



# What's New in HR Law

## Fairly Represented – Union's Response to Mandatory Vaccination Policy Not in Breach of Obligations

February 3, 2022

### Bottom Line

In the recent Ontario Labour Relations Board (“Board”) case of *Bloomfield et al v Service Employees International Union, Local 1*, 2022 CanLII 2453 (OLRB) (“*Bloomfield*”), the Board confirmed that a union is entitled to communicate with members about the legal realities of mandatory COVID-19 vaccination policies and is not necessarily obligated to file a grievance in response to an employer’s policy. This Board decision adds to the ever-evolving jurisprudence associated with employer mandatory COVID-19 vaccination policies in unionized environments.

### The Duty of Fair Representation – the *Labour Relations Act*

Under section 74 of the *Labour Relations Act, 1995*, SO 1995, c 1, Sch A (the “*Act*”), a union is obligated to represent employees in its bargaining unit and must do so in a manner that is not arbitrary, discriminatory or in bad faith. The Board has commented on this duty and the meaning that should be ascribed to the terms “arbitrary”, “discriminatory”, and “bad faith”, stating as follows in *Chrysler Canada Ltd.*, [1997] O.L.R.D. No. 2605:

- 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.

Where a bargaining unit employee feels that their representative trade union has acted in an “arbitrary”, “discriminatory”, or “bad faith” manner in its representation of the bargaining unit, that employee is entitled to file a complaint with the Board alleging a breach of the union’s duty of fair representation.

### **Employer Mandatory Vaccination Policy**

In the fall of 2021, CarePartners, a home healthcare service provider, implemented a mandatory COVID-19 vaccination policy that required employees to be fully vaccinated against COVID-19 by November 30, 2021 (the “Policy”).

Employees of CarePartners are represented by the Service Employees International union, Local 1 (the “Union”). After the release of the Policy, the Union sought legal advice regarding the Policy and, after receiving such advice, the Union advised its members that “given the current state of the law and the unprecedented challenges of COVID-19, mandatory vaccination policies will most likely be upheld”. The Union further warned that absent a valid exemption, employees who refused to be vaccinated risked discipline or dismissal.

Following the Union’s communication, five Personal Support Workers who were bargaining unit members filed an application with the Board alleging the Union breached its duty of fair representation by: not communicating with them and discouraging them from “taking action”, not filing a grievance when the policy was first issued, and not taking enough action with respect to a grievance.

A number of the employees who filed the complaint refused vaccination, and were thereafter placed on an unpaid leave of absence in accordance with the Policy. It was at this point that the Union filed a grievance, which was then held in abeyance.

### **The Board’s Decision – No Breach of Duty of Fair Representation**

The Board found that the duty of fair representation complaint was without merit, and dismissed it in full.

The complainants focused on the employer’s policy, stating it was unfair and contrary to the collective agreement, and generally voiced their opinion around vaccination. The Board found that, to the extent that the employees were challenging the employer’s vaccination policy, a duty of fair representation complaint was not the right mechanism to do so.

Related to the Union’s conduct, the Board found that the Union’s actions were not arbitrary, discriminatory, or in bad faith. While the complainants disagreed with the Union’s communications and advice, the Board found that the Union was not required to provide its unvaccinated members with “encouragement or a rosy outlook”, and that it was fair and prudent to provide a frank assessment of the situation.

The Board further stated that the duty of fair representation does not necessarily require a Union to file a grievance, provided that it does not conduct itself in a manner that is arbitrary, discriminatory or in bad faith. In this case, the Board stated that the Union was entitled, and indeed required, to consider the interest of the membership as a whole in deciding whether to file a grievance related to the vaccination policy.

Ultimately, and with some further helpful comments from the Board, the duty of fair representation complaint was dismissed.

## Check the Box

With respect to mandatory COVID-19 vaccination policies in unionized environments, context and the unique risks of COVID-19 in specific workplaces will still be paramount in assessing whether a vaccination policy is reasonable. However, the Board’s decision in *Bloomfield* provides unions and employers with confirmation that a union does not have to file a grievance related to vaccination policies, especially if the policies are reasonable for the specific workplace in question.

*Bloomfield* also emphasizes that the Board has no intention of permitting what should properly be policy grievances to proceed as duty of fair representation complaints through the Board’s adjudicative process. Unionized employees’ attempts to challenge vaccination policies in this improper manner will not be successful.

## Need more information?

For more information or assistance with COVID-19 vaccination policies or workplace management, contact Danny Parker at 416-408-5518, or your regular lawyer at the firm.



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