Manitoba

Manitoba Labour Board
Suite 500, 5th Floor - 175 Hargrave Street Winnipeg, Manitoba, Canada R3C 3R8
T 204 945-2089 F 204 945-1296
www.manitoba.ca/labour/labbrd
MLBRegistrar@gov.mb.ca

DISMISSAL NO. 2428
Case No. 190/21/LRA

IN THE MATTER OF: ***THE LABOUR RELATIONS ACT***

- and -

IN THE MATTER OF: An Application by

Anna Loewen,

Applicant,

- and -

River East Transcona Educational Assistant Association (RETEA Association),

Respondent,

- and -

RIVER EAST TRANSCONA SCHOOL DIVISION,

Employer.

BEFORE: C.S. Robinson, Chairperson

SUBSTANTIVE ORDER

A. Procedural History

1. On December 8, 2021, the Applicant filed an Application with the Manitoba Labour Board (the "Board") seeking a remedy for an alleged unfair labour practice contrary to section 20 of *The Labour Relations Act* (the "*Act*").

2. On December 23, 2021, following an extension of time, the Respondent, through counsel, filed its Reply submitting that there are no facts pleaded which, if proven, would result in a finding that it acted contrary to section 20 of the *Act*. As a result, the Respondent submitted that the Application does not establish a *prima facie* case and requested that it be dismissed without a hearing.

3. On December 23, 2021, following an extension of time, the Employer, through counsel, filed its Reply requesting that the Application be dismissed without a hearing pursuant to section 30(3)(c) of the *Act* and Rule 5(5) of the *Manitoba Labour Board Rules of Procedure*.

4. The Applicant did not file a Response to the Replies.

5. The Board is satisfied that this matter may be determined on the basis of the material filed and that a hearing is not necessary.

B. Facts

6. The essential background related to this matter is clearly set out in the written material filed by the parties with the Board. Many of the critical facts appear in the attachments to that material. The written material does not disclose any substantial disagreement between the Applicant and the Respondent on the material, relevant facts.

7. The Respondent is the bargaining agent for nearly five hundred Educational Assistants working in the River East Transcona School Division. At the material time, the President of the Respondent was Shelley Kile. Ms. Kile was responsible for facilitating the Respondent's representation of the Applicant.

8. The Applicant commenced employment on or about September 7, 2021 with the Employer as a Youth Care Worker in the classification of Educational Assistant Level 2 working at Chief Peguis Middle School.

9. As shall be discussed below, following the issuance of warnings and later a suspension, the Applicant was dismissed by the Employer on November 15, 2021. The Employer indicated the dismissal was for "wilful disobedience, dereliction of duty, and insubordination as you continue to refuse to follow the direction of your Principal and Superintendent" with respect to complying with Public Health Orders implemented by the Province of Manitoba in response to the COVID-19 pandemic.

10. The Employer is one of the largest school divisions in the Province, educating over 16,000 students in its forty-two schools.

11. The terms and conditions of employment for employees represented by the Respondent are set out in a collective agreement entered into between the Respondent and the Employer. On or about November 16, 2021, a renewal collective agreement for the term January 1, 2019 to December 31, 2022 was ratified

by the Respondent's members. According to the Respondent, there are no language changes in the 2019-2022 Collective Agreement that have any impact on the issues in this proceeding.

12. On August 24, 2021, Manitoba Public Health announced that Public Health Orders would be issued requiring mandatory testing for all designated persons in sectors deemed "high risk", based on the degree of contact between such persons in these sectors and vulnerable populations. Public education was identified by Manitoba Public Health as a high risk sector given vaccine eligibility and uptake rates among pupils.

13. On September 9, 2021, a letter was sent to all Division staff from Superintendent/CEO Kelly Barkman regarding the operationalization of anticipated Public Health Orders with respect to proof of vaccination and mandatory COVID-19 testing. The Division advised staff that pursuant to upcoming Public Health Orders, all staff had the option of providing proof of full vaccination or undertaking mandatory COVID-19 testing. The letter further advised that these measures were established as required by Public Health Orders and, therefore, no exemptions, exceptions, or accommodations would be permitted. As Superintendent Barkman indicated in this letter, the Employer is "committed to supporting Manitoba Public Health in their endeavors to keep the schools, students, staff members and communities safe from the threat of COVID-19" which included "establishing policies on vaccination and/or testing for all staff that comply with Public Health directives and orders".

14. Neither the Public Health Orders nor the Employer's policy require COVID-19 vaccination as a condition of employment. Employees who elected not to provide proof of vaccination or not to be vaccinated were provided with the option of providing proof of a negative COVID-19 test taken within 48 hours of the start of their shift. As such, on September 9, 2021, the Employer also published and circulated guidelines respecting the COVID-19 testing process for unvaccinated employees.

15. On September 24, 2021, the Chief Provincial Public Health Officer issued Minister-approved Orders under section 67(2)(d.1) of *The Public Health Act*, C.C.S.M. c. P210. The Orders required all "designated persons to send proof of double vaccination status or comply with prescribed testing requirements. The effective date of the Orders was October 18, 2021. However, the Province of Manitoba directed all School Divisions to operationalize required procedures at the earliest possible time to ensure that they were prepared to place timely orders for testing kits.

