Saskatchewan
Labour Relations Board

SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Applicant v RODNEY WILCHUCK, Respondent and REGINA HOUSING AUTHORITY, Respondent

LRB File Nos. 045-23 and 065-23; June 13, 2023
Chairperson, Michael J. Morris, K.C. (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

Counsel for Saskatchewan Government and General Employees Union:	R. Turner Purcell & Jacob D. Zuk
For Rodney Wilchuck:	Self-represented
For Regina Housing Authority:	No one appearing

Application for summary dismissal – Employee-union dispute – Clause 6-111(1)(p) of *The Saskatchewan Employment Act* – Employee's application discloses no arguable case – Application for summary dismissal granted.

Employee-union dispute – Duty of fair representation – Employee terminated for failing to comply with Employer's policy implemented pursuant to *The Public Employers' COVID-19 Emergency Regulations* – Union entitled to come to its own conclusion regarding the viability of a potential grievance.

REASONS FOR DECISION

Background:

[1] **Michael J. Morris, K.C., Chairperson:** These are the Board's reasons regarding an application by the Saskatchewan Government and General Employees' Union [Union] to summarily dismiss an employee-union dispute filed by Rodney Wilchuck [Mr. Wilchuck].

[2] Mr. Wilchuck filed his application alleging an employee-union dispute on March 13, 2023. He was terminated by the Regina Housing Authority [Employer] on October 18, 2021 for unapproved absenteeism and insubordination. In sum, Mr. Wilchuck refused to comply with the Employer's policy requiring him to either be vaccinated against Covid-19 or provide weekly negative test results in order to continue to work [Policy]. For its part, the Employer was required to implement these conditions of employment pursuant to *The Public Employers' COVID-19 Emergency Regulations* [Regulations], which became effective October 1, 2021.[1]

[1] *The Public Employers' COVID-19 Emergency Regulations*, Sask Reg 105/21.

[3] Mr. Wilchuck's application is very sparse, although it clearly takes issue with the Union not grieving his termination and references s. 6-59 of *The Saskatchewan Employment Act* [Act], which grounds the Union's duty of fair representation to its members. Mr. Wilchuck's application relies on the following statement of facts to support it: "I was unlawfully terminated by my employer Regina Housing Authority, and the Union has failed to represent me, and continues to fails (*sic*) to represent me."[2]

[4] The Union filed a detailed reply to Mr. Wilchuck's application and an application to summarily dismiss it. Mr. Wilchuck filed an affidavit in response to the Union's summary judgment application, rather than a Form 21 reply.[3] Unfortunately, Mr. Wilchuck's affidavit does not address all relevant matters of fact that are pled in the Union's reply and incorporated into its summary dismissal application, which is one of the primary purposes of a Form 21 reply. Respondents to applications, including self-represented litigants, should be using Form 21.

[5] Both the Union and Mr. Wilchuck filed written argument with respect to the Union's summary dismissal application. In addition to his affidavit, Mr. Wilchuck's written argument has assisted the Board in understanding his position regarding the legality of the Regulations, which caused the Policy, and the nature of his complaint against the Union.

[6] On the material before the Board, there is no dispute between the parties regarding the following chronology:

September 21, 2021	Mr. Wilchuck is informed by the Employer that he will need to abide by the Policy, effective October 1st.
September 27, 2021	Mr. Wilchuck swears a document entitled "Affidavit of Conscientious Objection, Section 64 of *The Public Health Act, 1994*" [September 27th Affidavit], which is thereafter provided to the Employer.
October 1, 2021	Mr. Wilchuck is on an unapproved leave of absence as of this date, having not abided by the Policy.
October 4, 2021	A meeting is held between Mr. Wilchuck, the Union and the Employer at which Mr. Wilchuck is provided a written warning for insubordinate behaviour and unexcused absenteeism. Mr. Wilchuck provides the Employer a one page document explaining his position on the Policy [October 4th Letter].

[2] Application, LRB File No. 045-23, para 4.
[3] Affidavit of Rodney Wilchuck, sworn May 8, 2023.

