Saskatchewan
Labour Relations Board

CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant v ALLAN KLIPPENSTEIN, Respondent, and SASKATCHEWAN HEALTH AUTHORITY, Respondent

LRB File Nos. 024-22 and 158-21; May 30, 2022

Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

Counsel for the Applicant, Canadian Union of Public Employees:	Jake Zuk
The Respondent, Allan Klippenstein:	Self-Represented
Counsel for Saskatchewan Health Authority:	Paul Clemens

Application for summary dismissal – Section 6-111 of *The Saskatchewan Employment Act* – Underlying Duty of Fair Representation Application – Section 6-59 – No reasonable chance of success – Underlying application dismissed.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: On February 14, 2022, CUPE filed an application for summary dismissal of an employee-union dispute brought by Allan Klippenstein. Mr. Klippenstein is an employee of the Saskatchewan Health Authority [Employer or SHA]. He objects to the Employer's Proof of Full COVID-19 Vaccination Policy Directive, effective October 29, 2021 [Policy], which requires that SHA employees be fully vaccinated or enter into a monitored testing program. In the original application, which was filed on December 6, 2021, Mr. Klippenstein states that CUPE has breached its duty of fair representation in relation to unvaccinated members, pursuant to 6-59 of *The Saskatchewan Employment Act* [Act], by not negotiating or challenging the Policy.

[2] CUPE filed a Reply to the original application on December 16, 2021. In its Reply, CUPE states that the original application amounts to bald statements of unfair representation without supporting facts. CUPE provides the following statement of material facts intended to be relied upon in support of its Reply:

(a) The union cannot provide the remedy of having all CUPE members tested, whether vaccinated or not. COVID-19 testing requirements are implemented and enforced by the SHA through its management rights set out in the collective agreement.

(b) The union has sought and considered the advice of legal counsel with respect to the SHA's "Proof of Full COVID-19 Vaccination Policy Directive" (the "policy"). The test of the policy was assessed in light of the employer's statutory obligations, employees' right to privacy and bodily integrity, and the collective agreement between the parties. The union has also referred to historical and recent arbitral case law.

(c) The union has, at all times, recognized and fulfilled its duty of fair representation as set out in The Saskatchewan Employment Act. The union retains the right to challenge the SHA's policy should it become unreasonable in the future, as well as the right to challenge its application on an individual basis. Any decisions with respect to grievances will be made with close attention to individual interests as well as the interests of the bargaining unit as a whole.

(d) The union is engaged in ongoing discussions with the challenges faced with having appropriate knowledge and access to technology to comply with the vaccine policy directive and the handling of accommodated requests.

[3] The Employer filed a Reply to the original application on December 13, 2021. In its Reply, the Employer relies on *The Employers' COVID-19 Emergency Regulations*, RRS 2021 c S-15.1 Reg 13 (now repealed), which enabled employers to require that their workers be either fully vaccinated or provide evidence of a negative COVID-19 test result. Under the Policy, employees who were entered into the testing program were to pay for the cost of testing and engage in testing during non-work hours. Employees who could prove an exemption for an accommodation were "enrolled" in the program but not required to pay.

[4] Through this application for summary dismissal, CUPE asks the Board to dismiss the original application without an oral hearing, pursuant to subclauses 6-111(1)(p) and (q) of the Act. After receiving the pleadings in this matter, the Board set deadlines for further written submissions. All of the parties opted to rely on the pleadings and did not file further submissions. The Board has reviewed the pleadings and has decided that this matter can be determined without an oral hearing.

Arguments:

[5] CUPE argues that Mr. Klippenstein has made bald assertions but has not furnished any particulars identifying individual union representatives, specific events, witnesses, dates or times of the alleged misconduct. CUPE cautioned Mr. Klippenstein that it would apply for summary dismissal of his application if further particulars were not provided. Despite issuing this caution, no particulars were forthcoming.