16. Under the said Orders, a "designated person" includes:

> **School personnel:** Persons who have direct and ongoing or prolonged contact with pupils at a public or independent school. For certainty, this includes teachers, educational support staff, school administration staff, custodial staff, bus drivers, practicum students as well as persons volunteering at a school who have direct and ongoing or prolonged contact with pupils.

17. In its Reply, the Employer noted that it implemented the above Vaccination and Testing policy in compliance with the Public Health Orders. The Vaccination and Testing policy required all staff to provide proof of vaccination, and for those who did not provide proof of vaccination, to provide proof of a recent (within 48 hours) negative COVID-19 test before the start of their shift.

18. Testing kits were provided to the employees by the Employer at no cost to the employees.

19. On September 27, 2021, the Applicant wrote to the HR Director indicating that she was uncomfortable sharing her personal health information as she "was never asked for consent" and asked that the individual who authorized the request contact her, if possible, within fourteen days. By email dated October 5, 2021, the HR Director responded to the Employee indicating that proof of vaccination status or proof of a negative test was permitted by the legislation, as collection of such personal medical information was mandated by the September 24, 2021 Public Health Order. The HR Director further advised the Applicant that the Superintendent authorized the Vaccination and Testing policy in the letter to employees dated September 9, 2021. The Applicant was reminded that it was ultimately her choice as to whether to provide the required information; however, if she failed to do so, the Public Health Order required that she not be allowed to enter the Employer's facilities.

20. On September 28, 2021, the Employer's Director of Human Resources (the "HR Director") sent an email to all employees who had not yet provided proof of full vaccination and attached the September 9, 2021 testing guidelines. She further advised employees that testing operations would begin on October 6, 2021.

21. As noted above, the Employer required all employees to provide proof of vaccination on or before October 4, 2021, failing which they would be provided with testing kits, with testing to commence on October 6, 2021. Those employees required to test had to submit proof of their first negative test on or before October 8, 2021.

22. On October 8, 2021, the Employer issued a document titled "Collection of Proof of Vaccination and Mandatory COVID-19 Testing – Information Update" which set out

details regarding the Employer's policy. Written in a question and answer format, the comprehensive document set out twenty-eight frequently asked questions and responses thereto.

23. The Applicant did not comply with the Employer's direction by the deadline of October 8, 2021, as she failed to provide proof of vaccination or proof of a negative test. Accordingly, as of that date, she was not in compliance with the Vaccination and Testing policy established by the Employer in response to the Public Health Order. In response to that failure, a discussion took place involving the Applicant, Ms. Kile, the HR Director, and the school Principal. During the call, the Employer requested a meeting with the Applicant, scheduled for October 15, 2021, in order to give her time to discuss the Vaccination and Testing policy with her doctor. The Employer also extended the deadline for the Applicant to comply until October 14, 2021. Following the telephone call on October 8, 2021, the HR Director wrote a detailed email to the Applicant in response to her questions and concerns.

24. By October 14, 2021, the Applicant had not complied with the Employer's policy. Accordingly, on October 15, 2021, another meeting was conducted involving the Applicant, Ms. Kile, the HR Director, the school Principal, and the school Vice-Principal to discuss the Applicant's concerns with respect to the Vaccination and Testing policy. Again, the Applicant refused to comply and advised that she would be taking her concerns to a "higher authority".

25. Following the meeting, the HR Director sent an email to the Applicant (copied to Ms. Kile and the other attendees) the subject of which is "Verbal Warning – Summary of Conversation". In the email the HR Director stated:

> The purpose of this email is to provide you with a written record of our meeting of October 15, 2021... Below, the notes from our conversation:
>
> - Last time we spoke, you had concerns about complying with the Divisions' requirements for proof of vaccination / testing and had discussed possibly getting some medical advice. I asked if you had had a chance to do so.
>
> - You shared that you were planning to take it to a higher authority.
>
> - I shared that at this point, we have no choice but to issue a **verbal warning**:
>
> - First, it's important to understand that, because the requirements are based on guidance issued by Manitoba Education on September 2, 2021, combined with the <u>Public Health Order issued on</u>

September 24, 2021, such requirements are akin to a condition of employment. Because you have failed to meet this condition of employment, we have no choice but to put you on a personal, unpaid leave.

- Second, we consider your refusal to follow the lawful direction of your Principal and Superintendent to be an act of wilful disobedience, dereliction of duty, and insubordination. Any employee who refuses to follow the lawful instructions of their employer, including the refusal to implement Public Health Orders as directed by the Division, may be subject to disciplinary action, up to and including termination of employment.

- The Division engages in a progressive discipline process that typically involves a three-step process including a written warning, suspension, and termination. You are now at the first step, a verbal warning.

- Further, because you are no longer able to enter the workplace, we have no choice but to place you on a **personal, unpaid leave effective Monday, October 18, 2021**.

- We cannot bring you back from this leave until you have met the Division's expectations.

