



What's New in HR Law

Union's Refusal to Advance Mandatory Vaccination Policy Grievance Found in Good Faith

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Bottom Line

In the recently published decision of *Ingrid Watson v Canadian Union of Public Employees, 2022 CIRB 1002* (“*Watson*”), the Canada Industrial Relations Board (the “Board”) found that the Canadian Union of Public Employees (the “Union”), representing flight attendant employees of Air Canada, did not violate its duty of fair representation in declining to initiate a policy grievance against the Employer’s workplace vaccination policy.

In a [previous Insight](#), we discussed a similar decision of the Ontario Labour Relations Board, which found a union was entitled to communicate with its members about the legal realities of mandatory COVID-19 vaccination policies and was not obligated to grieve an employer’s policy. *Watson* reinforces what is a growing line of cases on the duty of fair representation and workplace vaccination policies, emphasizing that unions must consider the interests of its entire membership and not just the interests of its unvaccinated members.

Watson adds to that line of cases’ commentary on the efficacy and importance of vaccination, albeit that commentary largely concerns the pre-Omicron stage of the COVID-19 pandemic. It remains to be seen whether the medical science regarding Omicron will lead to any different

result, insofar as most policies were implemented when Delta was the dominant variant. Employers should be prepared to carefully consider any distinguishing facts that could impact the ongoing validity of policies, especially as political decisions are dramatically changing social expectations in terms vaccines, masks, and other measures.

The Duty of Fair Representation Under the *Canada Labour Code*

Under section 37 of the *Canada Labour Code*, RSC 1985, c L-2 (the “Code”), a union in a federally regulated workplace has a duty to represent employees in its bargaining unit in a manner that is not arbitrary, discriminatory, or in bad faith. The Board in *McRae Jackson*, 2004 CIRB 290, described how “arbitrary,” “discriminatory,” and “bad faith” union representation should be interpreted.

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 and its members, that employee is entitled to file a complaint with the Board alleging a breach of the union’s duty of fair representation.

This is essentially identical to the entitlement and procedure for provincially regulated employees in Ontario who are represented by a union.

Background – The Vaccination Policy and Its Context

On August 13, 2021, the Government of Canada announced its intention to require all employees in the federally regulated air transportation sector, of which the Employer is a part, to become vaccinated against COVID-19 by the end of October 2021.

In response to this announcement, Air Canada announced its implementation of a mandatory vaccination policy on August 25, 2021. The policy would require employees to be fully vaccinated against COVID-19 by October 31, 2021, subject to valid exemptions requiring human rights accommodation, failing which an employee could be dismissed or placed on unpaid leave.

The Union considered and rejected filing a policy grievance challenging the vaccination policy, after receiving two legal opinions, which indicated that the policy likely would be deemed reasonable by a labour arbitrator. The Union continually communicated with its membership at every stage of its assessment and decision-making process. Nevertheless, Ms. Watson, an employee within the Union’s bargaining unit, repeatedly requested that the Union grieve the policy. The Union advised Ms. Watson that individual grievances would be filed as appropriate, but that it declined to proceed with a policy grievance. Ms. Watson then filed an application alleging a breach of the Union’s duty of fair representation.

Concurrently, Ms. Watson sought a medical exemption from the vaccination policy’s requirements. Ultimately, Ms. Watson’s request for medical exemption was denied and the Union filed an individual grievance on her behalf.

The Board’s Decision – Balancing Member Interests

The Board’s analysis focused on two main issues.

The first issue was whether the Union’s decision to not pursue the policy grievance was arbitrary. This analysis turned largely on the unique facts of the case and, in particular, the facts that the Federal Government explicitly required the Employer to enact the mandatory vaccination policy, and that the Union held “considerable discretion in making decisions that involve the representation it provides to its members.”

The second part of the analysis focused on whether the Union appropriately balanced the interests of its membership. The Board found that the Union’s duty was to consider the interests of all members of its bargaining unit, and that the Union had acted reasonably when it relied on external legal advice to evaluate its chance of successfully challenging the Policy. Even though the generally pro-vaccination position taken by the Union was counter to the views of a minority of its membership, the Board noted that a large majority of the membership supported vaccination. Importantly, the Board also noted that the scientific evidence overwhelmingly supported vaccination as the most effective tool to get past the unprecedented global circumstances of the COVID-19 pandemic.

As noted in the decision, the Union had acknowledged that it was aware that some bargaining unit members opposed the Employer’s vaccination mandate. However, as a policy grievance would impact the entire membership, the Union had a duty to make a decision in the interest of all bargaining unit employees. The Board found that the Union’s balancing of interests, and resulting decision to not pursue a policy grievance, was not arbitrary, discriminatory, or in bad faith.

Check the Box

When considering the reasonableness of a COVID-19 vaccination policy, the primary focus should remain on the particular risks of COVID-19 associated with that workplace, the data and medical evidence available at the time, and any applicable government rules and regulations. The Board’s decision once again confirms that there is no “one size fits all” recipe when developing workplace policies. The decision also confirms that a union does not have to file a grievance related to an employer’s policy simply because some members dislike the policy, especially if the policy in question is reasonable for the specific workplace in question.

The Board’s decision in *Watson* does include a cautionary tale as well: even if a union declines to file a policy grievance, this does not guarantee that an employer will be able to avoid individual grievances arising from application of that same workplace policy. A union may still pursue individual grievances arising from the application of any policy, in order to address the unique circumstances of individual members, as was done in *Watson*.

Need More Information?

For additional information or strategic advice on COVID-19 vaccination policies or workplace management, please contact [Hossein Moghtaderi](#) at 416-408-5564 or your regular lawyer at the firm.

*The author thanks **Micah Fysh** for his assistance in preparing this article.*

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