[6] In response to the application for summary dismissal, Mr. Klippenstein states,

> *I said that CUPE has supported SHA in their targeted approach of unvaccinated members. Support, in this case, not only implies open written or oral accension but also a lack of representation of unvaccinated members to SHA. Because of this lack of support from CUPE, unvaccinated members were targeted with a forced enrolment in the Monitored Testing Program (MTP) until such a time that they became vaccinated or, if they didn't enroll, faced disciplinary action up to and including being fired. CUPE, once again, simply denied my statement about this without providing proof that it was untrue. Denial, in both instances, does not prove my statement to be false.*

[7] Mr. Klippenstein believes that the facts in support of his allegations are self-evident, in particular, that CUPE did not once announce what they had specifically done to fairly represent unvaccinated members and that the Employer implemented the program "with impunity". He stresses that CUPE has a duty to fairly represent all of its members. The fact that CUPE consulted with legal counsel is not equivalent to representing its members. Because of CUPE's lack of support, unvaccinated members were targeted with forced enrollment in the program until such time as they became vaccinated, or, if they did not enroll, were faced disciplinary action up to and including being fired.

Analysis and Decision:

[8] It is well established that the Board has authority to summarily dismiss an application, and that it may do so without holding an oral hearing. The source of this authority is found at section 6-111 of the Act:

> ***6-111****(1) With respect to any matter before it, the board has the power:*
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> *…*
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> *(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or no arguable case;*
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> *(q) to decide any matter before it without holding an oral hearing;*

[9] The Board in *Siekawitch v Canadian Union of Public Employees, Local 21*, 2008 CanLII 47029 (SK LRB), at pages 4-5, confirmed its authority to dismiss an application without an oral hearing:

> *The above provisions, which came in to force in Saskatchewan in 2005, originated in The Canada Labour Code, Part I, have been considered by several cases in the Federal jurisdiction. Those cases are clear authority for the proposition that the Board may proceed, in appropriate circumstances, to dismiss an application without an oral hearing where the documents provided on the application show there is either a lack of evidence or no arguable case. Those documents, which form a part of the record such as the Application and Reply, can be supplemented by reports of investigations conducted by the Board or written submissions of the parties.*

[10] The Board's Regulations outline the process to apply for summary dismissal:

> *19(1) In this section:*
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> *"application to summarily dismiss" means an application pursuant to subsection (2);*
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> *"original application" means, with respect to an application to summarily dismiss, the application filed with the board that is the subject of the application to summarily dismiss;*
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> *"party" means an employer, union or other person directly affected by an original application.*
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> *(2) A party may apply to the board for an order to summarily dismiss an original application.*
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> *(3) An application to summarily dismiss must:*
> *(a) be in Form 18 (Application for Summary Dismissal); and*
> *(b) be filed and served in accordance with subsection (5).*
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> *(4) In an application to summarily dismiss, a party shall specify whether the party requests the board to consider the application with or without an oral hearing.*
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> *(5) The application to summarily dismiss must be filed, and a copy of it must be served on the party that made the original application and on all other parties to the original application, before the date for the hearing of the original application is set.*

[11] With respect to the relevant process on summary dismissal, CUPE relies on the description provided in *CUPE v D. Richens and City of Saskatoon*, 2019 CanLII 98500 (SK LRB):

> *[8] In an application for summary dismissal, the Board may consider the subject application, any particulars that have been provided, and the documents (referred to within the claim) upon which the applicant relies to establish his or her case. The onus is on the applicant to provide sufficient particulars to disclose a violation of the Act, or to frame the application in such a manner that the nature of the complaint is comprehensible.*
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> *[9] In deciding whether to dismiss summarily, the Board assesses whether the allegations, assuming that they are true and are ultimately established, disclose a violation of the Act. If the Board determines that the application has no reasonable prospect of success, then the Board should exercise its power to dismiss the application on a summary basis.*
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> *[10] The Board must be careful not to prejudge the case before it and must exercise its power to summarily dismiss only in plain and obvious cases, or in cases where the application is patently defective. In deciding whether to summarily dismiss, the Board must avoid weighing evidence, assessing credibility or evaluating novel statutory interpretations.*

[12] The question for the Board to consider is whether, assuming the applicant proves the allegations, the claim has no reasonable chance of success, that is, whether it is plain and obvious that the application should be dismissed as disclosing no arguable case or a lack of evidence.

[13] CUPE bears the onus to establish that Mr. Klippenstein has not put forward an arguable case. In considering whether CUPE has met that onus, the Board assumes that the facts alleged in the main application are true or, at least, provable: *Roy v Workers United Canada Council*,

2015 CanLII 885 (SK LRB) [*Roy*], at paragraph 9. It is up to Mr. Klippenstein, in the original application and through any supplementary materials, to provide sufficient particulars of his allegations so as to sustain the allegation that CUPE breached its duty of fair representation. The allegations should specify the acts or omissions on the part of the Union (or agents) that support a conclusion that the Union has failed to satisfy its duty: *Roy* at paragraph 14.