- To be certain, the Division's expectations are that you adhere to the lawful directions of the Division, and, that you comply with the requirements to provide proof of full vaccination OR submit to testing up to three times per week

- We ask that you confirm, no later than 4:00 on Tuesday, October 19, 2021, whether you plan to agree to, and adhere to, the expectations. If you will not agree, we will be in touch to schedule a second, in-person meeting with you and your RETEA representative no later than Friday, October 22.

Anna, Doug tells me you are a valued member of his team and I know he would love to have you back to work sooner than later. I encourage you to review the RETSD testing protocols (COVID-19 Onsite Rapid Testing Program - River East Transcona School Division (retsd.mb.ca) and to consult with your RETEA representative, in the hopes that we will see you back at work soon.

26. Following the October 15, 2021 meeting, Ms. Kile contacted the Applicant to discuss the situation. At that time, the Applicant requested that Ms. Kile provide a signed copy of the Public Health Order and proof that the Public Health Order was sworn on a Bible. Prior to responding to those requests, the Respondent contacted its legal counsel. The advice received was that there was no requirement to provide a signed copy of the Public Health Order, nor was there any requirement for the Public Health Order to be "sworn on a Bible". Thereafter, Ms. Kile advised the Applicant of the advice received from legal counsel.

27. On Saturday, October 16, 2021, the Applicant emailed the school Principal indicating that she did not consent to a "leave without pay". In addition, in its Reply, the Respondent notes that the Applicant sent an email to Ms. Kile stating that she did not consent to being placed on a leave without pay. The Respondent indicates that Ms. Kile responded on October 18, 2021, and suggested that the Applicant could call her if she wished to discuss the issue in further detail. The Respondent indicates that the Applicant did not respond to Ms. Kile's October 18, 2021 email.

28. By October 18, 2021, both the Employer's policy and the Public Health Orders were in effect. Notwithstanding the fact that the Applicant still refused to provide proof of vaccination status or a rapid test result, she attended work contrary to the written instructions of the Employer. The Employer informed the Respondent of the Applicant's actions and noted that the Vice-Principal of the school met with the Applicant and informed her that she was not permitted to be in the school given her continued refusal to comply.

29. On October 20, 2021, the Applicant exchanged emails with the Vice-Principal of the school. Noting that the Applicant had failed to confirm whether she intended to comply with the Employer's Vaccination and Testing policy, the Vice-Principal indicated that a further meeting would be scheduled.

30. The Applicant provided the Respondent with a document entitled "Notice of Liability". On behalf of the Respondent, Ms. Kile acknowledged receipt of the document and indicated that she intended to send it to the Respondent's legal counsel in order to obtain legal advice. The "Notice of Liability" attached to the Reply of the Respondent (at Tab 7) was purportedly notarized and includes an Affidavit from the Applicant. The first 15 pages of the document indicate a date of November 2, 2021 and the exhibits attached thereto indicate that they were notarized on that date.

31. The "Notice of Liability" attached to the Reply of the Respondent was addressed to the then Minister of Education, the Provincial Chief Public Health Officer, one of the Employer's school trustees, the Employer's Superintendent, and Ms. Kile. In the document, the Applicant purports to raise a number of legal issues which she

believed were relevant to her concerns respecting, amongst other things, the vaccination and testing requirements in the Public Health Orders and the Employer's policy established in compliance with said Orders. In addition to sending the Employer the "Notice of Liability", the Applicant again indicated that she would not comply with the Vaccination and Testing policy. The Reply of the Employer refers to the "Notice of Liability", however the attached document (Tab 13) is not the same as the one included in the Reply of the Respondent. It is not clear, based upon the material filed, that the Employer received the same "Notice of Liability" as the Respondent.

32. In response to the Applicant's "Notice of Liability", the HR Director noted that the Applicant's view differed markedly from that of the Employer and requested a meeting with the Applicant on October 25, 2021. The HR Director explained in an email to the Applicant dated October 22, 2021 that the purpose of the meeting was "to have the opportunity to have a discussion, allow you to ask questions, and to share your perspective". Quite appropriately in the circumstances, the HR Director encouraged the Applicant to seek advice from the Respondent. The Applicant replied that she required all future communication to be in writing. She did not meet with the Employer on October 25, 2021 as directed.

33. Following their review of the Applicant's "Notice of Liability", legal counsel for the Respondent provided it with a legal opinion. Counsel indicated that they considered the issues raised by the Applicant and concluded that a grievance brought on the basis of one or more of the claims suggested by the Applicant would be extremely unlikely to be successful. On October 25, 2021, Ms. Kile emailed the Applicant to suggest that they discuss the legal advice obtained by the Respondent. The Applicant responded that she required all further communication to be in writing and confirmed that she would not meet with the Employer later that day.

34. Following the Applicant's refusal to engage in a discussion with the Respondent about the legal advice it obtained, in an email later sent on October 25, 2021, Ms. Kile informed the Applicant of the preliminary legal advice provided by its counsel which was that the Employer's Vaccination and Testing policy would "likely be upheld by an arbitrator as reasonable". Ms. Kile emphasized that she wished the Applicant to be aware that the "decisions you are making will likely impact your employment" and, further, that if she continued to refuse to comply with the policy, her employment could be terminated and "there may be nothing the Association can do for you".

