



ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **1904-21-U**

Esther Klein-Brown, Applicant v Elementary Teachers' Federation of Ontario, and Elementary Teachers of Toronto, Responding Parties v Toronto District School Board, Intervenor

BEFORE: Danna Morrison, Vice-Chair

DECISION OF THE BOARD: April 14, 2022

1. This is an application brought pursuant to section 96 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, as amended (the "Act") alleging a breach of section 74 of the Act. The applicant alleges that the Elementary Teachers' Federation of Ontario ("ETFO") and the Elementary Teachers of Toronto ("ETT") collectively violated their duty of fair representation in respect of her employment with the Toronto District School Board (the "TDSB"). This application was filed on January 14, 2022.

2. In an earlier decision dated March 21, 2022, I directed the applicant to file submissions in response to the requests of ETFO and the TDSB that the application ought to be dismissed without a hearing or consultation for failing to disclose a *prima facie* case of a violation of section 74 of the Act. More specifically, I directed the applicant as follows:

15. Based on the foregoing, it would appear to the Board that the application does not disclose a violation of section 74 of the Act by ETFO or the ETT and ought to be dismissed on that basis. However, the applicant should be granted the opportunity to state in writing why the Board should not dismiss the application for failing to plead a *prima facie* case. The applicant need not reiterate the reasons why she feels that the Vaccination Procedure is unlawful or discriminatory but rather, should direct her submissions to respond to the motion to dismiss on a *prima facie* basis contained in

paragraphs 37-43 of ETFO's response and paragraphs 20-24 of the TDSB's intervention. In addition, the applicant should respond to ETFO's submission that the requested remedy of a court injunction to end mandates related to vaccination and/or testing requirements is outside of the Board's jurisdiction.

16. Finally, the applicant is requested to indicate in her submissions which statements of fact in the response and in the intervention she disagrees with, citing specific reference to paragraph numbers. Any fact alleged by ETFO or the TDSB which is not challenged by the applicant will be viewed by the Board as undisputed.

17. The applicant is directed to file her submissions with the Board, and deliver a copy to the other parties, by no later than April 4, 2022. The applicant should be aware that failure to file these submissions may result in the application being dismissed.

3. The applicant provided additional submissions on April 4, 2022. This decision deals with the preliminary motion brought by ETFO and the TDSB that this application ought to be dismissed without a hearing or a consultation for failing to establish a *prima facie* case of a violation of section 74 of the Act.

The Application

4. In her application, the applicant requests "a court injunction to end the mandates requiring teachers of Ontario to be vaccinated and/or requiring [her] to take any COVID-19 testing in order to be employed or be paid". She also asks for a removal of mandates for testing and wearing masks.

5. In addition, she requests that ETFO be required to file a grievance on her behalf without requiring her to comply with the mandated components of the TDSB's PR734 - COVID-19 Vaccination Procedure for Employees, Trustees and Other Individuals ("PR734"). She also requests to be reinstated as a full-time teacher and to be made whole for all salary, benefits and pension contributions lost for the duration of time she was suspended without pay. Finally, she requests that the TDSB be restricted from "coercing" her to take the COVID-19 vaccine, any booster shots, PCR tests, Rapid Antigen tests or any other testing, or from requiring her to adhere to any masking mandates in order to allow her to return to work.

6. In support of her requests, the applicant pleads that she was advised on October 14, 2021 that she was to be put on a leave of absence with pay until Monday, October 18, 2021 when she could return to work with a negative PCR test. She returned to work on October 18, 2021, but refused to take a PCR test. At that time, she was asked to leave the building and advised that she would be placed on a leave of absence without pay until she provided a negative test result every Monday and Thursday morning. She contacted ETFO and ETT on October 18, 2021 for advice and to file a grievance.

7. The applicant pleads that ETFO would not allow her to be part of a group grievance filed because she refused to adhere to the testing requirements as set out in PR734. She states that because she did not submit to bi-weekly (and then thrice-weekly) testing, ETFO would not consider filing a grievance on her behalf.