[14] The requirement for an applicant to provide sufficient particulars was emphasized by this Board in *Soles*:

> *The Board in Soles v Canadian Union of Public Employees, Local 4777, 2006 CanLII 62947 (SK LRB), explained the nature of the applicant's onus in a duty of fair representation case:*
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> > *[37] We agree with the decision of the Canada Board in McRaeJackson, supra, where it is made clear that the onus is on the applicant to provide particulars and documents to support its allegations that a union has violated the duty of fair representation. In that case, while determining that certain applications should be dismissed without an oral hearing, the Board stated at 16 and 17:*
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> > > *[49]* ***The Board is an independent and adjudicative body*** *whose role is to determine whether there have been violations of the Code. Although the Code gives the Board broad powers in relation to any matters before it,* ***it is not an investigative body. Accordingly, it is not mandated to go on a fact-finding mission on behalf of the complainant****, to entertain complaints of poor service by the union, to investigate the union's leadership or to investigate complaints against the employer for alleged wrongs suffered in the workplace.* ***Employees who allege that their union has violated the Code and wish to obtain a remedy for that violation must present cogent and persuasive grounds to sustain a complaint.***
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> *[Emphasis added in Soles]*

[15] In assessing the claim, the Board starts by reviewing the principles underlying the duty of fair representation. The nature of the duty is well established. The starting point is section 6-59, which prohibits a union from acting in a manner that is arbitrary, discriminatory or in bad faith in considering whether to represent or in representing an employee or former employee. Section 6-59 provides:

> ***6-59****(1) An employee who is or a former employee who was a member of the union has a right to be fairly represented by the union that is or was the employee's or former employee's bargaining agent with respect to the employee's or former employee's rights pursuant to a collective agreement or this Part.*
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> *(2) Without restricting the generality of subsection (1), a union shall not act in a manner that is arbitrary, discriminatory or in bad faith in considering whether to represent or in representing an employee or former employee.*

[16] The duty applies to representation with respect to the employee's or former employee's rights pursuant to a collective agreement or Part VI of the Act. It has both a substantive and a procedural aspect. A breach may be sustained either in relation to the substance of a union's decision or in relation to the process by which it was made, or both.[1]

[17] With respect to the meaning of the terms "arbitrary", "discriminatory" and "bad faith", the Board continues to rely on the guidance provided in *Berry v SGEU*, 1993 CarswellSask 518:

> *21 This Board has also commented on the distinctive meanings of these three concepts. In Glynna Ward v. Saskatchewan Union of Nurses, LRB File No. 031-88, they were described in these terms:*
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> > *Section 25.1 of The Trade Union Act obligated the union to act "in a manner that is not arbitrary, discriminatory, or in bad faith". The union's obligation to refrain from acting in bad faith means that it must act honestly and free from personal animosity towards the employee it represents. The requirement that it refrain from acting in a manner that is discriminatory means that it must not discriminate for or against particular employees based on factors such as race, sex or personal favouritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do.*
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> *22 In the case of Gilbert Radke v. Canadian Paperworkers Union, LRB File No. 262-92, this Board observed that, unlike the question of whether there has been bad faith or discrimination, the concept of arbitrariness connotes an inquiry into the quality of union representation. The Board also alluded to a number of decisions from other jurisdictions which suggest that the expectations with respect to the quality of the representation which will be provided may vary with the seriousness of the interest of the employee which is at stake. They went on to make this comment:*
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> > *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake. Given the importance of the employee interests the union has the responsibility to pursue, they should also carry out their duties seriously and carefully. The ultimate decision made or strategy adopted, however, may take into account other factors than the personal preferences or views of an individual employee.*

[18] The Board also relies on the succinct descriptions provided by the Ontario Labour Relations Board in *Toronto Transit Commission*, [1997] OLRD No 3148, at paragraph 9:

> *. . . a complainant must demonstrate that the union's actions are:*
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> *(1) "ARBITRARY" – that is, flagrant, capricious, totally unreasonable, or grossly negligent;*

[1] *Canadian Labour Law*, loose-leaf (12/2021 - Rel 5) 2nd ed (Toronto: Thomson Reuters, 2022), at 13-29.