35. On October 26, 2021, the Employer issued a written warning to the Employee for her continued failure / refusal to comply with the policy. The written warning informed the Applicant that further discipline, including termination of employment, could result for failure to comply with the Vaccination and Testing policy and Public

Health Order. The Employer further noted that the Applicant's failure to follow the lawful direction of the school Principal and the Superintendent constituted wilful disobedience, dereliction of duty, and insubordination. The written warning concluded with a direction to the Applicant to confirm that she would comply with the requirements set out in the letter by October 29, 2021 at 4:00 p.m.

36. On October 29, 2021, the Applicant emailed the HR Director to advise that she would not comply with the deadline set in the written warning letter and that she intended to communicate with the Superintendent. The HR Director replied that she had been directed to continue with the process and invited the Applicant to a Teams meeting on November 3, 2021.

37. On November 3, 2021, the Applicant wrote to the HR Director to say that, until she received a response from "upper management", she would not attend any meetings with her.

38. On behalf of the Superintendent, the Assistant Superintendent sent an email to the Applicant on November 3, 2021 directing her to follow the meeting and communication schedule outlined by the HR Director. Notwithstanding that clear direction, the Applicant did not attend.

39. On November 5, 2021, the Employer suspended the Applicant from November 8 to November 12, 2021. The reasons for the suspension included:

    a) failure to follow the Vaccination and Testing policy, Public Health Orders, and Manitoba Education Directives in breach of her employment obligations;

    b) failing to indicate by October 29, 2021, her willingness to comply with the Public Health Orders and the lawful instruction of the Division; and,

    c) declining to attend the meeting scheduled for November 3, 2021 to discuss the matter.

40. The suspension notice states, in part, the following:

    > As discussed at our October 15th meeting, all employees of the Division are subject to the Public Health Order, Manitoba Education directives, and/or Division policy requiring mandatory testing is a breach of your employment obligations and amounts to insubordination at law. It will not be tolerated.
    >
    > Your continued actions amount to wilful disobedience, dereliction of duty, and insubordination as you continue to refuse to follow the lawful direction of your Principal and the Superintendent. In addition, as indicated in the

written warning of October 26, 2021, your failure to correct the behaviour would result in a suspension.

Therefore, as a result of your own actions, including your failure to comply with the expectations set out in the disciplinary letter dated October 26, 2021, and your continued refusal to comply with implementing the requirements, this letter confirms that you have been suspended without pay commencing Monday, November 8, 2021 to Friday, November 12, 2021, inclusive.

During this suspension you are not permitted to attend at work or on the Division's premises, for any reason whatsoever. In addition, your email account with the Division has been suspended.

Any employee who refuses to follow the lawful instructions of their employer, including the refusal to implement Public Health Orders as directed by the Division, may be subject to disciplinary action, up to and including termination of employment. As noted previously, the Division engages in a progressive discipline process that typically involves a three-step process including a written warning, suspension, and termination.

Please note you are now at the suspension stage and failure to comply with the Public Health Orders and continuing refusal to adhere to the instructions provided to you by your Principal and the Division will result in the termination of your employment with the Division.

It is expected that you will adhere to the requirements set out in this letter, immediately upon the conclusion of your suspension. In the event that you fail to comply with the requirements, the recommendation will be made to terminate your employment, as set out above.

You are hereby required to confirm, no later than 4:00 p.m., Wednesday, November 10, 2021, by email to [omitted] that you will agree to, and adhere to, the expectations set out above upon your return from suspension. To be clear, should you continue to choose not to adhere to the obligations and fail to provide confirmation by November 12, 2021, we will be left with no choice but to terminate your employment with the Division.

Should you require clarification in respect of this letter or wish to schedule a meeting to address any of your questions, concerns or address the matter further, please contact the undersigned in advance of 4:00 p.m., Wednesday, November 10, 2021. We strongly recommend that you treat this matter as urgent and contact your RETEA representative, as soon as

possible, to address the ramifications for continued insubordinate behaviour.

41. On November 10, 2021, the Applicant emailed a "Response to Notice of Suspension" to the HR Director taking the position that she should still be working, and decrying the fact that she had yet to receive answers to "legitimate questions" posed to the Employer. The Applicant raised additional concerns with regard to her personal health information and the state of emergency in the Province. The HR Director responded later that day that the meetings which had been scheduled for October 25 and November 3, 2021 would have been the appropriate time for the Applicant to raise questions and concerns. The HR Director indicated that the Employer wished to schedule a further meeting with the Applicant and a representative of the Respondent during the week of November 15, 2021.

42. Again, on November 12, 2021, the Applicant wrote to the Employer to state that she continued to wait for answers to her inquiries and therefore felt that a meeting was an inappropriate forum for discussion. The HR Director responded that the Employer had no knowledge of what inquiries the Applicant was waiting for responses to and asked the Applicant to provide them. The Employer's Assistant Superintendent also wrote to the Applicant to advise that the fact that she had questions "does not stop, deflect or delay the progressive discipline process that you find yourself in at this point" and he directed her to follow the meeting schedule outlined by the HR Director.

