Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Ingrid Watson,

complainant,

and

Canadian Union of Public Employees,

respondent,

and

Air Canada,

employer.

Board File: 035187-C
Neutral Citation: 2022 CIRB **1002**
January 19, 2022

The panel of the Canada Industrial Relations Board (the Board) was composed of Ms. Ginette Brazeau, Chairperson, and Ms. Elizabeth Cameron and Mr. Daniel Thimineur, Members.

Parties' Representatives of Record

Mr. Robert J. Hawkes, for Ms. Ingrid Watson;
Ms. Elizabeth Nurse and Ms. Laura Ross, for the Canadian Union of Public Employees;
Ms. Jennifer Black, for Air Canada.

These reasons for decision were written by Ms. Ginette Brazeau, Chairperson.

I. Introduction

[1] This decision is about the union's duty of fair representation (DFR) towards its members in the face of a mandatory vaccination policy unilaterally implemented by the employer. The specific issue to be determined in this case is whether the union's decision not to pursue a policy grievance contesting the employer's mandatory vaccination policy, despite the insistence of a group of bargaining unit members, was arbitrary, discriminatory or made in bad faith.

[2] For the reasons that follow, the Board finds that, in this case, the union did not breach its DFR by refusing to file a policy grievance with respect to the employer's mandatory vaccination policy.

II. Background and Facts

[3] The complainant, Ms. Ingrid Watson (the complainant), is a flight attendant (cabin personnel) with Air Canada (the employer). She is a member of the bargaining unit represented by the Canadian Union of Public Employees – Air Canada Component (CUPE ACC or the union) and has almost 23 years of service with Air Canada. She works out of the Air Canada base in Calgary, Alberta, and is part of CUPE Local 4095.

[4] A collective agreement is in effect between the parties.

[5] Ms. Watson is on a full-time flight release and is designated by Local 4095 as the Chair of the local preferential bidding system (PBS) committee. She has been a member of the PBS committee since 2011. In this role, she and other members of the committee develop monthly schedules in accordance with employee preferences and seniority to meet Air Canada's operational and classification requirements.

[6] Ms. Watson indicates that prior to the pandemic, she worked a portion of her time from home.

[7] The chronology of events is straightforward and largely uncontested as it is based on email announcements and email exchanges.

[8] On August 13, 2021, the Government of Canada announced its intent to require all employees in the federally regulated air, rail and marine transportation sectors to be vaccinated by no later than the end of October 2021. This government policy would extend to employees in these sectors

and also to certain travellers. The union communicated an update to its membership by email that same day, sharing this government announcement and indicating its support for vaccination as a proven strategy to mitigate the threat of COVID-19.

[9] On August 19, 2021, the union sent out a message to all members through its members' portal in which it indicated that it had sought a preliminary legal opinion regarding the government's announcement of a mandatory vaccination policy in the air transportation industry. In that communication, the union provided a link to a copy of the legal opinion for members to consult.

[10] Air Canada announced on August 25, 2021, that it was implementing a mandatory vaccination policy that would apply to all employees working for it. The policy required that all employees be fully vaccinated by October 31, 2021, subject to the employer's duty to accommodate. In this communication, Air Canada asked employees to report their vaccination status through the vaccination reporting tool no later than September 8, 2021. It also indicated that "failure to be fully vaccinated by October 30, 2021 will have consequences up to and including unpaid leave or termination, except for those who qualify for accommodation."

[11] A set of questions and answers accompanied the vaccination requirement announcement. The consequences of choosing not to get vaccinated were presented as follows:

> **13. What happens if I choose not to get vaccinated? I understand I won't be able to travel but I'm fine with that.**
>
> A: We understand that there will be a small number of people who will want to be exempt for medical or other substantiated reasons; we will evaluate those on a case-by-case basis. While we will meet all our Duty to Accommodate obligations, we expect there will be very few circumstances in which exemptions would be granted.
>
> Consequences will be up to and include unpaid leave and termination. Employees who choose not to get vaccinated would ultimately be unable to fulfill their roles and the applicable terms of the appropriate collective agreements or management policies may come into effect.
>
> More information will be outlined in the policy once it is finalized following discussions with Health and Safety representatives and our union partners.