> *(2) "DISCRIMINATORY" – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or*
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> *(2) "in BAD FAITH" – that is, motivated by ill-will, malice, hostility or dishonesty.*

[19] The usual duty of fair representation application involves an employee or former employee who has sought the assistance of the union in relation to a dispute with the employer over their rights pursuant to a collective agreement. In most cases, the employee will have sought that the union file a grievance or sought that a filed grievance be taken to arbitration. The employee's request will have been denied or the employee will have otherwise been dissatisfied with the representation provided or with the absence of representation. The employee will then have filed with the Board an application alleging a breach of the duty coming within one or more of the three categories of arbitrariness, discriminatory treatment, or bad faith conduct.

[20] This is not the usual case. Mr. Klippenstein has not specified that he has a personal dispute with the Employer nor asked CUPE to represent him in the resolution of a dispute with the Employer relating to his rights pursuant to the collective agreement or Part VI of the Act. Nor has he specified whether CUPE has engaged in arbitrary, discriminatory, or bad faith conduct.

[21] Nonetheless, a careful review of Mr. Klippenstein's application discloses two primary complaints: first, he believes that CUPE provided an inadequate response to his query about its efforts to represent unvaccinated members; second, he alleges that CUPE has breached its duty by permitting the Employer's vaccination and testing policy to proceed without negotiating or "fighting". In relation to this latter complaint, it seems that Mr. Klippenstein wishes that CUPE had either pushed the Employer to negotiate the Policy or filed a policy grievance.

[22] The duty of fair representation arises from a union's status as the exclusive bargaining agent for the members of the bargaining unit that it is certified to represent. As the exclusive bargaining agent, a union has power to influence the terms and conditions of employment of all of the members of the unit. By extension, it is required to act fairly in the interests of all of those members. The duty has been described in this way:

> *... is to ensure that individual rights are not abused by the majority of the bargaining unit; it is an attempt to achieve a balance between the individual interests and the majority interest by recognizing that the exclusive bargaining agent has a duty to consider all the separate interests in the performance of its obligations. The duty has been described as the duty of fair representation. The emphasis is on fairness - it is a duty to act fairly in the interests of all members of the bargaining unit, minority factions, as well as majority factions, individual employees, as well as the collective group, members as well as non-members, craft employees as well as industrial employees. It is not a duty which makes the union the guarantor or insurer for every situation in which an individual employee is aggrieved or*

> *adversely affected; rather, the statute attempts to have the union consider the position of all groups and to weigh the competing interests of minorities, individuals and other like groups in arriving at its decision.*[2]

[23] In assessing a union's actions in the context of its duty, the touchstone is fairness. Fairness is not equivalent to identical treatment.

Arbitrariness:

[24] It is well recognized that the union is the owner of a grievance. The employee does not have a right to have a grievance be filed or be pursued to arbitration. It is the union's decision whether to take these actions. In deciding whether to file or proceed with a grievance, a union is entitled to consider a variety of factors, including the likelihood of success at arbitration, the union's resources, the cost of an arbitration, and the interests of the collective membership.[3]

[25] To fulfill its duty, a union must take a reasonable view of the problem and make a thoughtful decision about what to do. To be successful on a claim of arbitrariness, an applicant must prove that the union has acted in a manner that was flagrant, capricious, totally unreasonable, or grossly negligent. The threshold for finding that the union engaged in arbitrary conduct is high. It is not sufficient to show that the union's conduct was, for example, merely negligent.

[26] In *Hartmier v SJBRWDSU, Local 955*, 2017 CanLII 20060 (SK LRB), the Board set out four criteria that a union must fulfill to meet its duty, with particular relevance to arbitrariness: whether the union conducted a proper investigation into the full details of the grievance; whether it clearly turned its mind to the merits of the grievance; whether it made a reasoned judgment about its success or failure; and, if it decided not to proceed with the member's grievance, whether it provided clear reasons for its decision.

[27] A duty of fair representation application is not an opportunity for an employee to appeal a decision taken by a union to this Board: *Prebushewski v CUPE, Local No. 4777*, 2010 CanLII 20515 (SK LRB), at para 55. By extension, the Board's role is not to assess the merits of the grievance but instead to assess the union's decision-making process and conduct in handling the

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[2] *Ford Motor Co.*, (1973) OLRB Rep Oct 519 at para 38 as cited in *United Food & Commercial Workers International Union Local, 340 and Saskatchewan Brewers Association Limited*, [1995] 2nd Quarter Sask Labour Rep 185 [*Sask Brewers Association*].