8. The applicant also takes issue with ETFO/ETT's position that the testing alternative to vaccination, as required by PR734, would not be challenged. She acknowledges that in ETFO's 2021 annual meeting ETFO delegates had voted to agree to a vaccination policy, but she does not agree with the majority's position and states that she was "entitled to individual support and representation".

9. The applicant also notes that a representative from ETFO (later determined to be Kelly Holley) told her to "take the PCR test or get terminated" and then hung up on her. The applicant views this behaviour as being in bad faith by refusing to represent her, as well as being discriminatory.

10. The applicant acknowledges in her application that ETFO's lawyers took the position that they could not win a legal battle against the mandate, although she disagrees with that conclusion.

11. The applicant filed a considerable number of documents together with her application, including correspondence to and from ETFO, ETT and the TDSB. She also provided a copy of *Genetic Non-Discrimination Act*, S.C. 2017, c.3 and "Canadian National Report on Immunization, 1996", *Canada Communicable Disease Report*, Volume 23S4, May 1997 (https://publications.gc.ca/collections/collection_2016/aspc-phac/HP3-1-23-S4-eng.pdf).

ETFO's Submissions

12. In its response, ETFO submits that there are no allegations which, if true, could lead to a finding that ETFO's decision in respect of

the TDSB's COVID-19 PR734 Policy was arbitrary, discriminatory, or made in bad faith. Furthermore, there are no allegations, which if true, could lead to a finding that ETT's decisions not to file a separate grievance for the Applicant were arbitrary, discriminatory, or made in bad faith. ETFO submits that the applicant has failed to disclose a *prima facie* case of a violation of section 74 of the Act.

13. ETFO relies on the following Board decisions: *CAW-Canada Local 1524*, [1994] OLRD no. 2150 (QL) (for the Board's definition of the terms "arbitrary", "discriminatory" and "in bad faith"); and *Halton Elementary Unit of the Ontario English Catholic Teachers Association (O.E.C.T.A) v Ontario English Catholic Teachers Association (O.E.C.T.A.)*, 2013 CanLII 9950 (ON LRB) (cited for the principle that the internal choices and decisions of a union are beyond the Board's jurisdiction to review within the scope of a section 74 application).

14. ETFO submits that it is clear from the materials filed by the applicant that ETFO and ETT: (i) were acting in a manner consistent with the policy position adopted by ETFO delegates during the 2021 Annual Meeting in respect of the safe and healthy return to in-person learning; (ii) sought legal advice in respect of the legality of the TDSB's PR734 Policy; (iii) regularly responded to the applicant's questions; (iv) provided the applicant with an opportunity to be added to the group grievance as long as she met the requisite criteria; and (v) consistently based its advice to the applicant on its understanding of all reasonable and relevant considerations.

15. ETFO further submits that it is not sufficient for the applicant to indicate that she disagrees with ETFO's decision without identifying any basis upon which the Board could consider the decision to be arbitrary, discriminatory or in bad faith. The applicant has not, according to ETFO, raised any instances where ETFO failed to engage with her or consider and respond to her requests, or any instances where ETFO treated the applicant any differently than other members of the bargaining unit or with any animus against her. ETFO also submits that it is not a violation of section 74 of the Act for ETFO to make decisions that do not align with the applicant's personally held beliefs and that as democratically elected leaders, ETFO officers and delegates are statutorily empowered to make decisions on behalf of members that advance the goals of the union as a whole.

16. Finally, ETFO submits that the relief requested by the applicant, in the form of "a court injunction to end the mandates requiring teacher of Ontario to be vaccinated and/or requiring to take any COVID-19 virus testing" is beyond the jurisdiction of the Board to grant.

TDSB's Submissions

17. In its intervention, the TDSB submits that the application does not make out a *prima facie* case of a violation of the Act and that it ought to be dismissed on a preliminary basis.

18. The TDSB relies on *Corporation of the County of Brant*, [2000] OLRB Rep. Nov/Dec 1106 for the principle that, in order for a party to show that an application does not make out a *prima facie* case of a violation, it must be plain and obvious that the allegations in the application do not disclose a violation of the Act.