43. On November 12, 2021, Ms. Kile sent an email to the Applicant regarding the meeting requested by the Employer and suggested that the Applicant call her if she wished to discuss the matter prior to scheduling the meeting. The Applicant did not respond to Ms. Kile's offer of a discussion.

44. The Respondent also wrote to the Applicant on November 12, 2021 in order to share the advice provided by its legal counsel that a challenge to the Employer's policy and any discipline imposed under that policy was unlikely to be successful:

> We have reviewed the documents that you have provided to us.
>
> As we indicated in our email dated October 25, 2021, we have carefully considered the Division's policy regarding vaccination in order to determine whether it would be appropriate for the Association to take any action to challenge that Policy. As outlined in that email, it is well established in labour law that employers are entitled to make rules and policies that apply to employees, subject to certain requirements. If the matter were to be challenged in arbitration, the Association would be required to establish that

> the Policy is not reasonable and/or that the Policy inconsistent (*sic*) with the terms of the Collective Agreement.
>
> We do not expect that such a challenge would be successful. The fact remains that employees who are not vaccinated have a reasonable alternative option – providing rapid testing results. We have been advised that such tests are unlikely to be considered to constitute genetic testing (and do not attract any form of protection under genetic testing legislation). We expect that a labour arbitrator would likely hold that the vaccinate or test Policy is a reasonable Policy implemented for the purposes of protecting the health and safety of staff and students.
>
> We have reviewed your specific situation and obtained advice from the Association's legal counsel regarding the situation. It continues to be their view that the Policy implemented by the Division would likely be considered to be reasonable, and that a grievance challenging the validity of discipline under the Policy is unlikely to be successful. We expect that – if your employment is terminated due to violation of the Policy – the Association will not be able to provide assistance.

45. On November 15, 2021, the Applicant wrote to the Employer's Assistant Superintendent alleging that his actions amounted to an unfair labour practice and that he had engaged in "despotic communication". She attached her "Notice of Liability" document previously sent to the Employer and wrote that the Assistant Superintendent should "Consider yourself served". Indeed, the Applicant went further and threatened that he "may be held personally accountable for any wrongdoings against me".

46. Later on November 15, 2021, the Employer sent a notice of Termination of Employment (signed by the HR Director) to the Applicant which states:

> In regards to the above matter, we are writing to address your recent conduct and continuing refusal to adhere to the instructions provided to you by your Principal and River East Transcona School Division ("the Division"), as required by the discipline letter you received, dated November 5,2021.
>
> You have repeatedly refused to cooperate with the Division's request to meet: you did not attend meetings scheduled for October 25, 2021, and November 3, 2021, and would not agree to a request to meet the week of November 15, 2021. You indicated that you might be willing to meet, "provided some basic questions are answered," but did not respond to our multiple requests on November 12, 2021, to share those questions.

Regarding the "Notice of Liability" that you have provided; we wish to make it abundantly clear that we consider documents of this nature to be of no force or effect. You have no authority at law, or otherwise, to impose additional obligations on the Division or its staff or trustees simply by sending them to the Division. As such, any attempt to place additional obligations on the Division are not accepted by the Division. Any allegations contained in a "Notice of Liability" document are expressly denied.

As you are aware, you were instructed by your Principal and Superintendent to comply with Public Health Orders which require employees to provide proof of full vaccination or undergo regular COVID-19 testing (and show proof of negative results), and you refused. Unless an employee has confirmed their COVID-19 full vaccination status, there is no exemption from COVID-19 testing. This is a requirement of law and a requirement of employment.

Since we have not heard from you as to whether you plan to agree to, and adhere to, the expectations set out above, we are left with no choice but to move to the next step of the progressive discipline process and to communicate with you by mail.

As discussed at our meeting on October 15, 2021, all employees of the Division are subject to the Public Health Order, Manitoba Education directives, and/or Division policy requiring mandatory testing. Refusing testing is a breach of your employment obligations and amounts to insubordination at law and will not be tolerated.

Your continued refusal to comply amounts to wilful disobedience, dereliction of duty, and insubordination as you continue to refuse to follow the lawful direction of your Principal and the Superintendent. In addition, as indicated in the previous disciplinary letter, dated November 5, 2021, your failure to correct the behaviour would result in the termination of your employment.

Therefore, as a result of your own actions, including your failure to correct your behaviour and comply with the expectations set out in the verbal warning of October 15, 2021, the written warning dated October 26, 2021, and notice of suspension dated November 5, 2021, and continued refusal to comply with the public health order, you are terminated from the position of Educational Assistant with the River East Transcona School Division effective Monday, November 15, 2021.

> All earned wages and other monies will be deposited into your on the next pay period. Your Record of Employment will be forwarded to Service Canada electronically.

47. On December 6, 2021, the Applicant sent a document titled "Notice of Agreement" to the Chair of the Employer's Board of Trustees. In its Reply, the Employer stated that it has no knowledge of, and expressly denies, the alleged conditional acceptance dated November 2, 2021 that purportedly permits the Employee to be exempt from the testing mandate. The Applicant also sent, on December 6, 2021, a "Notice of Agreement" to the Respondent. Both Notices threaten the imposition of a "fee schedule" in the event that the Applicant's demands were not met by January of 2022.