October 18, 2021	Mr. Wilchuck is terminated after being on an unapproved leave of absence since October 1st and receiving multiple written warnings regarding potential consequences up to and including termination.
October 29, 2021	Mr. Wilchuck advises the Union he'd like to grieve his termination. He is advised that he should gather evidence to support a human rights-based exemption from the Policy's proof of negative testing requirement, because the Policy is likely in accordance with the collective agreement.
November 4, 2021	The Union has received no evidence from Mr. Wilchuck further to its October 29th communication with him, and emails him requesting the answers to several questions in order to consider his request for a grievance. Mr. Wilchuck replies indicating that the October 4th Letter "was and is my defence." Thereafter, the Union receives no further information from Mr. Wilchuck and does not proceed with a grievance on his behalf.
March 13, 2023	Mr. Wilchuck files his application alleging the Union breached its duty of fair representation.

[7] Because of the centrality of the September 27th Affidavit and the October 4th Letter to Mr. Wilchuck's position that he was unlawfully terminated, and that the Union breached its duty of fair representation by not grieving his termination, the text of these documents will be reproduced below.

[8] The September 27th Affidavit states:

> *AFFIDAVIT of Conscientious Objection*
> *Section 64 of The Public Health Act, 1994*
>
> *I, Rodney Wilchuck of Regina, Saskatchewan MAKE OATH AND SAY:*
>
> *1. For conscientious and health reasons, I hereby conscientiously object to any prophylaxis, immunization or immunoprophylaxis.*
>
> *2. Therefore, pursuant to the Canadian Charter of Rights and Freedoms, Bill of Rights, and Section 64 of The Public Health Act, 1994, I, my children and ward, all are **exempt and excused** from compliance with any current or future regulation, bylaw or order that makes any prophylaxis, immunization or immunoprophylaxis, or any related device or program, mandatory.*
>
> *3. For clarity of the above, immunization is a prophylaxis, as are masks, and as are any other device, or testing device, and any testing procedure or program, or any enforcement method or program conducted by any government, person, business, service, or organization of any kind.*

4. Therefore, any immunization, prophylaxis, mask, or any other device, or testing device, or any testing procedure or program, or any enforcement method or program conducted by any government, person, business, service, or organization of any kind, is a discrimination and prejudice, and prejudicial against Myself and my children and ward, and is an ***actionable violation*** *of My Human Rights, The Christ Jesus and God of The Bible, The Public Health Act, 1994, the Canadian Charter of Rights and Freedoms, Bill of Rights, the Universal Declaration of Human Rights, and* ***TheNuremberg Code (1947).***

Sworn before me this 27th day of September 2021.
…

[9] The October 4th Letter states:

To*:* ***October 4, 2021***
Regina Housing Authority

Attn*: Rayne Kuruliak – HR Manger*

Re*: Rod Wilchuck, SGEU Grievance*

In response to your letter of September 29, 2021, and subsequent email letter I received on Saturday, October 2, 2021, without lawful authority, you continue to threaten to harm me, my family and children who rely on me, our health, safety and security of life, by removing my job and income in order to attempt to intimidate and coerce me into consenting to conditions to my employment after the fact, and doing something I believe will harm and threaten the health and safety of myself and other people. And although in accordance with section 3-10 of The Saskatchewan Employment act, it is my duty to consider these things.

Your tactics are tantamount to intimidation and extortion as described in the Criminal Code of Canada in Sections 346 and 423. You need to stop, and you need to consider the gravity and repercussions of whatever you think you're doing. I am ***not*** *on "unapproved leave or absence" as you state, and I do not consent to that. My work instruction from you for Friday Oct 1, 2021, was to hand in my keys and don't come to work. All of which the union and union steward are well aware of.*

The Public Employers' COVID-19 Emergency Regulations, which you cited in your letter and then failed to provide me the day you threatened me with them, The Saskatchewan Employment Act, the employment contract, or the SGEU Local 2487 Collective Bargaining Unit (CBA), do not authorize or instruct you to enforce anything. I have also provided you with my affidavit thereby activating Section 64 of The Public Health Act, and therein outlining my creed and subsequently my concerns for violations of my human rights.

The Public Employers' COVID-19 Emergency Regulations, which you appear to be relying on to justify your tactics, do not suspend The Saskatchewan Employment Act, The Public Health Act, Section 64 of The Public Health Act, the employment contract, or the SGEU Local 2487 Collective Bargaining Agreement (CBA).

In spite of the above facts, you have told me that if I do not comply with what you want, you are placing me on some form of "forced unpaid leave", which you are now referring to as "unapproved leave". As "unpaid leave" can only be activated by employee request, and "forced unpaid leave" is not supported by any law or contract, this tactic is merely a "constructive dismissal". Meaning, that

without my consent, you are violating employment law, the employment contract, and likely the CBA.

Further, your hands are not tied, as the Public Employers' COVID-19 Emergency Regulations provides "choices" for public employers, as in Section 4(1)(a)(ii) where it states: if requested by the public employer, provide satisfactory evidence to the public employer in relation to the worker's vaccinations; ("if" is the operative meaning it can be chosen by the employer "not" to request anything).

Nowhere in these new regulations does it say a worker cant work, can not be allowed to work or not allowed to enter anywhere. These are all yours and Regina Housing Authority's choices, and you are liable for them pursuant to the Employment Act s. 9-6, 9-7 and 9-8, not the government or their legislation. I am following the law. You are not.

This letter is also to notify you that I believe I am not being fairly represented by my Union Steward, and am not very comfortable with not having an unbiased person at the meeting you requested.

My union steward has so far told me; that I work at the pleasure of the employer, and if I don't hand in my keys, it would be hard for them to represent me, and that the employer can fire me without cause, and also that what I signed was an offer and not a contract.

All of which I think are ridiculous things to say to someone for whom he professes to be representing their interests. I also believe he may have had numerous discussions with you and Regina Housing Authority without my knowledge.

Otherwise, although it can be stressful and quite labouress at times, I like my job working for Regina Housing, and the people I am working with, and I know my supervisor appreciates the fact that I work hard and get things done. I would like to keep my job, and so in consideration of that and all the above, I would like to offer the following solutions to this grievance and these issues:

-That I get paid for all the days you instructed me to not go to work, and then I will return to work under the current standing contract of employment on whichever date you chose. As I was on October 1st and 4th, I am ready, willing and able to return on Tuesday, October 5, 2021; or

-That you lay me off or dismiss me in such a manner that I am able to receive Employment Insurance (EI) benefits, so that I will have money to pay my bills and feed my children, and also provide a written guarantee that you will hire me back to do the same job whenever the government is done unlawfully and illegally oppressing the people;

-Either of these solutions are fair and reasonable.

Sincerely,
Rod Wilchuck

[10] Before proceeding to outline the parties' respective arguments, it is appropriate to outline the obligations that the Regulations placed on both the Employer and Mr. Wilchuck, effective October 1, 2021.[4] Sections 4 and 5 of the Regulations stated:

[4] The Regulations were repealed effective February 14, 2022, by *The Public Employers' COVID-19 Emergency Repeal Regulations*, Sask Reg 5/22.

Public employers' duties re clause 3-8(a) of the Act

4*(1) On and after October 1, 2021, every public employer shall, for the purposes of clause 3-8(a) of the Act, require each of its workers to comply with one of the following:*

(a) to:

(i) be fully-vaccinated; and

(ii) if requested by the public employer, provide satisfactory evidence to the public employer in relation to the worker's vaccinations;

(b) to provide a valid negative COVID-19 test result to the public employer at least every 7 days.

(1.1) The public employer shall give a worker the option to comply with either clause (1)(a) or (b), but the worker must be in compliance with at least one of those requirements before commencing a shift on and after October 1, 2021.

(2) For the purposes of clause (1)(b), a negative COVID-19 test result is valid for 7 days from the date of testing.

(3) A worker is not required to provide a negative COVID-19 test result to the public employer if the worker is on vacation, an employment leave or a leave granted by the public employer.

(4) The public employer shall:

(a) establish a verification process for collecting and reviewing the evidence provided by the worker in relation to the worker's vaccinations or negative COVID-19 test results;

(b) review the evidence provided by a worker in relation to the worker's vaccinations or negative COVID-19 test results in accordance with the verification process established pursuant to clause (a) to verify that the worker can be at the workplace; and

(c) keep confidential the evidence provided by a worker pursuant to this section.

Workers duties re clause 3-10(a) of the Act

5 *For the purposes of clause 3-10(a) of the Act and unless otherwise agreed to by the public employer:*

(a) any worker required to provide a negative COVID-19 test result pursuant to clause 4(1)(b) is responsible for taking the COVID-19 test during non-work hours; and

(b) any costs associated with taking a COVID-19 test are to be paid by the Worker.

[11] As indicated above, the Regulations prescribed the conduct necessary for the Employer and Mr. Wilchuck to comply with their respective duties under clauses 3-8(a) and 3-10(a) of Part III (Occupational Health and Safety) of the Act. These clauses state:

3-8 *Every employer shall:*

> *(a) ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer's workers;*

…

3-10 *Every worker while at work shall:*

> *(a) take reasonable care to protect his or her health and safety and the health and safety of other workers who may be affected by his or her acts or omissions;*

[12] The authority for the Lieutenant Governor in Council to enact regulations prescribing the standards to be maintained for the purposes of the abovementioned duties is found in s. 3-83 of the Act, which includes:

3-83*(1) The Lieutenant Governor in Council may make regulations:*

> *(a) prescribing the standards to be established and maintained by specified persons for the protection of the health and safety of workers and self-employed persons at any place of employment;*
>
> *…*
>
> *(d) prescribing measures that employers must take to carry out their duties pursuant to section 3-8;*
>
> *…*
>
> *(q) requiring the making of arrangements to promote the health of workers, including arrangements for medical examinations and health surveys;*
>
> *…*
>
> *(ss) respecting any other matter or thing that the Lieutenant Governor in Council considers necessary or advisable to carry out the intent of this Part.*

(2) Any regulation made pursuant to this section may be made to apply:

> *(a) to all persons, to one or more persons or to one or more categories of persons; or*
>
> *(b) to all places of employment or worksites, to one or more places of employment or worksites or to categories of places of employment or worksites.*

[13] Having set out the context of the Regulations which informed the Policy implemented by the Employer, the Board will proceed to outline the arguments on behalf of the Union and Mr. Wilchuck.

Argument on behalf of the Union:

[14] First, the Union argues that Mr. Wilchuck's application should be summarily dismissed on the basis that it is not sufficiently particularized, and therefore pleads no arguable case. The Union notes the entirety of the facts pled in the application amount to the following three underlined sentences:

> *4. The applicant alleges that a contravention of The Saskatchewan Employment Act has been and/or is being engaged in by the union by reason of the following facts:*
>
> *I was unlawfully terminated by my employer Regina Housing Authority, and the Union has failed to represent me, and continues to fails to represent me.*
>
> *5. If the complaint involves a grievance, what was the outcome of the grievance proceeding?*
>
> *The Union office was notified of my grievance and to date, except for a quick meeting with my employer, no further attempts have been made to represent me.*
>
> *6. Describe any union appeal or complaint procedures available in the union's constitution, bylaws or regulations, as well as the results of your participating in those proceedings:*
>
> *The Union procedures involve filing a grievance and as noted in No. 6 above, to date nothing has been resolved.*

[15] The Union submits that the above pleading does not adequately plead a violation of s. 6-59 based on the Board's decision in *Soles*,[5] at paragraph 37 (emphasis in original):

> ***[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.***
> >
> > *[50] A complaint is not merely a perceived injustice; it must set out the facts upon which the employee relies in proving his or her case to the Board. A complaint goes beyond merely alleging that the union has acted "in a manner that is arbitrary,*

[5] *Soles v Canadian Union of Public Employees, Local 4777*, 2006 CanLII 62947 (SK LRB) [*Soles*].

> *discriminatory or in bad faith."* ***The written complaint must allege serious facts, including a chronology of events, times, dates and any witnesses. Copies of any documents that are relevant, including letters from the union justifying its actions or decision, should be used to support the allegations.***[6]

[16] The Union notes that Form 10, which is required for applications alleging a breach of the duty of fair representation, directs applicants to concisely plead all relevant facts, and invites supporting documentation to be exhibited to the application. With Mr. Wilchuck having failed to do so, the Union invites the Board to dismiss the application as disclosing no arguable case.

[17] Second, the Union argues that the record filed, including Mr. Wilchuck's affidavit which was filed in response to the Union's summary dismissal application, does not disclose that the Union acted in an arbitrary or discriminatory manner, or in bad faith, in not filing a grievance on Mr. Wilchuck's behalf.

[18] The Union worked with Mr. Wilchuck to attempt to establish a basis for a grievance, particularly one whereby the Policy's testing requirement might be alleged to breach Mr. Wilchuck's human rights, but Mr. Wilchuck did not provide the Union with the information necessary to ground such a grievance. The Union's decision to proceed was not arbitrary, in that it was not flagrant, capricious, totally unreasonable or grossly negligent. It was not discriminatory or in bad faith either, in that it was not based on invidious distinctions or motivated by ill-will, malice, hostility or dishonesty. The Union simply held the view that there was no basis for a grievance on the information Mr. Wilchuck provided to it, and he refused to provide additional information.

[19] In the Union's view, Mr. Wilchuck's complaint is premised on the notion that the Union is required to file a grievance at his request, and this is not the law. Contrary to Mr. Wilchuck's belief, the Union is entitled to form its own opinion, separate from a member's, about whether to file a grievance. Further, it is entirely appropriate for the Union to consider the potential grievance's likelihood of success when determining whether to file it. The Union is entitled to significant latitude in determining whether to file a grievance, provided it does not act in an arbitrary or discriminatory manner, or in bad faith.

[20] Lastly, the Union notes that while Mr. Wilchuck's application lists s. 6-58 as being contravened, it does not allege an employee-union dispute falling within the parameters of that

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[6] *Soles*, at para 37.

section. The dispute is limited to the Union's conduct in its representational capacity; it is a duty of fair representation complaint, and s. 6-58 has no application.

Argument on behalf of Mr. Wilchuck:

[21] Mr. Wilchuck's arguments are contained in the affidavit and written argument he filed in response to the Union's summary judgment application.

[22] First, Mr. Wilchuck submits that his application contains few facts because as a self-represented litigant, he was not familiar with what was expected of him.

[23] Second, Mr. Wilchuck argues that the Union is required pursuant to s. 6-45 of the Act to exhaust any grievance process established by the collective agreement, and that filing a grievance is the most fundamental part of complying with the Union's duty of fair representation.[7] Relatedly, the Union's basing its decision on whether to file a grievance on its opinion, as opposed to the wishes of Mr. Wilchuck, is the "purest definition of 'arbitrary'".[8] In Mr. Wilchuck's view, the validity of his proposed grievance must be determined by an arbitrator. In his words, "it is not the Unions function to arbitrarily decide if my "wrongful dismissal complaint" is worthy or has merit, that is the job and responsibility of an "arbitrator", or an adjudicator."[9] The Union should have filed a grievance on Mr. Wilchuck's behalf before he was terminated, and certainly afterward.[10]

[24] Third, Mr. Wilchuck submits that all of the facts required for the Union to file and pursue a grievance on his behalf were outlined in the October 4th Letter.[11] The Union's request for him to provide further information to substantiate a human rights argument for exemption from the Policy was arbitrary, and a dereliction of its duty to proceed with a grievance based on the information already known to it, particularly via the October 4th Letter.

[25] In Mr. Wilchuck's view, the Union was trying to push him into a different forum which would not require its involvement. Mr. Wilchuck relies on the dissenting reasons of Major and LeBel JJ. in *Parry Sound*[12] for the proposition that a grievance arbitrator would not have jurisdiction over a matter grounded in *The Saskatchewan Human Rights Code, 2018*.[13]

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[7] Affidavit of Rodney Wilchuck, sworn May 8, 2023, para 9.
[8] Affidavit of Rodney Wilchuck, sworn May 8, 2023, para 10.
[9] Affidavit of Rodney Wilchuck, sworn May 8, 2023, para 11.
[10] Affidavit of Rodney Wilchuck, sworn May 8, 2023, para 12.
[11] Affidavit of Rodney Wilchuck, sworn May 8, 2023, para 12.1.
[12] *Parry Sound (District) Social Services Administration Board v OPSEU*, *Local 324*, 2003 SCC 42, [2003] 2 SCR 157 [*Parry Sound*], at para 108.
[13] *The Saskatchewan Human Rights Code, 2018*, SS 2018, c S-24.2.

[26] According to Mr. Wilchuck, the Union ought to have known, particularly based on the October 4th Letter, that requiring him to comply with the Policy was unlawful. He notes that he had sworn an affidavit purporting to invoke s. 64 of *The Public Health Act, 1994*, being the September 27th Affidavit, and that this precluded application of the Policy to him. For reference, s. 64 of *The Public Health Act, 1994* states:

> ***Conscientious objection to immunization***
>
> *64(1) A person who conscientiously believes that immunization or prophylaxis would be prejudicial to his or her health or to the health of his or her child or ward, or who for conscientious reasons objects to immunization or prophylaxis, may swear or affirm an affidavit to that effect before a justice of the peace, commissioner for oaths or notary public.*
>
> *(2) A person described in subsection (1) is excused from compliance with any regulation, bylaw or order pursuant to this Act that makes immunization mandatory if the person delivers personally or by registered mail to the local authority for the area in which the person resides a duly attested affidavit described in that subsection.*[14]

[27] Further, in Mr. Wilchuck's view, clause 3-83(1)(u) of the Act, which is one source of the Lieutenant Governor in Council's regulation-making authority under the Act, precluded the Regulations and the Policy from applying to those who did not choose to be vaccinated. For reference, clause 3-83(1)(u) states:

> ***3-83****(1) The Lieutenant Governor in Council may make regulations:*
>
> *…*
>
> *(u) respecting the provision of vaccinations against diseases associated with any occupation or category of occupations to any worker or worker in a category of workers who chooses to receive the vaccination;*

[28] Finally, Mr. Wilchuck argues that if the Union had at least tried to proceed with a grievance based on the information he had provided to it, the Employer may not have terminated him while the grievance was pending.

Relevant Statutory Provisions:

[29] The following provisions of the Act are relevant:

> ***6-58****(1) Every employee who is a member of a union has a right to the application of the principles of natural justice with respect to all disputes between the employee and the union that is his or her bargaining agent relating to:*

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[14] *The Public Health Act, 1994*, SS 1994, c P-37.1, s 64.

> *(a) matters in the constitution of the union;*
>
> *(b) the employee's membership in the union; or*
>
> *(c) the employee's discipline by the union.*
>
> *(2) A union shall not expel, suspend or impose a penalty on a member or refuse membership in the union to a person, or impose any penalty or make any special levy on a person as a condition of admission to membership in the union if:*
>
> *(a) in doing so the union acts in a discriminatory manner; or*
>
> *(b) the grounds the union proposes to act on are that the member or person has refused or failed to participate in activity prohibited by this Act.*
>
> *…*
>
> ***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.*
>
> *(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.*
>
> *. . .*
>
> ***6-111(1)*** *With respect to any matter before it, the board has the power:*
>
> *…*
>
> *(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or no arguable case;*
>
> *(q) to decide any matter before it without holding an oral hearing;*

Analysis and Decision:

[30] The Board has authority to summarily dismiss an application pursuant to s. 6-111(1)(p), and may do so without holding an oral hearing.[15]

[31] The Union applies to dismiss Mr. Wilchuck's application on the basis that it discloses no arguable case. The test for summary dismissal on this basis is summarized in *Roy*:

> *1. In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant is able to prove everything alleged in his/her claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.*

[15] *Saskatchewan Polytechnic Faculty Association v Chau Ha*, 2022 CanLII 75556 (SK LRB), at paras 21-23.

> *2. In making its determination, the Board may consider only the subject application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his/her claim.*[16]

[32] The strict application of *Roy* would limit the Board to only considering Mr. Wilchuck's application (which is very sparse) for the purposes of the Union's application.

[33] In *Rosom*, the Board concluded that it was appropriate to consider the employee's reply to the applicant's summary dismissal application as the equivalent of particulars, stating the following:

> ***[24]*** *In these proceedings, the application for summary dismissal operates in a manner that is comparable to (but not the same as) a request for particulars. The parties have had a further opportunity to file submissions. As such, there is no unfairness in considering the Employee's reasons as set out in his reply to the application. It is appropriate for the Board to exercise some flexibility in considering the submissions made by self-represented parties.*[17]

[34] The Board concludes that the reasoning in *Rosom* is apposite to the summary dismissal application before it. Accordingly, it will consider the affidavit Mr. Wilchuck filed in reply to the Union's application as akin to particulars with respect to his underlying application.

[35] The onus is on the Union to establish that Mr. Wilchuck's application, as particularized, has no reasonable chance of success. Insofar as Mr. Wilchuck has alleged material facts, they must be taken to be true. The Board is not required, however, to accept the legal conclusions Mr. Wilchuck suggests the facts warrant.

[36] It is convenient to deal with whether s. 6-58 applies to Mr. Wilchuck's application at the outset of the Board's analysis. The Union is correct that s. 6-58 is not engaged. Mr. Wilchuck's application does not allege a denial of procedural fairness in an internal dispute relating to matters in the constitution of the Union, including Mr. Wilchuck's membership in the Union or his discipline by it.[18] Mr. Wilchuck's complaint is with how the Union has conducted itself in its representational capacity, on his behalf.

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[16] *Roy v Workers United Canada Council*, 2015 CanLII 885 (SK LRB) [*Roy*], at para 8.
[17] *Canadian Union of Public Employees v Reuben Rosom*, 2022 CanLII 100088 (SK LRB) [*Rosom*], at para 24.
[18] See *McNairn v United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 179*, 2004 SKCA 57, at para 38, for a discussion of the purpose of the predecessor provision, s. 36.1(1) of *The Trade Union Act*.

[37] As identified by the Supreme Court in *Gagnon*, "the exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit."[19]

[38] This obligation is codified in s. 6-59 of the Act, 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.

[39] In *Ward*, the Board described the meaning to attribute to the terms "arbitrary", "discriminatory" and "in bad faith", in the context of s. 25.1 of *The Trade Union Act*:

> *Section 25.1 of The Trade Union Act obligates 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 favoritism. 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. So long as it does so, it will not violate section 25.1 by making an honest mistake or an error in judgment.*[20]

[40] The Board also routinely relies on the following descriptions established by the Ontario Labour Relations Board:

> *. . . a complainant must demonstrate that the union's actions are:*
>
> *(1) "ARBITRARY" – that is, flagrant, capricious, totally unreasonable, or grossly negligent;*
>
> *(2) "DISCRIMINATORY" – that is, based on invidious distinctions without reasonable justification or labour relations rationale; or*
>
> *(3) "in BAD FAITH" – that is, motivated by ill-will, malice, hostility or dishonesty.*[21]

[41] A refusal to file a grievance on behalf of a member does not necessarily equate to a union acting in an arbitrary, discriminatory or bad faith manner. A union is entitled to form its own opinion separate and apart from a member's about whether to file a grievance, provided it has turned its mind to the merits and made a reasoned judgment. The Board commented as follows, in *Klippenstein*:

> ***[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*

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[19] *Canadian Merchant Service Guild v Gagnon et al*., 1984 CanLII 18 (SCC), [1984] 1 SCR 509 [*Gagnon*], at p 527.
[20] *Glynna Ward v Saskatchewan Union of Nurses*, [1988] Winter Sask Labour Rep 44 [*Ward*], at p 47.
[21] *Tammy Kurtenbach v Canadian Union of Public Employees,* 2019 CanLII 10586 (SK LRB), at para 16.

> *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.*[22]

[42] The Board will proceed to apply the foregoing principles to the Union's application.

[43] Mr. Wilchuck's application is based on two underlying premises. First, that the Union could not rely on its own assessment of the viability of a potential grievance, and was required to proceed with a grievance at his insistence. Second, that the information Mr. Wilchuck provided to the Union, including the September 27th Affidavit and the October 4th Letter, established the unlawfulness of the Policy, and could support a viable grievance.

[44] With respect to the first premise – that the Union was required to file a grievance at Mr. Wilchuck's insistence – this is simply not the law. The Union was required to turn its mind to the merits of his proposed grievance, and to make a reasoned judgment with respect to it. Contrary to Mr. Wilchuck's assertion, s. 6-45 of the Act does not require the Union to file a grievance at a member's insistence. Rather, s. 6-45 establishes that an arbitrator or arbitration board has exclusive jurisdiction to adjudicate all disputes respecting a collective agreement's meaning, application or alleged contravention, including a question as to whether a matter is arbitrable. In other words, *if* such a dispute is to be litigated, it is to be litigated before a grievance arbitrator or arbitration board.

[45] Subsection 6-59(2) of the Act confirms that a union is not obliged to file a grievance solely because it has been asked to do so: "…a union shall not act in a manner that is arbitrary, discriminatory or in bad faith <u>in considering whether to represent</u> or in representing an employee or former employee" (emphasis added).[23] A reasonable decision to not file a grievance can accord with the duty of fair representation.

[46] The reasoning with respect to the September 27th Affidavit and the October 4th Letter – and more particularly, whether the Union could be viewed as acting arbitrarily, discriminatorily or in bad faith by not filing a grievance based on this reasoning - requires some examination.

[47] The Board will examine the September 27th Affidavit first.

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[22] *Canadian Union of Public Employees v Allan Klippenstein*, 2022 CanLII 44759 (SK LRB) [*Klippenstein*], at para 43.
[23] Act, s 6-59(2).

[48] The September 27th Affidavit purports to be in accordance with s. 64 of *The Public Health Act, 1994*. Under s. 64, an individual may swear an affidavit to be excused from compliance with any regulation, bylaw or order pursuant to *The Public Health Act, 1994* that makes immunization mandatory.

[49] Neither the September 27th Affidavit nor s. 64 of *The Public Health Act, 1994* provided a legal basis for Mr. Wilchuck to refuse to comply with Policy's requirement that he provide proof of negative testing. The first reason is that s. 64 only applies to excuse compliance with mandatory immunization, not proof of negative testing. The second reason is that it only applies to mandatory measures under *The Public Health Act, 1994*, not measures enacted pursuant to other enactments, such as the Regulations.

[50] The September 27th Affidavit provided no excuse, absent anything further, for not complying with the Policy.

[51] Based on Mr. Wilchuck's references in the September 27th Affidavit to "The Christ Jesus and God of The Bible", it was reasonable for the Union to ask Mr. Wilchuck to consult his faith leaders and to provide evidence or information which might support a human rights-based grievance, in spite of his incredulity at this suggestion and his associated failure to provide the requested information. Contrary to Mr. Wilchuck's contention, which relies on the dissent in *Parry Sound*, the substantive rights and obligations in *The Saskatchewan Human Rights Code, 2018* are incorporated into every collective agreement, and are therefore arbitrable by a grievance arbitrator or arbitration board.[24] In *Livingston*, the Saskatchewan Court of Appeal recently confirmed:

> *[11] Human rights legislation and the base protections provided by employment standards legislation are incorporated into all collective bargaining agreements: Parry Sound (District) Social Services Administration Board v O.P.S.E.U., Local 324, 2003 SCC 42, [2003] 2 SCR 157. …*[25]

[24] *Northern Regional Health Authority v Horrocks*, 2021 SCC 42, at para 13.
[25] *Livingston v Saskatchewan Human Rights Commission*, 2022 SKCA 127 [*Livingston*], at para 21.

[52] Similar to the September 27th Affidavit, the October 4th Letter did not establish that the Policy was unlawful, or otherwise support a viable grievance.

[53] As outlined earlier in these reasons, the Regulations were enacted by the Lieutenant Governor in Council pursuant to authority in s. 3-83 of the Act. The Regulations prescribed the conduct necessary for the Employer and Mr. Wilchuck to comply with their statutory duties under clauses 3-8(a) and 3-10(a) of the Act. The Policy was the result of the Employer complying with its mandated legal obligations.

[54] As described above, though referenced in the October 4th Letter, s. 64 of *The Public Health Act* could not provide a lawful excuse for failing to comply with the Regulations, or the Policy.

[55] The October 4th Letter's suggestion that the Regulations did not compel the Employer to require proof of negative testing in the absence of vaccination is simply wrong, and contrary to the clear wording of the Regulations, particularly ss. 4(1) and (1.1).

[56] While not referenced in the October 4th Letter, Mr. Wilchuck's argument that the Regulations could not apply to those unwilling to be vaccinated due to clause 3-83(1)(u) is also ill-conceived.

[57] As described earlier in these reasons, the authority to enact the Regulations was not clause 3-83(1)(u) of the Act. Rather, the Lieutenant Governor in Council's authority to enact the Regulations was found in one or more of clauses 3-83(1)(a), (d), (q) or (ss). And to be clear, the Regulations (and the Policy) did not require Mr. Wilchuck, or anyone, to be immunized. In the absence of immunization, however, they did require proof of negative testing.

[58] Mr. Wilchuck's assertion to the Employer in the October 4th Letter that it was not following the law was premised on his erroneous interpretation of the law. It certainly was not unreasonable for the Union to refuse to file a grievance based on this interpretation.

[59] Mr. Wilchuck's submission that the Employer may not have terminated him if the Union had filed a grievance on his behalf prior to his termination is speculative. Further, the issue before the Board is whether the Union's conduct in not filing a grievance can be characterized as arbitrary, discriminatory or in bad faith, not to hypothesize regarding what might have occurred had the Union conducted itself differently.

[60] In the Board's view, the Union's conduct, as pled and particularized by Mr. Wilchuck, cannot be characterized as arbitrary, discriminatory or in bad faith.

[61] It was not unreasonable to not file a grievance based on the information available to the Union and supplied by Mr. Wilchuck, including the September 27th Affidavit and the October 4th Letter.

[62] The Union's request for Mr. Wilchuck to provide further information for it to consider pursuing a human rights-based grievance was reasonable. When Mr. Wilchuck refused to engage in this regard, the Union was able to reasonably rely on its assessment that a grievance could not succeed.

[63] The result of these reasons is that the Union's application is granted, and Mr. Wilchuck's application is summarily dismissed.

[64] An appropriate order will issue.

DATED at Regina, Saskatchewan, this **13th** day of **June, 2023.**

LABOUR RELATIONS BOARD

Michael J. Morris, K.C.
Chairperson