[12] There was also information provided regarding the suspension of bidding for in-flight personnel who did not report and document their first vaccination by September 8, 2021:

17. Will there be a grace period if I don't get vaccinated in time?

A. Our deadlines are informed by current Canadian government advice regarding the implementation of mandatory vaccination. However, we are also focused on meeting that timeline before the end of the Fall and the beginning of our busy holiday season. This does not give us much leeway.

In order to plan our operation and fulfill our obligations to our customers, Air Canada requires sufficient time to assess how many of our employees will have chosen to be vaccinated. This means that our dates for first vaccinations, full vaccinations, reporting and documentation should be considered firm. We do not plan to extend a grace period, except (and only where necessary) in certain international locations where we have determined vaccines are not accessible within our time frame. In these cases, safety measures and precautions will remain in place in those locations to ensure everyone's safety. That said, we urge employees in these locations to make all efforts to obtain their vaccinations as quickly as possible.

Deadlines are as follows:

Sept. 8: All vaccinated employees must report their status and upload their proof of vaccination.

All currently unvaccinated employees must have had at their first shot and uploaded their documentation.

As of this date, any employee who has not reported and documented at least their first shot will be considered unvaccinated for planning purposes.

Please note: Operating crews who have not reported and documented at least a first vaccination by September 8th and a second vaccination by October 8th you will not be eligible to bid effective with the November block month.

[13] Further information regarding the suspension of bidding was also provided in a separate communication from the Vice President, In-Flight Service that same day.

[14] On August 26, 2021, Ms. Watson sent a text message to Local 4095 President, Ms. Kim Wentzell, regarding the mandatory vaccination policy. Ms. Wentzell responded that the union would challenge any discipline, including termination, that resulted from the application of the policy.

[15] On August 27, 2021, the union issued a further update on the members' portal acknowledging the different perspectives of members regarding vaccination but indicating its agreement that vaccines were critical to providing a safe work environment for employees and ensuring a recovery of the airline industry. The union also stated its intention of filing grievances for individuals that faced discipline as a result of the policy.

[16] On August 30, 2021, Ms. Nadine Perrin, on behalf of a group of employees that included Ms. Watson, wrote to the union, expressing concerns with the impact of the vaccination policy and requesting information from the union on the assessments it had conducted with respect to vaccination and what steps it was taking to represent those who did not support the mandatory vaccination policy.

[17] Ms. Wentzell responded to Ms. Perrin on the same date and invited her to consult the union's information bulletins that outlined its approach. She also indicated that the union was in consultation with legal counsel to assess the policy and determine whether a grievance would be filed.

[18] The union received a second legal opinion on August 31, 2021. This opinion confirmed the advice previously received in the first legal opinion. It concluded that the Air Canada policy would likely withstand a challenge through grievance arbitration and, further, that a challenge under the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*) (the Charter) to the government's vaccine mandate was not likely to succeed.

[19] On September 3, 2021, the union communicated an update to its membership on the vaccination policy. It indicated that it had received feedback from its members who were for and against the policy. It also stated that it had obtained a second legal opinion and consulted with other unions at Air Canada and advised that the employer's policy would likely be deemed reasonable by an arbitrator. It indicated that it would be focusing on the policy's implementation and administration and on supporting members through the grievance procedure should discipline be imposed as a result of the policy. It also noted that if members are not able to attend work because they choose not to be vaccinated, this would not necessarily mean that the Charter has been breached.

[20] On September 9, 2021, Air Canada sent an email to those employees who had not yet reported their vaccination status. In this message, it indicated that if an employee was not vaccinated or did not report their status by October 30, 2021, they would be subject to certain consequences. In particular, unvaccinated employees would be barred from entering the workplace, would be considered unavailable to fulfill their duties and would be placed on unpaid

leave without benefits for a period of six months. It also specified that those who did not receive a second vaccination by October 8 would not be eligible to bid for the November block month.

[21] On September 10, 2021, Air Canada issued and published its updated COVID-19 vaccination policy. This version of the policy specified that employees who were not fully vaccinated by October 30, 2021, and who were not exempted from the vaccination requirement would be placed on an unpaid leave of absence for up to six months, following which their employment status would be reviewed.

