts to be true and provable. However, as confirmed by the parties at the consultation, the pertinent underlying facts are not in any event in dispute. The facts recited below were either set out in the applicants' pleadings or agreed by the parties at the consultation to be accurate.

7. The employer provides home healthcare services. All of the applicants are employed as Personal Support Workers.

8. In the fall of 2021, the employer introduced a COVID-19 vaccination policy, which required employees to be fully vaccinated by no later than November 30, 2021. An allowance was subsequently made for employees to continue working into January 2022, if they had received one dose of the vaccine by November 29, 2021 and attested that they would receive a second dose by January 19, 2022.

9. Following the release of the policy, the union advised its membership that it had sought legal advice on the employer's policy and that the advice was clear: "given the current state of the law and the unprecedented challenges of COVID-19, mandatory vaccination policies

will most likely be upheld." The union advised that a grievance could be filed which would be held in abeyance "pending case law". The union warned that such grievances were unlikely to succeed, and that absent a valid exemption, employees who refused to be vaccinated risked discipline or dismissal. The union's position as described in this paragraph was set out explicitly in an email attached to the application. At the consultation, the applicants confirmed that, whether or not they had received the particular email, they had received this message from the union and understood it to be the union's position.

10. This application was filed on November 24, 2021. At the time the application was filed, the applicants anticipated being, but had not yet been, placed on unpaid leave.

11. As a result of the application of the policy, on November 30, 2021, Tiffany Bloomfield, Danielle Hurding and Lexi Bezzo were placed on unpaid leave. The policy states that non-compliant employees will be "managed accordingly, including but not limited to, being placed on an unpaid leave of absence." As of the date of the consultation, these applicants remained on unpaid leave.

12. On November 30, 2021, the union filed a group grievance on behalf of several individuals including Ms. Bloomfield, Ms. Hurding and Ms. Bezzo. The grievance is proceeding through the steps of the grievance procedure with the scheduling of a Step 2 meeting.

13. Mel Lewis has been on a leave of absence since October 2021, which is unrelated to the application of the policy and for an indeterminate period. The policy has not yet been applied to her.

The duty of fair representation

14. 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.

15. 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.

16. 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.

17. 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.

Decision

18. It is clear, plain and obvious that the applicants have no reasonable chance of success in establishing a violation of the duty of fair representation. The application is about the employer's policy, the applicants' decision to remain unvaccinated, and their belief that the union should support their position without qualification or question. This is not an application about the union's conduct in any way being arbitrary, discriminatory or in bad faith.

19. In the application and at the consultation, the applicants asserted that the employer's policy was unfair, contrary to the collective agreement, and/or failed to provide reasonable and available alternatives. One of the applicants read a letter at the consultation which expressed her views about the vaccine and various statistics related to the vaccine. These 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). To the extent that the applicants seek to challenge the employer's policy and/or to have the Board order the employer to change that policy or provide compensation, a section 74 complaint is simply not the right forum and those remedies are not available.

20. At the consultation, the Board encouraged the applicants to focus their submissions on the union's conduct and any remedies requested. The applicants indicated that the union's conduct to which they objected was as follows: (i) the union had not communicated sufficiently with them and/or had discouraged them from "taking action"; (ii) the union should have taken steps to challenge the policy before November 30, 2021; and (iii) the union was not taking enough action with respect to the grievance. In terms of remedy, the applicants effectively requested that the Board require the union to pursue all of their concerns more forcefully and quickly. The applicants also asserted that the union should have challenged what they allege was unfairness when the employer allowed employees with one dose extra time for compliance.

21. None of the applicant's complaints about the union establish a *prima facie* case.

22. With respect to the union's communications, the applicants have not made out a *prima facie* case that the union acted in a manner which was arbitrary, discriminatory or in bad faith. The applicants filed with their application copies of various emails, including an email setting out the message described in paragraph 9 above. 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.