19. The TDSB submits that the onus lies with the applicant to establish a *prima facie* case of a violation of the Act. The TDSB submits that the applicant has failed to put forth any allegations that ETFO's actions were conducted in an arbitrary, discriminatory or bad faith manner.

20. The TDSB also notes that on or about November 22, 2021, ETFO filed a group policy grievance on behalf of the applicant with respect to the same allegations set out in the application, which it alleges, "directly contradicts the Applicant's bald assertions that ETFO acted contrary to its duty of fair representation pursuant to section 74 of the Act." I do note that in my decision of March 21, 2022, I indicated that it would be useful for ETFO to indicate whether a grievance had been filed which is applicable to the applicant, as indicated by the TDSB. ETFO did not make any submissions in this regard, so I cannot find, for the purposes of this decision, that a grievance was filed on the applicant's behalf.

Applicant's Reply Submissions

21. The applicant filed additional submissions on April 4, 2022. She does not specifically address paragraphs 37-43 of ETFO's response or paragraphs 20-24 of the TDSB's intervention, but her submissions do attempt to clarify how she believes ETFO has violated section 74 of the Act.

22. The crux of the applicant's position is that she believes that ETFO has violated its duty of fair representation (i) by failing or refusing to challenge the TDSB's PR734 Policy; (ii) by refusing to file a grievance on her behalf and/or refusing to allow her to be part of the group grievance filed against the TDSB; and (iii) in the manner in which ETFO and ETT representatives communicated (or failed to communicate) with her.

23. In support of her position, the applicant relies on the *Genetic Non-Discrimination Act, supra*; the *Canada Labour Code*, R.S.C., 1985, c. L-2; the *Occupational Health and Safety Act*, R.S.O. 1990, c.0.1; and the *Canadian Bill of Rights*, S.C. 1960, c.44.

24. The applicant does concede that her original request for a court injunction to end mandates is beyond the Board's jurisdiction. She also advises that as of March 21, 2022, she was permitted to return to work.

Authority to Dismiss an Application Without a Hearing or Consultation

25. Rule 39.1 of the Board's Rules of Procedure provides that the Board may dismiss an application if it does not make out a case for the orders requested, even if all of the allegations made by the applicant are assumed to be true. More specifically, it states:

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.

26. The Board will not dismiss an application for failing to disclose a *prima facie* breach of the Act unless it is clear, or plain and obvious, that there is no reasonable chance of success for establishing a violation of the Act based on the allegations made in the application. In order to make this determination, the Board assumes all of the facts set out in the application are both true and provable and it does not consider any contradictory facts or defences put forward by the other parties. However, in this case, where the applicant has not disputed statements of fact made by the responding party or intervenor, as directed, those statements may also be considered for the purposes of this motion.

Does the Application Make Out a *Prima Facie* Case?

27. In my decision of March 21, 2022, I set out the Board's general approach with respect to vaccination and/or testing policies and the duty of fair representation. For ease of reference, my comments were as follows:

8. The Board has had a number of opportunities to consider the duty of fair representation vis-à-vis the imposition of

COVID-19 vaccination and/or testing policies (See, for example, *Milka Cavic*, 2022 CanLII 5015 (ON LRB), *Halyna Pasternak*, 2022 CanLII 6766 (ON LRB) and *Kurt Lewin*, 2022 CanLII 17610 (ON LRB)).

9. In the above-cited cases, and in many cases decided before them, the Board has indicated that a duty of fair representation complaint is not the proper forum to challenge an employer's vaccination policy and remedies to that end are not available through a section 74 complaint.

10. In the context of a duty of fair representation complaint, the Board looks *only* to whether a union's conduct was arbitrary, discriminatory or in bad faith. This is a limited inquiry. An applicant need not agree with the decisions made by a union or any positions taken vis-à-vis a vaccination or testing policy, but provided those decisions or positions were not arbitrary, discriminatory or in bad faith, the Board cannot find a violation of section 74.

28. Addressing the applicant's core concerns in turn, the question is, did ETFO/ETT act in a manner which was arbitrary, discriminatory or in bad faith by failing or refusing to challenge the TDSB's PR734 Policy; by refusing to file a grievance on the applicant's behalf and/or refusing to allow her to be part of the group grievance filed against the TDSB or in the manner in which ETFO and ETT representatives communicated (or failed to communicate) with the applicant?

