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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

KYLE DU VAL, EVAN MALTMAN AND RENISE MLODZINSKI,	)	Kyle Du Val
	)	acting on his own behalf
	)	
applicants,	)	Evan Maltman
	)	acting on his own behalf
-and-	)	
	)	Renise Mlodzinski
	)	acting on her own behalf
	)	
MANITOBA LABOUR BOARD AND UNIVERSITY OF WINNIPEG FACULTY ASSOCIATION,	)	Tamara D. Edkins
	)	for the respondent,
	)	Manitoba Labour Board
respondents.	)	
	)	Shannon L. Carson
	)	for the respondent,
	)	University of Winnipeg Faculty
	)	Association
	)	
	)	Judgment Delivered:
	)	April 25, 2024

BOCK J.

INTRODUCTION

[1] This is an application for judicial review of three decisions made by the Manitoba Labour Board (the "Board").

[2] The applicants were teachers at the University of Winnipeg Collegiate (the "Collegiate"), an independent high school located on the campus of the University of Winnipeg (the "UW"). They were also members of their union, the University of Winnipeg Faculty Association (the "UWFA"). The UWFA and the UW were parties to a collective agreement governing the terms of the applicants' employment.

[3] The dispute between the applicants and the UWFA arose out of the COVID-19 pandemic. Effective September 7, 2021, the Collegiate had returned to in-person attendance for all students. The UW required all staff, including the applicants, to be fully vaccinated against COVID-19 to access the campus. Because none of the applicants provided proof of vaccination against COVID-19, the UW placed all three on unpaid leaves of absence effective September 7, 2021.

[4] The applicants implored the UWFA to grieve the UW's decision to place them on unpaid leaves of absence. The UWFA ultimately decided not to initiate a grievance. That decision led each applicant to make a substantially similar complaint to the Board in January 2022, alleging the UWFA had failed in its duty of fair representation.

[5] In July 2022 the Board dismissed the applicants' complaints. Each applicant requested that the Board review its decision. In December 2022, following that review, the Board again dismissed the applicants' complaints.

[6] Each applicant filed an application for judicial review. Because the applications were based on the same facts and occurrences and raised common questions of law, I granted an order that they be consolidated.

[7] The object on this application is to review the Board's decision for error. As I will discuss, the Board's decision stands to be reviewed on a standard of reasonableness and it meets that standard. Therefore, the applicants' application is dismissed.

BACKGROUND

[8] The COVID-19 pandemic forced the UW, including the Collegiate, to resort to remote learning for parts of the 2019-2020 and 2020-2021 academic years. In July 2021, Dr. James Currie, the UW's interim president and vice chancellor, announced to faculty and staff its plans for a gradual return to in-person learning in the 2021-2022 academic year. Further details would follow, Dr. Currie said.

[9] On August 19, 2021, the UW, concerned about a potential fourth wave of COVID-19, issued an email informing staff that for the coming academic year it would require all employees to provide proof of vaccination against COVID-19 to attend the campus in person. The email did raise the possibility that unvaccinated employees would either be permitted access to the campus upon "proof of negative COVID-19 test" or to work remotely "if feasible", but by August 31, 2021, the UW had informed its staff that rapid testing in lieu of vaccination would not be available due to "logistical issues". Instead, anyone seeking a human rights or medical exemption from vaccination was directed to the UW's Human Rights and Diversity Officer.

[10] When the UW released its "COVID-19 Plan" on September 3, 2021, it included a vaccine mandate requiring proof of vaccination to attend campus in person. Soon thereafter, the UW issued a formal policy, the "Mandatory COVID-19 Vaccination Policy",

which imposed the same vaccination requirement on anyone, including staff, coming into indoor campus spaces.

[11] In the meantime, on August 5, 2021 Manitoba's Minister of Education released the province's "Safe Return to Schools Plan" for the 2021 academic year, which called for all staff and students in kindergarten to grade 12 schools (which included the Collegiate) to return to in-person learning on September 7, 2021. To that end, on August 24, 2021, the province announced that public health orders would soon be issued requiring "designated workers" (a classification which included schoolteachers like the applicants) to be vaccinated by October 31, 2021, or to undergo regular COVID-19 testing. One month later, on September 24, 2021, the Chief Provincial Public Health Officer did issue the "Orders Requiring Vaccination or Testing for Designated Persons" (the "Public Health Order"). The Public Health Order applied to the applicants and operated to prohibit their in-person attendance on campus unless they were vaccinated against COVID-19 or complied with rapid antigen testing requirements. The Public Health Order remained in force until February 28, 2022.