48. The Application does not indicate that the Applicant asked the Respondent to file a grievance respecting the suspension or termination. In its Reply, the Respondent maintains that the Applicant never asked that it file a grievance "challenging the unpaid leave or termination imposed by the Employer, notwithstanding regular communication between RETEA and the Applicant". The Respondent further notes however that even if such a request had been made, the Respondent had been advised by its legal counsel that a grievance challenging the reasonableness of the Employer's policy was unlikely to succeed.

C. Positions of the Parties

Applicant

49. The Applicant provided scant detail regarding her complaint in her Application. She wrote that the Respondent violated section 20 of the *Act* as follows:

> As per memo from Kelly Barkman, Superintendent, on September 9, 2021 (see attached) all staff was asked to voluntarily disclose their vaccination status or proof of negative rapid test result. Thereupon I informed my employer that my medical information is protected under: PIPEDA Principle 4.3, PHIA 19 and Criminal Code of Canada 265. I attended meetings and had writen (*sic*) corespondance (*sic*) with my employer and my Association to the point that I asked to provide me with answers (NOCA, see attach.) in writing. To this day I did not receive a ligitimate (*sic*) answer to my questions, but I did loose (*sic*) my position despite the fact that my health information disclosure or testing was not a requirement in my contract. I did not consent to forced unpaid leave and still (*sic*) ready, able and willing to work. The Association was additionaly (*sic*) served with an AOCA with no response till now.

Respondent

50. The Respondent submits that the onus is on the Applicant to establish a violation of section 20 of the *Act*. The Respondent maintains that it has not acted in a manner which is arbitrary, discriminatory, or in bad faith, and there are no facts alleged which support such an assertion. The Respondent points out that it made consistent and ongoing efforts to communicate with, and provide representation to, the Applicant. Furthermore, with respect to the termination of the Applicant's employment, that it certainly took reasonable care to represent the interests of the Applicant.

51. In defence of its representation of the Applicant, the Respondent notes that it engaged legal counsel in order to discuss the Applicant's concerns, and obtained legal advice specific to the Applicant on a number of occasions. The Respondent states that its representation of the Applicant was based on the specific advice provided by its legal counsel.

52. While the Respondent acknowledged that the Applicant clearly objects to the Vaccination and Testing policy implemented by the Employer, and does not agree with the Respondent's assessment of the merits of a potential grievance (based upon its legal advice), such disagreement does not amount to a failure to represent her in accordance with section 20 of the *Act*.

53. The Respondent submits that there were no facts pleaded which, if proven, would result in a finding that it had acted in a manner that violated section 20 of the *Act* and requested that the Board dismiss the Application without the holding of a hearing.

Employer

54. The Employer asserts that the Applicant was provided with adequate notice of the requirements of the Division, which mandates regular testing for employees who have not provided proof of full vaccination and that it repeatedly attempted to correct the Applicant's refusal to comply using progressive discipline, making it clear to the Applicant what was required and the consequences for failing to meet those requirements.

55. With respect to the Applicant's complaint against the Respondent, the Employer notes that the Respondent provided her with advice as to the consequences for failing to adhere to the Vaccination and Testing policy and/or the Public Health Order, and expressly advised her that if she was terminated for failing to comply with the policy, any grievance would be unlikely to be successful and it would be unable to provide assistance to her.

56. The Employer, therefore, requested that the Application be dismissed without a hearing.

D. Legislation

57. The Application alleges a breach of Section 20 of the *Act*. That provision reads as follows:

> **Duty of fair representation**
> 20 Every bargaining agent which is a party to a collective agreement, and every person acting on behalf of the bargaining agent, which or who, in representing the rights of any employee under the collective agreement,
>
> (a) in the case of the dismissal of the employee,
>
> (i) acts in a manner which is arbitrary, discriminatory or in bad faith, or
>
> (ii) fails to take reasonable care to represent the interests of the employee; or
>
> (b) in any other case, acts in a manner which is arbitrary, discriminatory or in bad faith;
>
> commits an unfair labour practice.

58. Subsection 140(8) of the *Act* provides that if the Board is satisfied that an application is without merit, it may dismiss it at any time. In addition, subsection 30(3)(c) of the *Act* permits the Board to decline to take further action on an unfair labour practice complaint. The Board has consistently found that an application that does not establish a *prima facie* case should be dismissed without a hearing in accordance with those provisions.

E. Analysis

59. The issue to be determined in this case is whether the Respondent violated section 20 of the *Act* by representing the rights of the Applicant under the collective agreement in a manner which was arbitrary, discriminatory or in bad faith and, additionally, with respect to the termination of her employment, whether it failed to take reasonable care to represent her interests.

60. This case is not about the safety or efficacy or vaccines or methods of testing for COVID-19. It is not about whether the Public Health Orders were appropriate or

necessary. It is not about whether the Employer's policy respecting vaccination and testing, implemented to operationalize the Public Health Orders, was reasonable.

61. Furthermore, it is not the function of the Board to assume the role of a surrogate "rights" arbitrator under a collective agreement and decide whether an applicant would have succeeded on a grievance or potential grievance at arbitration.