[3] See, for example, *Radke v Canadian Paperworkers Union, Local 1120*, [1993] 2nd Quarter Sask Labour Rep 57; *Banga v Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask Labour Rep 88; *Datchko v Deer Park Employees' Association*, 2006 CanLII 63025 (SK LRB).

grievance. Relatedly, the Board will afford union representatives considerable latitude in the handling of grievances: *Hargrave v CUPE, Local 3833*, 2003 CanLII 62883 (SK LRB); *McRae-Jackson v CAW-Canada*, 2004 CIRB No 290, at para 8; *Emeka-Okere v CUPE*, 2021 CanLII 89513 (SK LRB) at para 55.

[28] According to Mr. Klippenstein, CUPE could have fulfilled its duty by requiring either "a testing of every CUPE member…and for SHA to pay for the testing" or "SHA to stop all testing immediately and encourage proper hygiene as we have been required in healthcare to do for decades".

[29] Mr. Klippenstein does not plead that CUPE failed to conduct a proper investigation, to turn its mind to the merits, or to make a reasoned judgment. Instead, he states that CUPE should have required the Employer to take a different approach to ensure safety in the workplace during the pandemic. No doubt Mr. Klippenstein is aware that CUPE does not have autonomous power over the Employer's policies; assuming as much, he appears to be complaining that CUPE did not object to the exclusive application of the testing requirement to unvaccinated members, and more critically, to any testing at all. It is the fact that CUPE decided not to do these things, not whether CUPE made a reasoned judgment, that is the focus of his complaint. At its core, Mr. Klippenstein's application takes issue with the conclusions that CUPE has drawn.

[30] In his complaints with respect to inadequate communication, Mr. Klippenstein focuses on the responses he received to his requests for information. From his perspective, these responses simply confirmed that CUPE had done nothing to represent unvaccinated members. Again, Mr. Klippenstein is focused on the direction CUPE took with respect to the Policy.

[31] The fact that Mr. Klippenstein disagrees with CUPE's decision is not an adequate basis to find that CUPE acted in a manner that was arbitrary.

[32] To be sure, Mr. Klippenstein does complain, in his Reply to the application for summary dismissal, that CUPE did not respond when asked what it was doing to support unvaccinated members. Mr. Klippenstein states that, instead of simply inviting him to information sessions, CUPE should have sent him an email with a direct response to his question. This amounts to an allegation of poor service. The Board does not have jurisdiction to sustain a complaint of poor service from the union. Furthermore, CUPE provided for an alternate form of communication to relay complex and dynamic messages to groups of employees. In such circumstances, there is no duty to send an email as well.

[33] Moreover, CUPE, in this application, has explained what actions it took in response to the Policy. These actions cannot reasonably be interpreted as being arbitrary:

> *3. CUPE Local 5430 communicates with its members in many ways. It has a membership database through Nation Builder, a website, and makes use of the Facebook platform. Mr. Klippenstein has not advised the local to sign him up through Nation Builder for the purpose of receiving notifications of union business through his personal email. The same communiques that would have been sent to his personal email are also posted on the CUPE Local 5430 website, which is available for everyone. The Facebook page is also a public page for anyone to see. It is kept up to date and has all of the local's information regarding upcoming meetings.*
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> *4. The employer introduced the vaccine policy directive at the direction of the Government of Saskatchewan. This was announced by the government on August 30, 2021. CUPE immediately responded to our membership with a communique on September 1, 2021.*
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> *5. On September 29, 2021, a communique was sent through our system to announce that a special membership meeting will be held October 7, 2021.*
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> > *The process of the membership meetings are as follows:*
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> > *A notice of the meeting is sent to all members with meeting times and instructions on how to request a meeting invitation from the local. Once a member has requested an invitation, they are sent a Zoom link and are able to attend the meeting at the designated time. The local also keeps an attendance record of the meetings held via Zoom.*
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> *6. On September 30, 2021, Mr. Klippenstein emailed Linda Vancuren, Local 5430 General Vice-President, Region 1, and wanted to know if CUPE will support members who choose not to vaccinate, as well as members who do get vaccinated.*
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> *7. Ms. Vancuren replied October 1, 2021, stating the local was still waiting for the SHA's policy/directive as it was still being created. She informed Mr. Klippenstein of the local's Zoom meeting on October 7, 2021, around vaccinations and to answer any questions the membership may have. She included the Zoom link invitation with that email response. Attached as "Appendix C".*
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> *Mr. Klippenstein then again asked what CUPE specifically would do to support members who choose to stay unvaccinated. Ms. Vancuren replied that the local is seeking legal advice.*
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> *8. On October 1, 2021, the SHA issued a press release saying they were moving forward with a Proof of Vaccine Policy. Attached as "Appendix D".*
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> *9. On October 7, 2021, the local held a special membership meeting. Questions and concerns the union posed to the employer pertaining to the vaccine policy were communicated to the membership. Mr. Klippenstein did not attend this meeting as he stated he could not attend because he had to work. Attached as "Appendix E".*
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> *10. On October 15, 2021, CUPE Local 5430's objection response was sent to members through our system. Attached as "Appendix F".*