[12] The release of the UW's COVID-19 Plan on September 3, 2021, led each applicant to send an email to the UW's senior labour relations officer objecting to the vaccine mandate. The applicants asserted that under ***The Public Health Act***, C.C.S.M. c. P210, they could not be compelled to be vaccinated against COVID-19. In her reply on September 6, 2021, the UW's senior labour relations officer acknowledged that while the UW could not compel its staff to be vaccinated, it did have the right to restrict campus access to people who had been fully vaccinated against COVID-19. She also warned the

applicants they would be placed on unpaid leaves of absence effective September 7, 2021, unless they presented "a verified medical or human-rights based" exemption to the vaccine mandate.

[13] The applicants disputed the position taken by the UW. On September 6, 2021, they each sent an email to the Executive Director of the UWFA with a request that the "union represent me going forward in grievance proceedings". The Executive Director responded by e-mail on September 7, 2021. She said, in part, that the "University is within its rights to issue a vaccine mandate. What is not clear is whether or not the Employer [i.e., the UW] has an obligation to provide an alternative such as rapid testing." For the time being, the Executive Director advised the applicants to "follow your Employer's instructions and to not attend on campus". She also invited them to let her know if they were objecting to the vaccine mandate based on medical or human rights grounds.

[14] On September 7, 2021, each applicant was placed on an unpaid leave of absence, and they remained on unpaid leave until May 2, 2022, when the UW lifted its COVID-19 vaccine policy.

[15] The UWFA obtained a legal opinion on September 9, 2021, advising against a grievance. The opinion noted that the Public Health Order, already announced and soon to be put into effect, would require all Collegiate staff to submit to vaccination or rapid testing in any event. Given that, the UWFA's counsel advised, if the UW's vaccine mandate were modified to include a rapid testing alternative, it would likely be found to be a reasonable exercise of the UW's management rights under the collective agreement.

In other words, provided the UW's vaccine mandate aligned with the Public Health Order by including a rapid testing alternative, a grievance was unlikely to succeed. As a next step, the UWFA's counsel suggested the UWFA might inquire of the applicants whether they would be willing to submit to mandatory testing, presumably on the assumption that the UW could be prevailed upon to modify its vaccine mandate to include a rapid testing alternative if that would accommodate the applicants' concerns about vaccination.

[16] On September 13, 2021, the UWFA asked the applicants whether they were seeking accommodations based on "medical status or protected grounds under the Human Rights Code". The UWFA also asked the applicants to provide reasons if they were "unwilling to participate in mandatory testing" so it could "properly respond to [their] concerns". In response, each applicant declined to address the "issues of Human Rights, vaccine mandate, or accommodation" until a grievance in respect of their unpaid leaves of absence had been filed.

[17] A meeting between representatives of the UWFA and the applicants on September 14, 2021, failed to resolve matters. By this point the parties had effectively staked out their respective positions. The applicants contended that the UWFA was duty-bound to file a grievance on their behalf with respect to the UW's decision to place them on unpaid, rather than paid, leaves of absence for failing to comply with the vaccine mandate. For its part, the UWFA held fast to its position that a grievance was inadvisable given its conclusion, supported by a legal opinion, that the UW's implementation and enforcement of the vaccine mandate was a valid exercise of management rights under the collective agreement.

[18] The UW's vaccine policy was lifted on May 2, 2022, and all three applicants returned to work. They have not been compensated for their unpaid leave from September 7, 2021 to May 2, 2022.

PROCEDURAL HISTORY

[19] On January 17, 2022, each applicant filed an application with the Board under s. 20 of ***The Labour Relations Act***, C.C.S.M. c. L10 (the "***Act***"), alleging the UWFA had breached its duty of fair representation by failing to initiate a grievance. The UWFA and the UW both filed replies requesting the applications be dismissed for failing to disclose a *prima facie* breach of the ***Act***, to which the applicants filed responses. The Board dismissed the applications without an oral hearing on July 27, 2022 (in the case of Mr. Du Val) and July 28, 2022 (in the cases of Mr. Maltman and Ms. Mlodzinski). It is these three decisions which are the subject of the applicants' application for judicial review.