62. The legal principles applied by the Board in respect of section 20 applications may be summarized as follows:

    a) The onus is on the applicant to establish a violation of section 20 of the *Act*.

    b) Section 20(a) of the *Act* provides that in cases of dismissal from employment the bargaining agent must exercise "reasonable care" in representing the interests of the employee in addition to not acting in a manner which is arbitrary, discriminatory or in bad faith. The term "reasonable care" in section 20(a) of the *Act* has been defined by the Board to mean the degree of care which a person of ordinary prudence and competence would exercise in the same or similar circumstances. In the present case, the Applicant was ultimately dismissed, although the complaint also relates to the Respondent's representation prior to the termination.

    c) With respect to the Applicant's complaints about matters that predate the termination, section 20(b) of the *Act* applies.

    d) The standard of care under section 20(b) of the *Act* is expressed in the negative. Bargaining agents must not represent employees in a manner that is arbitrary, discriminatory or in bad faith. The Board's inquiry in such cases is limited to determining whether an applicant has demonstrated that his or her bargaining agent has acted in a manner prohibited by the section. If the bargaining agent has represented the employee in a manner which is free from the three prohibited elements, then there is no violation of section 20(b) of the *Act*, and no remedy is available to the employee.

    e) A summary of the meaning ascribed to the terms "arbitrary", "discriminatory" and "bad faith" by the Board appears in *J.H.B. v. Canadian Union of Public Employees* (2009), 164 C.L.R.B.R. (2d) 182 at page 190:

        > "Arbitrary" conduct has been described as a failure to direct one's mind to the merits of the matter, or to inquire into or to act on available evidence, or to conduct any meaningful investigation to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles, or displaying an attitude which is indifferent, summary, capricious, non-caring or perfunctory. Flagrant errors

consistent with a non-caring attitude may also be arbitrary, but not honest mistakes, errors of judgment, or even negligence. "Bad faith" has been described as acting on the basis of hostility or ill-will, dealing dishonestly with an employee in an attempt to deceive, or refusing to process the grievance for sinister purposes. A knowing misrepresentation may constitute bad faith, as may concealing matters from the employee. The term "discriminatory" encompasses cases where the union distinguishes among its members without cogent reasons.

f) The fact that a union has committed an error or that the Board concludes that, with the benefit of hindsight, it might have acted differently in a particular circumstance, is not sufficient to sustain a violation of section 20(b) of the *Act*.

g) Unions have the discretion to determine whether a grievance or complaint shall be filed, referred to arbitration, withdrawn, or settled with or without the consent of the employee(s) concerned. Provided that its discretion is exercised in a manner which is not inconsistent with the union's obligations under the *Act*, the Board does not interfere with such decisions.

h) The decision-making process regarding whether to file, or to proceed to arbitration with, a grievance or complaint often involves the union securing an opinion from legal counsel as to the merits and likelihood of success. The Board has consistently held that following the advice of legal counsel is a potent defence to a duty of fair representation complaint.

i) The Board has previously noted that it would be unreasonable to impose upon trade unions a standard analogous to that expected of the professions, or to second-guess excessively the decision-making in which they must engage. While it is expected that the decisions of unions in representing the rights of employees under a collective agreement will be made honestly, conscientiously and without discrimination, 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. The Board has consistently indicated that a complaint will not be allowed merely because the union was wrong, could have given better representation, or did not do what the member(s) wanted.

j) Section 20 of the *Act* relates to the obligations of unions in representing the rights of any employee under the collective agreement. A section 20 application is not an appropriate avenue for employees to advance complaints about their employer, members of management, or fellow employees.

k) When assessing the merits of a duty of fair representation complaint, the Board may also consider whether an employee has taken the appropriate steps in protecting their own interests. Employees have a vital role in assisting bargaining agents in representing their rights under the collective agreement. Employees must cooperate with their bargaining agent, and its representatives, and conduct themselves appropriately. Respectful communication and conduct between the bargaining agent and the employee is important for effective representation and that respect must go both ways. Employees should, for example, appropriately and expeditiously respond to the bargaining agent's requests for relevant information, follow the advice its representatives provide, and mitigate their damages. If the employee's conduct negatively affects the representation that the bargaining agent is able to provide, the Board will consider that conduct when assessing whether there has been a breach of section 20 of the *Act*.

63. The Board agrees with the position of the Respondent that there are no facts pled in the Application which, if proven, could result in a finding that the Respondent acted in a manner which violated section 20 of the *Act*. Accordingly, the Applicant has failed to establish a *prima facie* case.

64. Clearly, the Respondent provided representation to the Applicant in a manner which was not the least bit arbitrary, discriminatory or in bad faith. Moreover, the Respondent took reasonable care in representing the Applicant's interests with respect to her issues including, but not limited to, her dismissal. Indeed, the Respondent, and notably Ms. Kile, exhibited extraordinary patience, tolerance, and understanding towards the Applicant despite her continued and, frankly, baffling, intransigence. Parenthetically, I would also note the extreme patience and understanding exhibited by the Employer, and those acting on its behalf, in relation to the Applicant's conduct and the issues she raised.