ETFO's decision not to challenge the TDSB's PR734 Policy

29. The applicant has not pled any facts that could establish that ETFO's decision not to challenge the TDSB's PR734 Policy was arbitrary, discriminatory or in bad faith. **It is abundantly clear that the applicant does not agree with PR734 and does not believe that it should be applicable to her, or to others. This position is based, in part, on a belief that PR734 is a violation of the *Genetic Non-Discrimination Act* and the *Canada Labour Code*, among other things. It is also based on the applicant's personally held beliefs that the required COVID-19 testing amounts to "genetic experimentation" and is proven to be inaccurate. Her view is that the TDSB's enforcement of PR734, including by placing her on an unpaid leave for refusing to abide by PR734, is tantamount to coercion and extortion.**

30. As the Board has previously stated, including in *Tina Di Tommaso*, 2021 CanLII 132009 (ON LRB), "The Board is not the forum for debating or complaining about vaccinations in general, this vaccine

in particular, scientific studies, the government's direction and/or a particular employer's policy." As such, the applicant's personally held views on vaccinations, scientific studies, government mandates and/or PR734 (or any other TDSB policy) are not up for debate in this application.

31. It is undisputed that ETFO has made a determination not to challenge PR734 and the testing requirements contained therein. That determination was based on a vote taken of ETFO's delegates at its 2021 annual meeting to develop its policy position on the issues of vaccination and testing in order to facilitate a return to in-person learning and was reached after seeking legal advice in respect of the legality of PR734.

32. While the applicant may not agree with the decision made by ETFO not to challenge the legality or reasonableness of PR734, that is not sufficient to make out a case that ETFO has violated its duty of fair representation under section 74 of the Act. The Board has repeatedly stated that there is nothing inherently unlawful about a union making a decision which favours one group of employees over another (see, for example, *City of Thunder Bay*, [1983] OLRB Rep. May 781 at para. 69), provided it has otherwise complied with its duty of fair representation.

33. The duty of fair representation does not require a union to file a grievance against a policy simply because a member demands it (see, for example, see, for example, *Sager v. Service Employees Union Local 183*, 2001 CanLII 19278 (ON LRB) at para. 15). Rather, a union is required to engage in a delicate balancing act whereby it must weigh the competing interests of its members and ensure that it acts in the best interests of the bargaining unit as a whole. As the Board stated in *Harkin v Canadian Union of Brewery and General Workers Component 325*, 2007 CanLII 631 (ON LRB): "...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."

34. With respect to PR734, it appears that ETFO has done just that. It has considered the policy implications and its membership has voted on a policy position regarding the facilitation of a return to work. That policy position includes an agreement to certain testing requirements for the unvaccinated. ETFO has also indicated that it sought a legal opinion as to the reasonableness of PR734 and was advised that where a member refused to be vaccinated or refused to attest as to their

vaccination status, rapid testing and an educational program were reasonable measures for the TDSB to take.

35. ETFO's decision not to challenge PR734 was not arbitrary. ETFO's decision was based on a consideration of relevant factors, including legal advice, the will of a majority of its membership as represented by its delegates, and a view to act in the best interests of the bargaining unit as a whole. Nor was ETFO's decision discriminatory. There was a cogent reason for treating the vaccinated differently than the unvaccinated and that reason was to facilitate a return to safe in-class learning. Finally, ETFO's decision was not made in bad faith. While the applicant disagrees with ETFO's decision, there are no facts pled upon which the Board could find that ETFO's decision was motivated by hostility, malice, ill-will, dishonesty or improper motivation.

ETFO's/ETT's decision not to file a grievance on behalf of the applicant

36. The applicant has not pled any facts upon which the Board could find that ETFO's/ETT's decision not to file a grievance on behalf of the applicant, whether as part of a group grievance or as an individual grievance, is a violation of section 74 of the Act.