[20] On August 30, 2022, each applicant filed a request that the Board review its decision pursuant to s. 143(3) of the ***Act*** and s. 17 of the ***Manitoba Labour Board Rules of Procedure***, M.R. 184/87 R (the "***Rules***"). In due course the UWFA filed a reply that the requests for review be dismissed, to which the applicants filed responses. The UWFA objected to the applicants' responses on the grounds that they were unresponsive to the facts and information raised in the replies, and impermissibly raised new allegations and arguments. The Board upheld the UWFA's objections and exercised its discretion under s. 22(5) of the ***Rules*** to exclude the applicants' responses. On

December 23, 2022, the Board dismissed the applicants' requests for review and upheld its original decisions.

THE BOARD'S DECISIONS

[21] The Board's decisions in respect of each applicant's application are substantially similar to one another. What follows is a brief summary of the Board's decision in respect of Mr. Du Val's application (Dismissal No. 2469), but it applies equally to the Board's decisions in respect of Mr. Maltman's application (Dismissal No. 2472) and Ms. Mlodzinski's application (Dismissal No. 2473).

[22] The Board's decision, comprising four sections, is lengthy and detailed. In Section I, "Introduction", the Board gives a brief chronology of the steps taken by the parties from January 17, 2022, when Mr. Du Val filed his application, to July 28, 2022, when the Board issued reasons dismissing his application.

[23] Section II, "Background", lays out in comprehensive detail the facts and evidence led by the parties. It also describes the parties' positions on the evidence.

[24] Section III, "The Duty of Fair Representation", contains the Board's analysis and discussion of s. 20 of the ***Act***. Among other things, the Board instructs itself on the meaning of "arbitrary", "discriminatory" and "bad faith" as used in s. 20, relying on ***J.H.B. v. Canadian Union of Public Employees*** (2009), 164 C.L.R.B.R. (2d) 182. It considers whether and to what extent acting on legal advice provides a defence to an allegation of unfair representation. The Board takes into account its own history with respect to COVID-19 vaccination policies and the duty of fair representation under

s. 20, referring to its recent decision in ***M.T. v. Winnipeg Policy Association***, 2022 CanLII 39600 (MB LB).

[25] In Section III the Board also takes note of its statutory authority "at any time [to] decline to take further action on the complaint" (s. 30(3)(c) of the ***Act***), and to dismiss a complaint summarily, without an oral hearing, where a "complaint is without merit or beyond the jurisdiction of the board" (s. 140(8) of the ***Act***).

[26] Section IV, "Analysis", contains the Board's findings and conclusions. The Board's key conclusions, and the rationale for each, may be summarized:

(a) Mr. Du Val's "primary complaint" was that the UWFA ought to have acted more quickly at the time he was placed on unpaid leave, should have grieved the UW's vaccine mandate promptly when it was announced, and should have grieved the UW's lack of reasonable accommodation process (para. 83);

(b) to the extent that Mr. Du Val disagreed with or sought to challenge the UW's vaccine policy, a complaint under s. 20 of the ***Act*** was not the right forum, citing ***Tina Di Tommaso v. Ontario Secondary School Teachers' Federation***, 2021 CanLII 132009 (ON LRB): "a duty of fair representation application … is not the forum for debating or complaining about vaccination in general, this vaccine in particular, scientific studies, the government's directions, and/or a particular employer's policy" (para. 82);

(c) Mr. Du Val's mere assertion of bad faith by the UWFA was insufficient to justify his complaint of unfair representation. The UWFA's decision not to

file a grievance was not, in itself, proof of bad faith within the meaning of s. 20 of the ***Act*** (para. 84);

(d) the UWFA's decision was not arbitrary because, in response to Mr. Du Val's stated concerns about the COVID-19 vaccine mandate, the UWFA had obtained a legal opinion which supported the UW's right to implement and enforce such a mandate. The UWFA informed Mr. Du Val of the opinion, continued to communicate with him on his best course of action, and considered and responded to his concerns with respect to accommodation (para. 85);