[22] On September 14, 2021, counsel for Ms. Watson wrote to Mr. Wesley Lesosky, the President of CUPE ACC, asserting that the union was acting in a manner that was arbitrary, discriminatory and in bad faith with respect to the DFR owed to Ms. Watson and other members and asking that it initiate a grievance against the Air Canada policy.

[23] A representative of CUPE ACC responded to this communication on behalf of Mr. Lesosky on September 17, 2021, indicating that individual complaints would be dealt with on a case-by-case basis and that individual grievances would be filed where appropriate.

[24] Counsel for Ms. Watson expressed dissatisfaction with this response in an email dated September 22, 2021, and asked that Ms. Watson's demands be met by September 24, 2021. If no action was taken by the union, counsel indicated that a DFR complaint would be filed with the Board.

[25] On October 6, 2021, the federal government announced its plans to proceed with mandating COVID-19 vaccination across the federal public service and the federally regulated transportation sectors. This announcement made it clear that employers in the federally regulated air, rail and marine transportation sectors would have until October 30, 2021, to establish vaccination policies to ensure their employees are vaccinated. It also announced that travellers departing from Canadian airports would be required to be fully vaccinated.

[26] On October 22, 2021, the union issued an update to the membership titled "Vaccine Status Reporting." In this message, the union discussed certain issues with the uploading of proof of vaccination documents and also indicated that it would review all cases in which a member was removed from service for non-compliance with the vaccination policy.

[27] On October 29, 2021, the federal Minister of Transport issued an Interim Order pursuant to the *Aeronautics Act* (*Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 43*) (Order No. 43). This order directed all airlines to adopt and implement a mandatory vaccination policy for their employees by October 31, 2021, providing for limited exemptions due to a certified medical contraindication or religious grounds.

[28] Counsel for Ms. Watson communicated with CUPE ACC on November 9, 2021, to advise that Air Canada had denied Ms. Watson's request for a medical exemption from the vaccination policy. On November 11, 2021, a representative of Local 4095 filed an individual grievance for Ms. Watson. This grievance was denied by Air Canada at level 1 of the grievance procedure. The grievance was forwarded to the CUPE ACC grievance committee and is one of a number of individual grievances filed by the local unions in respect of the application of the COVID-19 vaccination policy.

III. Analysis and Decision

A. No Hearing

[29] The complainant made a specific request for a hearing, indicating that this matter would require significant document disclosure and an assessment of the credibility of union witnesses.

[30] The Board is not obliged to hold an oral hearing in every case. The Board's authority to rely on the written submissions of the parties and to make its determination without holding an oral hearing is well established. Section 16.1 of the *Canada Labour Code* (the *Code*) expressly allows the Board to proceed without an oral hearing. In addition, sections 10, 12 and 40 of the *Canada Industrial Relations Board Regulations, 2012*, are designed to give parties a full opportunity to make submissions, directing them to provide full particulars of the facts and the grounds for their position together with any supporting documents.

[31] The Board will normally not hold an oral hearing unless there are issues of credibility on questions that are central to its determination or other sound industrial relations reasons that require it to hear the witnesses in person. There is also no requirement for the Board to give notice to the parties of its intention not to hold a hearing (see *NAV CANADA*, 2000 CIRB 88; and *NAV Canada* v. *International Brotherhood of Electrical Workers*, 2001 FCA 30).

[32] In the matter under review, the Board invited the union and the employer to submit written responses, and the complainant had an opportunity to provide a final reply. Having reviewed all the written documentation, the Board has determined that it is not necessary to conduct an oral hearing and that the matter can be decided on the basis of the written submissions.

B. Section 37 of the *Code* and the Duty of Fair Representation

[33] In order to decide this matter, the Board must determine whether the union acted in a manner that was arbitrary, discriminatory or in bad faith in making its decision not to pursue a grievance challenging the employer's mandatory vaccination policy.

[34] The union's DFR is set out in section 37 of the *Code*, which reads as follows:

> **37** A trade union or representative of a trade union that is the bargaining agent for 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 with respect to their rights under the collective agreement that is applicable to them.

[35] The Board has described the factors it considers when deciding whether a union has engaged in arbitrary, discriminatory or bad faith conduct in its case law. The Board's decision in *McRaeJackson*, 2004 CIRB 290, provides a concise summary of these relevant factors:

> [27] A union must not act in bad faith; that is, with improper purpose. Three examples of this conduct include: the personal feelings of union officers influencing whether or not a grievance should be pursued; conspiring with the employer to have an employee disciplined or terminated; or, putting the ambitions of a group of employees who support a union official ahead of the interests of an individual employee.
>
> [28] A union must not discriminate on the basis of age, race, religion, sex or medical condition. Each member must receive individual treatment and only relevant and lawful matters must influence whether or not a grievance is referred to arbitration. It should be noted that not every instance of differential treatment is considered discrimination. For example, to refer one employee's grievance to arbitration and not another where there are relevant considerations to support the distinction is not discriminatory. Nor is an agreement with the employer to give different or better working conditions to a group of employees because of workplace considerations (see *Mario Soulière et al.*, [2002] CIRB no. 205; and 94 CLRBR (2d) 307).
>
> [29] A union must not act arbitrarily. Arbitrariness refers to actions of the union that have no objective or reasonable explanation, that put blind trust in the employer's arguments or that fail to determine whether the issues raised by its members have a factual or legal basis (see *John Presseault*, *supra*, ...

> [30] It is arbitrary to only superficially consider the facts or merits of a case. It is arbitrary to decide without concern for the employee's legitimate interests. It is arbitrary not to investigate and discover the circumstances surrounding the grievance. Failure to make a reasonable assessment of the case may amount to arbitrary conduct by the union (see *Nicholas Mikedis* (1995), 98 di 72 (CLRB no. 1126), appeal to F.C.A. dismissed in *Seafarers' International Union of Canada* v. *Nicholas Mikedis et al.*, judgment rendered from the bench, no. A-461-95, January 11, 1996 (F.C.A.)). A non-caring attitude towards the employee's interests may be considered arbitrary conduct (see *Vergel Bugay et al.*, *supra*) as may be gross negligence and reckless disregard for the employee's interests (see *William Campbell*, [1999] CIRB no. 8).

[36] In DFR cases, the complainant bears the burden of proof. In other words, the person making the complaint must convince the Board that their union has breached its DFR.

C. Did the union breach its duty of fair representation?

1. The Complainant's Allegations

[37] The complainant's main allegation is that the union's decision not to pursue a policy grievance regarding Air Canada's vaccination policy was arbitrary. She contends that the union did not seriously or sufficiently consider the prejudicial impact of the policy on a number of bargaining unit members who will not comply with the policy due to medical or other personal reasons. As a unionized employee, the complainant submits that she has no individual right to seek remedies in court or otherwise. Accordingly, the union has the duty to represent her and her colleagues who are negatively impacted by the policy.

[38] She argues that the union provided no explanation or detail regarding its involvement in negotiating the policy or attempts to improve or refine it in light of its impact on the rights of members. She also indicates that the union has arbitrarily refused to consult with the members to understand their concerns and to advocate for them.

[39] The complainant alleges that the union acted in bad faith when it refused to provide an explanation for why it was not advancing a grievance against the employer's vaccination policy. She states that she received no information on the union's investigation of the issues or its consideration of the merits of her specific concerns. She submits that the union did not conduct a serious analysis of or sufficiently inquire into the issues raised, did not gather sufficient information to make a sound decision and had a dismissive attitude towards those members who oppose the vaccination policy. She further alleges that certain union officers' personal feelings influenced the union's decision not to file a grievance.

[40] In her view, the collective agreement does not contemplate a vaccination policy and does not allow management to impose policies that require medical procedures as a condition of employment. The employer's vaccination policy is not a proper exercise of management's rights, and the union should have negotiated this policy with the employer or, alternatively, should have pursued a policy grievance. In failing to do so, she submits that the union is in breach of its duty to represent its members.

[41] In addition, the complainant contends that the union simply accepted and relied upon bald conclusions contained in deficient legal opinions without further analysis or debate. She also questions whether the legal opinions were based on an accurate description of the legal question and asks that the Board order the disclosure of materials and information provided to legal counsel when the legal opinions were requested. She argues that the issue was not whether the government could impose a vaccination mandate on flight attendants but rather whether the employer's policy was reasonable. In the absence of the employer's final version of the policy or the government's order, she submits that the legal opinions were based on hypothetical or speculative scenarios.

[42] Finally, the complainant indicates that other unions have successfully challenged similar mandatory vaccination policies and cites Arbitrator Stout's decision in *Electrical Safety Authority* and *Power Workers' Union (COVID-19 Vaccination Policy)*, Grievance: ESA-P-24, November 7, 2021 (Ont.) (*Electrical Safety Authority*), as an example of this. In light of this decision, the union should have challenged Air Canada's policy on behalf of those members who would be negatively affected by it. She argues that failing to do so is a breach of the duty owed to those members, and this breach is not mitigated by the fact that the union has offered to file individual grievances for members disciplined under or adversely affected by the policy.

[43] The Board notes that the complainant did not argue or make specific allegations regarding discriminatory conduct on the part of the union.

2. Decision Not to Pursue a Policy Grievance

[44] It is well established that an employee who is represented by a union does not have a right to pursue a grievance to arbitration; that is the role of the union as the exclusive bargaining agent (see *McRaeJackson*). As outlined in *Kasim*, 2008 CIRB 432, the union's DFR does not mean that an employee has an absolute right to have grievances filed and taken to arbitration. It is the union's role to determine which grievances are filed or proceed through to arbitration and which are settled or withdrawn. It is not required to advance grievances that, in its best judgment, are not likely to succeed. The union has considerable discretion in making decisions that involve the representation it provides to its members.

[45] There is no doubt that the COVID-19 pandemic has presented unprecedented challenges for employers, unions and the employees they represent. Over the span of some 20 months, the state of the pandemic has continuously evolved and the knowledge base around the effectiveness of different measures has increased. The airline industry, in particular, has had to rapidly and constantly respond to the challenges that COVID-19 has presented for the employees as well as for the broader operations.

[46] The union, as the bargaining agent for flight attendants, has had to respond quickly to evolving circumstances and at various levels to ensure an appropriate and coherent approach in the representation of its members. This has required it to constantly adapt to a very fluid and dynamic situation. When COVID-19 vaccines became available in early 2021, the union leadership made efforts to secure early access to them for flight attendants and, based on public health guidance, encouraged all its members to get vaccinated so all could be ready to return to service. At that time, there was no requirement to be vaccinated. The union recognized that a large number of its members were asking for priority access to the vaccines while other members had concerns about their efficacy or safety.

[47] Although the complainant argues that the union's conduct or decision not to pursue a policy grievance was arbitrary, the Board does not agree. The union was well aware of the objection of certain employees to the vaccination policy. As the chronology of events set out above demonstrates, the union provided regular information and kept the membership up to date on

developments, government announcements and the employer's approach and response as the events unfolded.

[48] Air Canada issued its initial vaccination policy in April 2021, in which it strongly encouraged employees to get vaccinated. This version of the policy also provided that, in certain instances, employees would be required to be vaccinated and, in the event that they did not respect the guidelines, could be subject to discipline, up to and including termination of employment. Following the communication of this policy, the union posted a message on the members' portal indicating that it had raised potential areas of concern with Air Canada regarding the policy and its alignment with the collective agreement and the *Canadian Human Rights Act* (CHRA).

[49] On August 13, 2021, the Government of Canada officially announced that it would require that all employees working in the federally regulated air, rail and marine transportation sectors be vaccinated by no later than the end of October 2021. The union sought a legal opinion immediately upon learning of the government's intention to direct airlines to implement a mandatory vaccination policy. It shared that legal opinion with the membership on August 19, 2021. This opinion concluded that the likelihood of success in challenging the employer's policy was very low.

[50] Further information was communicated by the union shortly after Air Canada announced its mandatory vaccination policy on August 25, 2021. In this message, the union acknowledged that mandatory vaccination was not welcomed by all members but indicated its support for vaccines as a critical tool to help ensure a safe work environment for everyone and the economic recovery of the airline industry. It highlighted the concern with the timelines established in the policy but clearly stated that unvaccinated employees would only be subject to flight removal starting in November 2021. The union also made clear in this statement that it would challenge individual discipline issued to members who chose not to be vaccinated and that it would seek alternative accommodations.

[51] The union sought a second legal opinion from a different counsel on Air Canada's updated mandatory vaccination policy. This legal opinion confirmed the advice received in the first opinion and that a challenge to the policy itself was unlikely to be successful.

[52] The complainant argues that the union should have debated the legal opinions, including their bases and analyses. She submits that the opinions do not answer the correct question and address the government's order rather than the employer's policy.

[53] With respect, the complainant has not persuaded the Board that the decision not to pursue a policy grievance challenging the employer's vaccination policy was arbitrary. In the Board's view, the union turned its mind to the issues at play and was fully engaged with its membership.

[54] The fact that the federal government issued an order directing the airlines to adopt a vaccination policy is a key distinction from other cases where employers were not bound by such a directive. Even if Order No. 43 was not issued until late October 2021, after Air Canada introduced the policy, the federal government had made its intention clear in its announcement of August 13, 2021, that it would impose a vaccination requirement on the airline industry. It is important to note that the employer is obligated by the terms of Order No. 43 to have a vaccination policy in place and that the terms of that order are very specific. Even though Air Canada did not have the precise terms of the order in August or September 2021, the government had made statements that strongly indicated that a mandatory vaccination requirement would be the likely outcome.

[55] The complainant argues that the union should have challenged the employer's policy based on the successful outcomes of other such challenges made by other unions. As an example, the complainant cites *Electrical Safety Authority.* However, the Board notes that, in that case, the employer was not under a government order to establish a vaccination policy. The arbitrator discussed the nuanced approach that must be taken when assessing a workplace policy that infringes upon individual employee rights and the balancing of interests that is necessary to determine its reasonableness. He also noted the fact that the employer was not under a government order to implement a vaccination policy:

> [20] There can be no doubt that the risks associated with contracting COVID-19 are serious to both the individual and society. Individual response to infection varies, but the higher the number of infections, the higher the number of admissions to hospitals and intensive care units (ICUs). The strain on our healthcare system has been immense and our long-term care system has suffered greatly, exposing flaws in these systems that need to be addressed. **However, it is for the democratically elected governments to address general public health issues, not employers. At this point there is no government mandate that all ESA employees must be vaccinated.**
>
> (emphasis added)

[56] Ultimately, Arbitrator Stout concluded that, in consideration of the circumstances and context of that specific workplace, the policy was unreasonable.

[57] It is important to note that Arbitrator Stout also referenced the decision of Arbitrator Von Veh in which a mandatory vaccination policy was found to be reasonable given the context in which the employees worked (see *United Food and Commercial Workers Union, Canada Local 333* v. *Paragon Protection Ltd. (Policy Grievance)*, [2021] O.L.A.A. No. 435 (QL)).

[58] It is within this context that the union sought a legal opinion on its chance of success with respect to a policy grievance challenging Air Canada's mandatory vaccination policy. Not only is the workplace context of an airline particularly different and distinct from that of most other industries, but the federal government clearly indicated that its intention was to direct all employers in the air, rail and marine transportation industries to implement mandatory vaccination policies. This was formalized in Order No. 43 issued by the Minister of Transport on October 29, 2021.

[59] The complainant is of the view that the union did not provide the relevant considerations to its legal counsel or that it did not ask the correct question on which to base the legal opinions. With respect, the Board is not prepared to entertain this argument. It is not for the Board to evaluate what question was put to counsel or which considerations were communicated as the basis for their legal advice. The Board has generally been deferential to a union's reliance on its counsel's legal opinion (see *Presseault*, 2001 CIRB 138), and it will not engage in a microscopic review of those opinions unless there are very unusual circumstances. Correspondingly, the Board will not order the production of any documents on which the legal opinions were based, as the complainant requested.

[60] In this particular case, and given the complex issues at play, the union sought two legal opinions and put the question of whether to pursue a policy grievance to the executive committee on September 3, 2021. The complainant is of the view that the union did not substantively deliberate on the issues and the relevant factors. However, by this time, the issue had been at the forefront of the union's concerns for some time. The union was well aware of the views of certain members who, for various personal reasons or beliefs, were opposed to vaccination. In the end, it determined that its efforts and resources would be better spent on individual cases in order to seek proper accommodation.

[61] As indicated, there is no absolute right or obligation to pursue a particular grievance to arbitration, even if an employee insists on it. It is well established that the decision to pursue a grievance is the union's to make. It must make that decision after proper consideration of the circumstances. In this case, the Board is of the view that the union turned its mind to the issue and took the necessary steps to evaluate its chance of successfully challenging the policy through the grievance procedure or otherwise. The Board cannot conclude that the union's decision was arbitrary.

3. Balancing the Interests of Members

[62] The Board has repeatedly stated that it is not necessarily a breach of the DFR when a union makes a decision that favours one group of employees over another (see *McRaeJackson*; and *Crispo*, 2010 CIRB 527). Unions routinely make difficult decisions that require balancing the interests of various groups amongst its membership. This is true in collective bargaining and in the decisions to present grievances.

[63] The complainant asserts that the union ignored the concerns and interests of approximately 10 percent of the members in the bargaining unit, who will bear the consequences of the policy. She maintains that the union acted in bad faith as it adopted a dismissive attitude and did not inquire sufficiently or communicate with those members who raised questions or concerns with respect to the mandatory vaccination policy.

[64] In the context of this policy, there is no doubt that those members who choose not to be vaccinated or not to disclose their vaccination status will be impacted differently than those who

comply with the policy. However, the duty that is imposed on the union does not mean that it has the obligation to pursue every grievance or to intervene in every situation where an individual employee's interests are affected; it means that the union must consider the interests of all members of the bargaining unit and act fairly. The Supreme Court of Canada made the following comments in *Gendron* v. *Supply and Services Union of the Public Service Alliance of Canada*, *Local 50057*, [1990] 1 S.C.R. 1298:

> The principles set out in *Gagnon* clearly contemplate a balancing process. As is illustrated by the situation here, a union must in certain circumstances choose between conflicting interests in order to resolve a dispute. Here the union's choice was clear due to the obvious error made in the selection process. The union had no choice but to adopt that position that would ensure the proper interpretation of the collective agreement. In a situation of conflicting employee interests, the union may pursue one set of interests to the detriment of another as long as its decision to do so is not actuated by any of the improper motives described above, and as long as it turns its mind to all the relevant considerations. The choice of one claim over another is not in and of itself objectionable. Rather, it is the underlying motivation and method used to make this choice that may be objectionable.
>
> (pages 1328–1329)

[65] In this case, the union supported vaccination generally as an effective means of ensuring the health and safety of its members. Even if this position by the union is in opposition to certain members' views, this, in and of itself, is not sufficient to find the union in breach of its DFR. In the current pandemic, there is overwhelming scientific evidence of the effectiveness of vaccines in the effort to eradicate COVID-19. Health authorities across Canada have stated that vaccination is one of the most effective ways to prevent severe illness, hospitalization and death from COVID-19.

[66] As Arbitrator Stout stated in *Electrical Safety Authority*:

> [6] I note that this case is not about the merits of being vaccinated or the effectiveness of COVID-19 vaccines. The science is clear that the COVID-19 vaccines currently being used are safe and effective at reducing the likelihood of becoming seriously ill or dying from this horrible disease. Moreover, vaccinating the population is necessary in order to secure the fragile healthcare system and eventually put this pandemic behind us.

[67] The complainant and other members may be opposed to vaccination, but the scientific evidence overwhelmingly points to vaccination as the most effective tool to get us past these unprecedented global circumstances. The union took a stance that is aligned with this evidence. A large majority of the membership supports the vaccination policy, as is demonstrated by the

high vaccination rate amongst the employees in the bargaining unit. There is simply no evidence to suggest that the union acted in bad faith in adopting a position that supports and favours vaccination for its members.

[68] The complainant suggests that the union failed to consult with those members that opposed the policy and that it did not provide a rationale for not advancing their concerns through the grievance procedure. However, the union is not obliged to consult each and every member when assessing whether to challenge an employer policy that impacts the membership in different ways. In a case involving a mandatory Hepatitis A vaccination policy, the British Columbia Labour Relations Board dismissed an employee's allegation that the union had acted arbitrarily or in bad faith because it had not consulted with the membership prior to engaging in discussions with the employer. The Board agrees with the following reasoning in *Gordon* v. *Hotel, Restaurant & Culinary Employees & Bartenders Union, Local 40*, BCLRB No. B138/2004; 2004 CanLII 65459 (*Gordon*):

> Gordon also suggests that the Union discussions with the Employer about the mandatory inoculation program were improper because employees were not consulted. As the exclusive bargaining agent, part of the Union's job in representing employees is to engage in discussions with the Employer regarding workplace issues: see, for instance, Section 53 of the Code. While consultation with employees over changes in working conditions such as occurred at the Capri is encouraged, it is not necessarily a requirement under the Code. As long as the Union does not act in a way that is arbitrary, discriminatory or in bad faith the duty of fair representation is not breached. In this case, the Union satisfied itself that the Employer's actions were reasonable and legally permissible, and it ensured that employees were permitted the exceptions available to them by law. In the circumstances, I do not find that the Union's agreement to the program or its failure to consult employees beforehand supports a breach of Section 12.
>
> (page 9)

[69] Although CUPE ACC did not engage in individual discussions with the complainant, it did communicate regularly with the membership to provide status updates in what was and continues to be a rapidly changing environment. Through these communications, the union made it clear that it was aware of the different views on the issue of vaccination. It was also aware of the complainant's specific concerns communicated to it through Ms. Perrin's letter of August 30, 2021. As this matter concerned a policy grievance, it concerned the membership as a whole. The union had to make a decision in the interest of all the employees in the bargaining unit. As in *Gordon*, the union satisfied itself that the policy was within the parameters allowed by the legislative

framework and provided for exceptions based on human rights grounds. Further, the union made clear that it would pursue individual grievances to seek accommodations where those were possible. An individual grievance is in fact proceeding with respect to Ms. Watson's particular circumstances. The Board notes that it would be premature at this stage to pronounce on the union's approach in that process.

[70] The Board is satisfied that the union did not act in an arbitrary or discriminatory manner or in bad faith in its approach and communication with the membership as it relates to its decision not to pursue a policy grievance regarding the employer's vaccination policy.

4. Management Rights Clause in the Collective Agreement

[71] The complainant also argues that the collective agreement does not contemplate a vaccination policy and that the employer has no management right to implement such an invasive medical procedure as a condition of employment. In her view, the union should have grieved the policy or demanded that the employer negotiate the terms of the policy. Failure to do so, in her view, is a breach of the union's duty to represent her fairly.

[72] The union's interpretation of the collective agreement differs from that of the complainant. The union is of the view that the absence of specific language in the collective agreement does not mean that the employer's vaccination policy is invalid. Although the union recognizes that it can challenge a new policy through a grievance, it is of the view that the management rights clause in the collective agreement does not prevent the employer from introducing new policies, as long as these are not inconsistent with terms of the collective agreement or other applicable legislation, such as the CHRA.

[73] The Board accepts that the union has the ultimate responsibility to decide on the interpretation of the collective agreement (see *Crispo*) and, as such, in this case, that it retains the discretion to determine whether it should challenge the vaccination policy as a proper exercise of management rights. The fact that the complainant disagrees with the union's interpretation of the collective agreement is not sufficient to establish a breach of the union's duty.

IV. Conclusion

[74] After careful consideration of the complainant's allegations and the written submissions of the parties, the Board is not persuaded that the union's approach and its decision not to pursue a policy grievance challenging the employer's COVID-19 vaccination policy was arbitrary, discriminatory or made in bad faith. The DFR complaint is dismissed.

[75] This is a unanimous decision of the Board.

Ginette Brazeau
Chairperson

Elizabeth Cameron
Member

Daniel Thimineur
Member