> *11. On October 20, 2021, the local hosted two separate Zoom meetings to discuss the vaccine policy. Mr. Klippenstein did not request a Zoom invitation to either of these meetings*
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> *12. On October 25, 2021, Ms. Vancuren sent Mr. Klippenstein the new regulations that the government enacted into The Saskatchewan Employment Act on vaccination policies and highlighted what affects healthcare workers in Saskatchewan. Mr. Klippenstein then requested information about exemptions to which Ms. Vancuren stated that the SHA will accommodate if a medical or religious exemption is requested, and proper documentation will need to be provided. Attached as "Appendix G".*
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> *13. In addition to open communication with the membership, CUPE Local 5430 has regularly reviewed the SHA's COVID-19 vaccination and/or testing policies. At the time of the original complaint, the union had made a reasoned decision not to pursue a grievance against the SHA with respect to these policies.*
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> *14. In making the decision to not pursue a grievance, CUPE considered at length the relevant regulations under The Saskatchewan Employment Act, including the employer's COVID - 19 emergency regulations, as well as opinions and analysis provided by CUPE's in house legal counsel. Attached as "Appendix H".*
> *…*

[34] On this application, CUPE provided the Board with its email exchanges with Mr. Klippenstein, its news release with respect to the Policy, special membership meeting notices, and its Policy Objection Response. In its news release, dated September 29, 2021, CUPE indicated that the “health care unions unanimously endorsed the position that no policy or policy directive should be implemented until the unions have full disclosure of all relevant information”. On September 30, 2021, when Mr. Klippenstein initially contacted CUPE, CUPE had not yet received the documentation that the Employer was in the process of creating. CUPE replied the next day to invite him to a Zoom meeting held for the purpose of informing the membership about vaccination related issues.

[35] After the Employer announced that it was moving forward with a proof of vaccine policy, the meeting was held. Mr. Klippenstein did not attend. A week later, CUPE distributed its Policy Objection Response, in which it described the many factors that it was taking into consideration in deciding how to respond to the Policy. In the Response, CUPE indicated that it was continuing to pressure the Employer to accept rapid antigen tests instead of PCR testing and remained vigilant about the “KVP” test, accommodation requests, and collective agreement provisions. CUPE advised that it had just received information about the program cost but had not yet had a chance to review all of the relevant details.

[36] As with many things during the pandemic, the situation was in flux. CUPE advised that it would keep the membership informed as "legal advice and information changes". CUPE later held two additional meetings to discuss the Policy.

[37] CUPE's response to the Policy was anything but arbitrary. CUPE was aware of the objections to the Policy. It communicated with the membership after it learned that the Employer was in the process of finalizing a policy and after it had received a copy of the Policy. In its Policy Objection Response, it observed that it had received messages objecting to a "vaccine mandate". It pointed out that, given the testing option, the Policy was not equivalent to a vaccine mandate. It advised its membership that it was reviewing the information from the Employer about costs.

[38] It turned its mind to the issue and considered whether it would be successful in challenging the policy. In considering whether to object to the Policy, CUPE considered a range of issues and sources of information, including its own legal opinion, past decisions related to mandatory flu vaccines, existing arbitral decisions about mandatory COVID-19 testing policies, a published legal opinion associated with the Alberta Federation of Labour, vaccine safety objections, public statements made by the Saskatchewan Human Rights Commission, and the *KVP* test.[4]

[39] Although it is not the Board's role to determine whether CUPE's decision was correct, it is worth observing that it is consistent with recent arbitral decisions, such as, *Teamsters Local Union 847 v Maple Leaf Sports and Entertainment*, 2022 CanLII 544 (ON LA) (Ont Arb, Jesin); and, *Revera Inc. (Brierwood Gardens et al.) v Christian Labour Association of Canada Award*, 2022 CanLII 28657 (ON LA) (Ont Arb, White).