(e) the UWFA's decision was not discriminatory merely because the UWFA supported a COVID-19 vaccine mandate and Mr. Du Val did not. The Board acknowledged the UWFA's support for a vaccine mandate (a position which had received overwhelming support of its membership in a vote taken in August 2021) stood in opposition to Mr. Du Val, but noted such differences of opinion do not, in and of themselves, constitute proof of discriminatory conduct. The Board also noted that the UWFA's decision not to file a grievance could be justified in light of a bargaining agent's obligation to balance the competing interests of its members. As regards the UWFA's decision not to initiate a grievance in respect of Mr. Du Val's concerns over the UW's duty to accommodate, the Board found the UW's decision could be explained by Mr. Du Val's own failure to cooperate (paras. 86 to 87); and

(f) the Board concluded that the material facts alleged by Mr. Du Val had failed to establish a *prima facie* violation of s. 20 of the ***Act***. The Board was unable to conclude on the basis of the written material filed by the parties that the UWFA had engaged in conduct that could be characterized as arbitrary, discriminatory or in bad faith. As such, there was no need for an oral hearing, and the application was dismissed (paras. 9 and 89).

THE STANDARD OF REVIEW

[27] The Board's decision must be reviewed, not relitigated, for error.

[28] The applicable standard of review is determined by reference to ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65 (CanLII), [2019] 4 S.C.R. 653. When reviewing the merits of an administrative decision the court "starts with a presumption that reasonableness is the applicable standard " (para. 16). The presumption can be rebutted where the legislature indicates a different standard is to apply, or "where the rule of law requires that the standard of correctness be applied" (para. 17).

[29] In this case, I find the presumption of reasonableness is not rebutted, despite the applicants' submissions to the contrary.

[30] The applicants argue the legislature has indicated a standard of review for correctness because s. 143(6) of the ***Act*** provides for a right of judicial review where the Board "failed to observe a principle of natural justice". I disagree. Rather, I find s. 143 reinforces the presumption of reasonableness review, by giving the Board exclusive jurisdiction to determine all questions of fact or law (s. 143(1)), and by circumscribing

the scope of judicial review of a Board decision through a strong privative clause (s. 143(6)). Applying reasonableness review to decisions of the Board is also consistent with long precedent in Manitoba. (See, for example, ***Rowel v. Hotel and Restaurant Employees and Bartenders Union, Local 206 et al.***, 2003 MBCA 157 (CanLII), para. 14.)

[31] The applicants argue in the alternative that the rule of law requires the application of the correctness standard, because this "dispute involves a question of law of central importance to the legal system as a whole – specifically, how labour law and unions have managed to handle and decide what the appropriate response to COVID-19 is, particularly with respect to vaccine mandates" (Applicants' Brief, para. 81). This argument cannot be sustained in light of the majority's emphasis in ***Vavilov*** that "the mere fact that a dispute is 'of wider public concern' is not sufficient for a question to fall into this category" (para. 61). For instance, in ***Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.***, 2013 SCC 34 (CanLII), [2013] 2 S.C.R. 458, reasonableness review was applied to a labour arbitrator's decision about "whether management's exercise of its unilateral rule-making power can be justified under a collective agreement" (para. 66). While the outcome of the parties' dispute might ultimately be of wider public concern, observed Justice Abella for the majority, it has "little *legal* consequence outside the sphere of labour law and that, not its potential real-world consequences, determines the applicable standard of review" (emphasis in the original) (para. 66). The same observation applies here, to the same effect: this dispute

has little legal consequence outside the realm of labour law, and the presumption of reasonableness review is therefore not rebutted.

[32] Accordingly, the Board's decision stands to be reviewed on a standard of reasonableness.

DISCUSSION AND DISPOSITION

[33] I now turn to consider whether the Board's decisions were reasonable.

[34] Two types of flaws can render a decision unreasonable: first, "a failure of rationality internal to the reasoning process"; second, "when a decision is in some respect untenable in light of the relevant factual and legal restraints that should bear on it" (***Vavilov***, para. 101).

[35] I find the Board's decisions contain neither of these flaws. The Board concluded that the applicants' written submissions had failed to demonstrate arbitrary, discriminatory or bad faith conduct by the UWFA within the meaning of s. 20 of the ***Act***. The Board justified its decisions by a clear and logical line of reasoning which carefully linked the findings and conclusions contained in Section IV of each decision to the facts and evidence set forth in Section II and the legal principles discussed in Section III. In short, there is no failure of rationality internal to the Board's reasoning process, nor is there a failure by the Board to respect the relevant factual and legal restraints that bear on it.

[36] The applicants submit the Board erred in its decision not to hold an oral hearing after receiving the parties' written submissions, which they characterize as a denial of natural justice. I cannot accept this argument, because it fails to take into account the

Board's statutory authority under the ***Act*** and the ***Rules*** to proceed as it did, without an oral hearing. Moreover, as the UWFA noted in its submission, Manitoba courts have repeatedly recognized the Board's authority to dispense with an oral hearing. (See: ***Tucker v. Sheet Metal Worker's International Association Local 511***, 1999 CanLII 4698 (MB CA); ***Rhodes v. United Food and Commercial Workers International Union, Local 330W***, 1999 CanLII 14121 (MB KB), and ***Rowel***).

[37] The applicants argue the Board "erred in its duty to consider all of the relevant evidence before it" (Applicants' Brief, para. 109) by failing to consider that the UWFA "continuously during this matter only looked at specific pieces of evidence while ignoring relevant details as brought forth by the Applicants" (Applicants' Brief, para. 113). Those "relevant details" are reviewed at length in paragraphs 114 to 136 of their brief.

[38] It is apparent to me that the Board neither ignored nor misapprehended the evidence before it in arriving at its decisions. The real thrust of the applicants' argument is that if the evidence is reweighed and reassessed as they suggest, it leads inescapably to the conclusion that the UWFA failed them in its duty of fair representation. But such an approach is not permitted on a review for reasonableness, a point which ***Vavilov*** expresses in these terms (para. 125):

> (d) *Evidence Before the Decision Maker*
>
> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, para. 55 [*Canada (Canadian Human Rights Commission*) *v. Canada (Attorney General),* 2011 SCC 53, para. 55]; …

[39] The applicants' argument with respect to the UWFA's alleged bias against them and in favour of COVID-19 vaccine mandates fails for the same reason, based as it is on the Board's supposed failure "to appropriately assess the evidence" (Applicants' Brief, para. 164). The Board assessed the evidence and found no bias on the part of the UWFA. The applicants have not identified any "exceptional circumstances" which would justify interference with that finding.

[40] The applicants also contend the Board erred by failing "to acknowledge" that being placed on an unpaid leave of absence from September 7, 2021 to May 2, 2022 constituted their "constructive dismissal" (Applicants' Brief, para. 111). There is no merit in this position because the applicants did not allege in their original applications to the Board that they had been constructively dismissed, nor did they argue that point before the Board. The reasonableness of the Board's decisions cannot be assailed for failing to take into account allegations and arguments that the applicants did not make before the Board.

[41] Finally, the applicants argue the Board erred by not admitting the responses filed by them on their request for review. I find this argument to be without merit, too. The Board's rationale for excluding the applicants' responses is well reasoned and reasonable. Section 22(5) of the ***Rules*** provides, in relevant part, that "the board may permit the applicant to respond to any facts or information raised in the reply that were not raised in the original application". The Board concluded the responses filed by the applicants did not respond to new facts or information raised in the reply, and on that basis quite reasonably decided to exclude them.

UWFA's Motion to Strike for Mootness

[42] The UWFA filed a motion to strike the applicants' application for mootness. The motion was heard concurrently with the application. I will address it summarily.

[43] Had the applicants' motion dealt only with the UWFA's decision not to grieve the COVID-19 vaccine mandate, I would be inclined to give it serious consideration, given the fact that the UW's COVID-19 vaccine mandate and subsequent Covid-19 vaccine policy were terminated almost two years ago. A grievance in respect of the policy would arguably serve no purpose. But the same cannot be said for the UWFA's decision not to grieve the applicants' placement on unpaid leaves of absence. In theory, a successful outcome of that dispute in favour of the applicants could lead to a monetary award in their favour in respect of unpaid salary for the period September 7, 2021 to May 2, 2022.

[44] The UWFA's motion is therefore dismissed

Conclusion

[45] The Board's decisions are reasonable. They contain a careful review of the evidence before it, a thoughtful discussion of the applicable legal principles and appropriate consideration of each party's submissions. The Board's decisions to dismiss each application without an oral hearing are based on an internally coherent line of reasoning and are justified by the legal and factual constraints that bear on them.

[46] The applicants' application is therefore dismissed. The parties may arrange to make further submissions to me with respect to costs if they find themselves unable to agree.

_____J.