37. In the applicant's pleadings, she acknowledges that ETFO/ETT informed her that she could participate in the group grievance filed on behalf of individuals who did not wish to disclose their vaccination status, but that in order to do so, she would have to comply with the mandated components of PR734, including the requirement to submit to regular testing.

38. The applicant made a decision not to submit to the requisite testing and was advised by a representative of ETT that ETT could not launch a grievance without the approval of ETFO and that ETFO had received legal advice regarding the filing of the grievance and the requirements needed of members seeking to join the grievance.

39. While the applicant disagrees with the requirement that she must comply with the requisite testing as set out in PR734 in order to challenge PR734, it was the view of ETFO, based on advice provided by its legal team, that in order for members to participate in the group grievance, they were required to comply with the requirements of PR734. The duty of fair representation does not mean that a union is held to a standard of correctness with respect to the merits of a grievance. Even if ETFO was incorrect as to its determination that the applicant was required to comply with PR734 in order to join the group grievance (and I am not making a determination that it was incorrect in

making that decision), its decision would not constitute a breach of the duty of fair representation, as it was not arbitrary, discriminatory, or made in bad faith.

40. The applicant also requested that ETT file a separate grievance on her behalf. This request was denied, but that, alone, also is not sufficient to find that either ETFO or ETT violated its duty of fair representation of the applicant. The decision not to file a separate grievance on the applicant's behalf was made in light of the same considerations as the decision not to allow her to participate in the group grievance. It was the advice of ETFO's legal team that in order to file a grievance, the member must be in compliance with the requirements of PR734.

41. It is well established jurisprudence that the duty of fair representation does not require a union to file a grievance simply because a member has requested it (see *Sager*, above). It only requires the union not to act in a manner that is arbitrary, discriminatory or in bad faith in making its assessment as to whether it will file a grievance. Based on the facts pled by the applicant, and those facts pled by ETFO in its response which were not disputed by the applicant, there is no basis upon which to find that the decision not to file an individual grievance on behalf of the applicant, when she requested it, was arbitrary, discriminatory or made in bad faith.

The manner in which ETFO/ETT representatives communicated (or failed to communicate) with the applicant

42. Finally, the applicant has not pled any facts upon which the Board could find that the manner in which ETFO/ETT representatives communicated, or failed to communicate, with the applicant violated section 74 of the Act.

43. While the applicant does not agree with the content of the communications received from ETFO and ETT, it is clear from her pleadings, and the documents appended thereto, that representatives of both ETFO and ETT responded to her inquiries. Perhaps they did not respond in the manner or with the outcome desired by the applicant, and perhaps they did not engage in an extended debate on the issues viewed by the applicant as of significant importance, but it is clear that the responding parties communicated with the applicant and considered and responded to her concerns.

44. The applicant also raises a concern with the manner in which she was allegedly spoken to by a representative of ETFO, Kelly Holley.

According to the applicant, Ms. Holley told the applicant that she could either “take the PCR test or get terminated” and then hung up on the applicant. In its response, ETFO disputes that this occurred and submitted that while Ms. Holley did not specifically recall her conversation with the applicant, it would be unlikely and out of character for Ms. Holley to respond in this manner. ETFO does dispute that Ms. Holley hung up on the applicant.

45. For the purposes of this *prima facie* review, the Board must assume that the applicant’s version of events is both true and provable. However, even if Ms. Holley did advise the applicant that she could either take the PCR test or be terminated by the TDSB and then end the conversation by hanging up on the applicant, I do not find that interaction to have been arbitrary, discriminatory or bad faith behaviour on the part of ETFO.

46. Even after this interaction with Ms. Holley, representatives of ETFO/ETT continued to communicate with the applicant regarding her concerns with the COVID-19 vaccination, in general, and PR734, specifically, and with respect to what was required of the applicant in order for ETFO/ETT to pursue a grievance on her behalf. It is clear that the manner in which ETFO/ETT representatives communicated with the applicant was not arbitrary, discriminatory or in bad faith.

Conclusion

47. In my view, for the reasons set out above, the application as pleaded fails to make out a violation of section 74 of the Act. The application has no reasonable chance of success.

48. Accordingly, the application is dismissed.

“Danna Morrison”

for the Board