23. With respect to the applicant's complaints regarding the grievance filed by the union, this Board has consistently held that a union is not even required to file a grievance to meet its duty of fair representation (see, for example, *Sager v Service Employees Union Local 183*, 2001 CanLII 19278 (ON LRB) at para. 15). Accordingly, a union need not file a grievance by a particular date or process it in a particular manner, provided that it does not conduct itself in a manner that is arbitrary, discriminatory or in bad faith. As the Board has stated in *Harkin v Canadian Union of Brewery and General Workers Component 325*, 2007 CanLII 631 (ON LRB) at para. 5:

> "… Any breach of the duty of fair representation arises not from the fact that the union made a choice as to whether to file a grievance, but from the manner in which that choice was made: the facts stated in the application must allow the Board to conclude that the union has acted in a manner that was arbitrary, discriminatory or in bad faith."

24. The Board makes no determination here on whether the union was required to file a grievance. However, it should be noted that the union was not automatically required to do so and that the union was entitled, and indeed required, to consider the interests of the membership as a whole. In any event, it is simply a fact that here the union did file a grievance, albeit with the caveat that it would watch the emerging case law.

25. At the time this application was filed, none of the applicants had suffered any adverse employment consequence. A grievance was filed immediately for the applicants who were placed on unpaid leave. Moreover, there was nothing asserted by the applicants in the application or at the consultation to support the proposition that the union's decision to file a group grievance, rather than a policy grievance,

was arbitrary, discriminatory or in bad faith. While the applicants clearly wanted a grievance filed sooner, they were given an opportunity to challenge the union's view that such grievance would have been premature based on the language of the applicable collective agreement. They did not do so.

26. Finally, the applicants have not asserted any basis upon which the Board could conclude that the union breached its duty of fair representation in how it is moving the grievance through the grievance procedure set out in the collective agreement. The union has indicated that the grievance will be held in abeyance, but that has not happened yet and any determination on such decision would be premature. 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.

27. In terms of remedy, the applicants effectively requested that the Board require the union to pursue their concerns more forcefully and quickly, but in the absence of arbitrariness, discrimination or bad faith, this is not the type of remedy the Board will grant.

28. The Board sees no basis upon which one could conclude that the union breached its duty of fair representation vis-à-vis the applicants in not challenging the employer's decision to allow employees with one dose extra time for compliance. The union filed a grievance immediately on behalf of employees who suffered an adverse employment consequence. There was nothing further that the union could or should have done for them in that regard. The fact that employees with one dose were given additional time for compliance does not render the actions taken by the union on behalf of the applicants any less thorough. Employees who were attempting to comply with the policy, if belatedly, and employees who refused to comply with the policy are differently situated. On its face, there is nothing arbitrary, discriminatory or in bad faith in the union refusing to grieve the employer's differential treatment of these groups.

Additional Issue

29. At the consultation, the applicants raised for the first time concerns about an event that was held by the union just after November 30, 2021. According to the applicants, this event was a meeting or celebration where vaccinated employees could get "swag bags". The

union responded to this new allegation, without prejudice to its concerns about the timing of this allegation and the lack of particulars. The union stated that this was an internal event organized by the union, which was held at a hotel and the hotel was responsible for imposing the vaccination requirement. Alternate arrangements were made to ensure that members who were not vaccinated could pick up any items. The applicants declined to reply to these assertions.

30. This allegation was not made in the initial application, and particulars were not provided to the opposing parties in a timely manner. However, even assuming the Board should consider this allegation (which is not here determined), the applicants did not dispute that the event was an internal union activity. The duty of fair representation is limited to the union's role as exclusive bargaining agent vis-à-vis the employer. The Act does not confer upon the Board the power to police internal affairs: see, for example, *Maryanne Field, Bev Cooper, and Leisa Cairns v Halton District Educational Assistants Association*, 2020 CanLII 64755 (ON LRB) and the cases cited therein. Accordingly, this new allegation does not make out a *prima facie* case of a breach of the Act.

Determination

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

"Lindsay Lawrence"
for the Board