

Blog

Labour Board Dismisses Complaints Against Unions Regarding Responses To COVID-19 Vaccine Policies

January 12, 2022

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In a pair of decisions released back-to-back, the Ontario Labour Relations Board dismissed separate applications alleging that trade unions violated their Duty of Fair Representation in relation to their handling of complaints concerning employer COVID-19 vaccine policies.

On January 10 and 11 2022, the Board released its decisions in *Bloomfield v SEIU, Local 1* and *Mustari v CUPE Local 79*, respectively, dismissing Duty of Fair Representation complaints on a *prima facie* basis. In both cases, the applicant union members were dissatisfied with their respective employers' COVID-19 vaccination policies and their respective unions' response to such policies, seeking ultimately for their unions to insulate them from adverse employment consequences flowing from their decisions to remain unvaccinated.

The applicants in *Bloomfield* are employed as Personal Support Workers ("PSW") and are subject to a policy introduced in fall 2021 that required full vaccination as of a specified date. As a result of the policy, some of the applicants were placed on an unpaid leave. The Union filed a group grievance challenging unpaid leaves including those of the aforementioned applicants. At the time of the policy's implementation, the union had advised its membership that it had received legal advice indicating that mandatory vaccine policies were likely to be upheld. Notwithstanding this, the union advised its membership that a grievance could be filed and held in abeyance "pending caselaw" on this continually-developing issue.

The Board observed that, fundamentally, the applicant-union members were unhappy about the employer's COVID-19 policy and that the union had not insulated them from their decision to remain unvaccinated and that this did not make out a breach of the Duty of Fair Representation.

In the circumstances, the Board concluded that it was "clear, plain and obvious" that the applicants had no reasonable chance of success in establishing a violation of their union's Duty of Fair Representation. In arriving at its decision, the Board observed that the union communicated the legal advice it had received and what it intended to do in response to the policy, and indicated that it was "fair and prudent" for the union to have done so. With respect to filing grievances, the Board noted that the union was not automatically required to file a grievance and was in fact duty-bound to consider the interests of its membership as a whole. On the facts, the union had filed a grievance with the caveat that it would watch the emerging case law and also grieved the institution of unpaid leaves after they were instituted. The Board concluded that this conduct was not "arbitrary, discriminatory and/or in bad faith" and therefore did not constitute a violation of the union's Duty of Fair Representation.

The Board also addressed an "additional issue" concerning allegations that the union excluded unvaccinated members from attending an internal union event at a hotel. The Board confirmed that the Duty of Fair Representation is limited to the union's role as exclusive bargaining agent vis-à-vis the employer and does not apply to internal union activity. As such, this additional issue was also dismissed.

The applicants in *Mustari* are members of CUPE Local 79 and work for the City of Toronto. The union held a town hall meeting with its membership in August 2021 regarding the upcoming implementation of the City's COVID-19 vaccination policy. Speakers at the town hall included the union's executive and also its legal counsel. The union expressed that it encouraged vaccination but would challenge discipline or discharge if actually pursued by the employer. The union also distributed a document concerning frequently asked questions regarding the policy.

In October 2021 the employer updated the policy. Non-compliance would result in an initial six-week suspension followed by termination of employment. The union responded with a policy grievance which the members were notified of by way of "eblast". The applicants were among those suspended for non-compliance beginning in November 2021. The City began terminations in January 2022.

Like in *Bloomfield*, the Board concluded that the union's conduct did not violate its Duty of Fair Representation. The Board summarized the applicants' complaints as the union not responding to them/answering all their questions; the union not protecting them from the application of the policy; the union providing inadequate representation in the discipline process and the union's actions not having been sufficiently quick or aggressive. In dismissing these complaints, the Board observed that the union had communicated with its membership via email and even held a town hall meeting. In light of the fact that the message conveyed by the union was based on legal advice, the Board did not conclude that it was in bad faith. The Board also noted that the union was not required to "debate endlessly" or agree with the applicants on the issue. The Board also expressed that the Duty of Fair Representation did not require the union to insulate the applicants from the application of the policy and ensure that they were not suspended or discharged. Instead, the Board found that the union acted appropriately in communicating to its membership about the risks of non-compliance and filing grievances when discipline/discharge was actually imposed. The Board declined to evaluate the union's conduct during the grievance process, noting that it is not its role to do so. In these circumstances, the Board dismissed the application without further inquiry or a hearing on the merits.

These cases inform the contours of a union's Duty of Fair Representation in connection with COVID-19 vaccination policies. It is notable that the Board observed with the approval the practice of a trade union relying on legal advice and communicating its position and views on the matter to its membership, including warning them about the risks of non-compliance. To stay informed and up-to-date on best practices, it is prudent to seek legal advice and opinions regarding the ever-evolving legal landscape of workplace issues related to COVID-19. It is also notable that these decisions do not mention that the applicants in either case abstained from vaccination for reasons related to grounds protected by the *Human Rights Code*. Such circumstances can vary the analysis and therefore obtaining legal advice is encouraged.

We will continue to monitor decisions and legislative changes related to the pandemic and how these affect the workplace in future blogs.

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