65. The Respondent provided capable and caring representation to the Applicant with respect to her concerns in relation to the Employer's policy and the disciplinary consequences that flowed from her repeated failure to comply. Ms. Kile offered assistance and advice to the Applicant and sought legal advice with respect to the potential of successfully challenging the Employer's policy through the grievance and arbitration process. The Respondent also sought legal advice regarding the Applicant's specific situation and whether the disciplinary consequences which flowed from her continued failure to comply with the policy could be successfully challenged.

66. Despite the Applicant's failure to take Ms. Kile up on her repeated offers to discuss the issues, and her completely unreasonable insistence on requiring all communication with the Respondent to be in writing, the Respondent effectively

communicated with the Applicant and provided her with clear, direct, and professional advice. The Respondent clearly and concisely explained the legal advice in correspondence to the Applicant dated October 25, 2021 and November 12, 2021. If the Applicant had acted reasonably and followed the advice provided by the Respondent, the negative employment consequences that she experienced would most certainly not have been necessary.

67. Actions have consequences. In the present case, the Applicant's conduct ultimately resulted in her termination. The Respondent clearly represented the Applicant in a manner which complied with the duty of fair representation set out in section 20 of the *Act*. The Applicant insisted on acting in a manner which was disconcertingly unreasonable and uncooperative. She was the author of her own misfortune.

68. The Applicant has failed to establish a *prima facie* case. The Application is entirely without merit and is dismissed in accordance with subsection 140(8) and subsection 30(3)(c) of the *Act*.

THEREFORE

The Manitoba Labour Board **HEREBY DISMISSES** the Application filed by Anna Loewen on December 8, 2021.

DATED at **WINNIPEG**, **Manitoba** this 21st day of April, 2022, and signed on behalf of the Manitoba Labour Board by

C.S. Robinson, Chairperson

CSR/st/lo

NOTES

REQUEST FOR REVIEW BY MANITOBA LABOUR BOARD OF A DECISION, ORDER, ETC. OF THE BOARD

Subsection 143(3) of *The Labour Relations Act* of Manitoba, C.C.S.M. Chapter L10 provides:

The board or a panel of the board may

(a) review and vary or rescind any decision, order, direction, declaration or ruling that it or another panel has made; and

(b) rehear a matter that it has heard or that another panel has heard.

Request for review by the board of its decision, order etc. must be made by application to the board, within ten days of the making of the board decision, order, etc.

Section 17 of the *Manitoba Labour Board Rules of Procedure* (being Manitoba Regulation 184/87R, published in the Manitoba Gazette Part II) provides:

Application for Review of Board Decision
17(1) Where an application is made to the board under subsection 143(3) of the *Act*, to review, rescind, amend, alter or vary any decision, order, direction, declaration or ruling made by it, the applicant, in addition to the material required to be filed under section 2, shall

(a) file a concise statement of any new evidence with such evidence being verified by statutory declaration;

(b) file a statement explaining when and how the new evidence became available and the applicant's reasons for believing that the new evidence so changes the situation as to call for a different decision, order, direction, declaration or ruling; and

(c) in the absence of any new evidence, file a concise statement showing cause why the board should review or reconsider the original decision, order direction, declaration or ruling.

Time Limit for Review
17(2) Except by leave of the board, no application under subsection 143(3) of the *Act* for a review of any decision, order, direction, declaration or ruling made by the board shall be reviewed by the board after more than 10 days have elapsed following the date of the making of the decision, order, direction, declaration or ruling.

JUDICIAL REVIEW OF FINAL DECISION OF THE MANITOBA LABOUR BOARD

Subsection 143(6) of *The Labour Relations Act of Manitoba* provides:

Judicial Review of Final Decision
143(6) Notwithstanding any other Act, a final decision, order, direction, declaration or ruling, but not a procedural, interim or any other decision, order, direction, declaration or ruling, of the board or a panel of the board may be

reviewed by a court of competent jurisdiction solely by reason that the board or the panel failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, if

(a) the applicant for review has first requested the board or the panel, as the case may be, to review its decision under subsection (3), and the board or the panel has decided not to undertake a review, or has undertaken a review and rendered a decision thereon, or has failed to dispose finally of the request to review within 90 days after the date on which it was made;

(b) the board has been served with notice of the application and has been made a party to the proceeding; and

(c) no more than 30 days have elapsed from, as the case may be, the decision by the board or panel not to undertake a review, or the date of the decision rendered by the board or panel on the review, or the expiration of the 90 day period referred to in clause (a).

REASONS FOR DECISION

It is the policy of the Manitoba Labour Board that where a party to the proceedings is adversely affected by an Order or by a decision of the Board, within ten (10) calendar days of the date on which the Board's Order or decision was signed, that party may request the Board in writing to furnish written reasons for its Order or decision. The Board then may consider such request for reasons for its Order or decision and shall notify the requesting party as to whether reasons will be provided.

Emailed to:
- C. Schinkel, Human Resources, River East Transcona School Division
- D. Simpson, Fillmore Riley LLP
- S. Kile, President, River East Transcona Educational Assistant Association
- A. Frost, Thompson Dorfman Sweatman LLP
- A. Loewen