[40] In *Watson and CUPE, Re*, 2022 CarswellNat 266 [*Watson*], the Canadian Industrial Relations Board dismissed a duty of fair representation application involving a request to challenge a vaccine mandate. The Board decided, based on the written submissions of the parties, to dismiss the application on the basis that the union's approach and its decision not to pursue a policy grievance was not arbitrary, discriminatory, or in bad faith.[5]

[41] The policy in *Watson* was implemented further to a federal government directive and did not provide a testing alternative. The Board found that the directive was a key distinction from

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[4] The *KVP* test is used when assessing employer policies that affect an employee's individual rights. It takes its name from *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co. (1965)*, 16 LAC 73 (Robinson), a decision setting out the scope of management's unilateral rule making authority under a collective agreement. The test was endorsed by the Supreme Court of Canada in *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp and Paper, Ltd*., 2013 SCC 34 (CanLII), [2013] 2 SCR 458.

[5] In that case, the applicant had specifically requested an oral hearing.

other cases in which policies had been found to be unreasonable. The Policy in the current case was also implemented further to a government directive.

[42] And, unlike the policy in *Watson*, the Policy in dispute provided a testing alternative. In *Electrical Safety Authority and Power Workers' Union (ESA-P-24), Re*, 2021 CarswellOnt 18219 (Ont Arb, Stout) [*Electrical Safety Authority*], the arbitrator found that a mandatory vaccination policy that was not implemented pursuant to a directive, and did not include a testing alternative, was not reasonable. In the end result, the arbitrator directed the employer to amend the policy to provide for a testing option.

[43] A union is entitled to weigh the likelihood of success at arbitration in deciding whether to file a grievance. The fact that one or more arbitrators have found specific workplace vaccination policies to be unreasonable does not mean that a union is required to challenge a vaccination policy. The question is not whether the union has looked under every rock for an entry point into a grievance proceeding, but rather, whether the union has turned its mind to the merits and made a reasoned judgment. There is certainly no glaring error in CUPE's decision not to file a policy grievance. On the contrary, it was an entirely reasonable course of action.

[44] It should be noted that Mr. Klippenstein has not pleaded that he has sought an accommodation or requested a grievance be filed in relation to his personal circumstances. Besides, CUPE's reference in the Policy Objection Response to accommodation requests suggests that it is considering such matters on a case-by-case basis.

[45] Finally, in its Policy Objection Response, CUPE indicated that it would keep members updated as information changes. While it seems apparent that CUPE decided not to launch a policy grievance, it appears that its overall approach was meant to evolve with the dynamic circumstances that have characterized the pandemic.

Discriminatory Treatment:

[46] Mr. Klippenstein alleges discriminatory treatment of unvaccinated employees on the part of the Employer, and by proxy, on the part of CUPE. The requirement that a union refrain from acting in a manner that is discriminatory means that it must not discriminate for or against particular employees based on invidious distinctions such as race, sex or personal favouritism without reasonable justification or labour relations rationale.

[47] To be clear, it is not the fact of making distinctions that results in a breach but, rather, the absence of any reasonable justification or labour relations rationale for those distinctions. The Board has explained why it is critical to the functioning of a labour relations system to permit unions to make distinctions between bargaining unit employees:

> *In this statutory scheme, the responsibility for allocating the gains and losses of collective bargaining within the bargaining unit is assigned to the union. Orderly and efficient collective bargaining therefore depends upon the union having not only the right, but the obligation and confidence to make the decisions that must be made. If a union could not lawfully make choices which favour one employee group over another, it would never be in a position to enter into a confidence to make the decisions that must be made. If a union could not lawfully make choices which favour one employee group over another, it would never be in a position to enter into a collective agreement with an employer. Orderly, timely collective bargaining would break down and this would not be in the interests of the employer, the union, the employees or the general public.*[6]

[48] A union is not obligated to act on every complaint, pursue every grievance request and attempt to resolve every dispute that impacts an employee's rights under the collective agreement. The Supreme Court of Canada, in *Gendron v Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 SCR, 1248 found that, in a situation of conflicting employee interests, the union may pursue one set of interests to the detriment of another as long as it considers the relevant factors and is not driven by improper motives. This conclusion remains good law and has been followed and applied on countless occasions by labour relations boards in this jurisdiction and others.

[49] In *Peters v Canadian Union of Public Employees, Local 3967*, 2006 CanLII 63024 (SK LRB), this Board reviewed a sampling of these cases, including, *Davies v General Truck Drivers and Helpers Union, Local No 31*, [1983] BCLRB 136-06, *Anderson v The Manitoba Government Employees' Association*, [1995] MLBD No. 5, *Mlakar v CUPE, Local 79*, [1989] OLRB Rep December 1246, *Shipowich v Service Employees' International Union, Local 333 and Saskatoon District Health Board*, [1999] Sask LRBR 56, *Hildebaugh v Saskatchewan Government and General Employees' Union and Saskatchewan Institute of Applied Science and Technology*, [2003] Sask LRBR 272, *Dorval v Canadian Union of Public Employees, Local 59*, [1995] 2nd Quarter Sask Labour Rep 94 [*Dorval*], *Smith v Canadian Union of Public Employees, Local 1975*, [2002] Sask LRBR 110, *Lymer v Saskatchewan Insurance Office and Professional Employees' Union, Local 397 (O.P.E.I.U.)*, [2000] Sask LRBR 174.

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[6] *Sask Brewers Association,* at 188.

[50] All of these cases confirm that a union can, and often must, distinguish between members of a bargaining unit in discharging its duty as their exclusive bargaining agent. Perhaps the most succinct description of the union's role relative to these distinctions is found in *Dorval*:

> *The whole system of collective bargaining and representation by trade unions is based upon the Union's right and duty to arbitrate between the conflicting interests of its members and also between the interests of the collective membership and an individual member and to then put a single position forward to the employer. This is why unions exist and provided they do not act arbitrarily, discriminatorily or in bad faith, they have discharged their duty to their members.*

[51] In *Watson*, the Canada Board explained that 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 concluding as much, the Board agreed with the following reasoning of the B.C. Labour Relations Board in *Gordon v Hotel, Restaurant & Culinary Employees & Bartenders Union, Local 40*, 2004 CanLII 65459, para 34:

> *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.*

[52] A union may pursue one set of interests to the detriment of another as long as it considers the relevant factors and is not driven by improper motives. Mr. Klippenstein has not provided the Board with any reason to believe that CUPE did not consider the relevant factors in coming to its decision. Nor does the Board have any reason to believe that CUPE was driven by improper motives. To be sure, Mr. Klippenstein states that union representatives should not act further to their "personal feelings" when representing the membership. This is a mere inference as opposed to a statement of fact. The pleadings provide no further particulars. Such an indirect and general remark is insufficient to sustain a breach.

[53] Again, Mr. Klippenstein is dissatisfied with the decision that CUPE has made in relation to the Policy. He believes that CUPE should not have treated unvaccinated employees differently than vaccinated employees. However, CUPE has presented extensive rationale for choosing not to object to the Policy, largely focused on the merits of a grievance if it had filed one. There is no

basis to find that CUPE made any distinctions without reasonable justification or labour relations rationale. It is plain and obvious that a claim of discrimination would fail.

Bad Faith:

[54] Lastly, Mr. Klippenstein's application does not plead bad faith or disclose allegations sufficient to establish that CUPE has acted in bad faith. To establish bad faith, an applicant must persuade the Board that underlying the Union's actions was an improper purpose: *Owl v Saskatchewan Government and General Employees' Union*, 2014 CanLII 42401 (SK LRB) [*Owl*] at paras 77-9. The Applicant has presented no particulars to suggest that CUPE was actuated by an improper motive in deciding not to pursue a grievance. He has presented no particulars of ill-will, malice, hostility, or dishonesty on the part of CUPE. There is no sign of bad faith conduct in the facts as presented by CUPE. It is plain and obvious that a claim of bad faith would fail.

Conclusion:

[55] In conclusion, the fact that Mr. Klippenstein did not agree with CUPE's conclusions is not evidence of deficient representation. Assuming he is able to prove everything that he has alleged, it is plain and obvious that he has no reasonable chance of successfully demonstrating that CUPE has breached section 6-59 of the Act. None of the allegations disclose facts that would give rise to a finding of arbitrary, discriminatory, or bad faith conduct.

[56] For the foregoing reasons, the Board has decided to grant the application for summary dismissal in LRB File No. 024-22 and dismiss the original application in LRB File No. 158-21. An appropriate order will accompany these Reasons.

DATED at Regina, Saskatchewan, this **30th** day of **May, 2022.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson