ONTARIO LABOUR RELATIONS BOARD

Labour Relations Act, 1995

OLRB Case No: 2839-20-U
Unfair Labour Practice

Ontario Public Service Staff Union, Applicant v Ontario Public Service Employees Union, Responding Party

OLRB Case No: 2860-20-U
Unfair Labour Practice

Ontario Public Service Employees Union, Applicant v Ontario Public Service Staff Union, Lois Boggs, Tim Mulhall, Cheryl Wing and Emily Visser, Responding Parties

OLRB Case No: 0134-21-U
Unfair Labour Practice (Bad Faith)

Ontario Public Service Staff Union, Applicant v Ontario Public Service Employees Union, Responding Party

COVER LETTER

TO THE PARTIES LISTED ON APPENDIX A:

The Board is attaching the following document(s):

Decision - January 14, 2022

DATED: January 14, 2022

Catherine Gilbert
Registrar

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Ontario

ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **2839-20-U**

Ontario Public Service Staff Union, Applicant v **Ontario Public Service Employees Union**, Responding Party

OLRB Case No: **2860-20-U**

Ontario Public Service Employees Union, Applicant v **Ontario Public Service Staff Union**, Lois Boggs, Tim Mulhall, Cheryl Wing and Emily Visser, Responding Parties

OLRB Case No: **0134-21-U**

Ontario Public Service Staff Union, Applicant v **Ontario Public Service Employees Union**, Responding Party

APPEARANCES: Katy O'Rourke and Joanne McMahon appearing for Ontario Public Service Staff Union et al; Michael Mendl appearing for Ontario Public Service Employees Union

BEFORE: Maureen Doyle, Vice-Chair

DECISION OF THE BOARD: January 14, 2022

1. These are applications alleging unfair labour practices under the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). Two applications, 2839-20-U and 0134-21-U were filed by the Ontario Public Service Staff Union (the "union") and 2860-20-U was filed by the Ontario Public Service Employees Union (the "employer").

2. Each application contains numerous allegations. Each allegation is the subject of at least one preliminary objection by the opposing party. In addition to the other preliminary objections it made, the employer also submitted that many of the issues are currently placed before arbitrators for determination, and the Board should defer consideration of those matters.

3. The union takes the position that there should be no deferral and that the Board should proceed to hear its applications. Generally, it takes the position that the matters should not be deferred, as the Board is in a position to hear all of the allegations together, and this is important in order to discern what it characterizes as a "pattern" of employer behaviour which is contrary to the Act.

4. In a decision dated October 21, 2021, the Board directed the parties to provide their positions on the opposing party's preliminary objections and to be prepared to address them at the Case Management Hearing. It also directed the parties to be prepared to address the significance of the grievances, if any, related to the allegations contained in these applications, including their current status and any decisions or interim decisions.

5. At the Case Management Hearing, the parties provided an exhaustive list of the grievances which touch upon the allegations contained in these applications, including their status. With some exceptions, noted below, the parties were in agreement with respect to the relationship of the grievances to the allegations contained in the applications.

6. The parties were directed to provide their submissions regarding the question of deferral of the applications. The Board did not invite submissions on the possibility of proceeding with the allegations for which there is no "related" grievance, and indeed such an approach would appear to be inconsistent with the union's stated goal of having all of the allegations being placed together before the Board.

2839-20-U

7. In Board File No: 2839-20-U ("ULP 1"), the union asserts that the employer has violated sections 70, 72, 73, and 76 of the Act. The allegations span the time period from approximately June 2020 to late April, 2021. The union alleges that the employer held "captive audience" meetings regarding an arbitral award and that it made disparaging remarks about the union at the meetings. It further alleges

that following remarks they made at the meetings, its First Vice President Cheryl Wing and its former First Vice President Emily Visser were terminated due to union activity. It alleges that the employer and some of its members who were in acting supervisory positions to "infiltrate" a zoom meeting it held regarding the arbitral award, and the acting supervisors reported back to the employer. It alleges that the employer changed long-standing practices regarding correspondence to the union, such as sending copies of discipline and dismissal letters to its president, sending notice of hiring and contract extension letters to its president and ending the practice of denoting which employees were in acting assignments by using "A" or "acting" on emails etc. It alleged that the employer demanded that its President Boggs and Chief Steward Mulhall return the laptops and cellphones it had issued to them. It alleges that unless employees arranged their own vacation coverage, the employer would not grant their vacation requests, despite seniority provisions in the collective agreement. It alleges that the employer refuses to consolidate related grievance, increasing its costs unnecessarily. It alleges that the employer has not posted vacancies since June 2020, leaving 40 positions unfilled on a permanent basis. It further alleges that the employer merged with the Educational Resource Facilitators of Peel (ERFP) and as part of an agreement with the ERFP, the employer awarded permanent positions to its members. The union also alleges that following discussions with it, the employer unilaterally announced a "Pandemic Exit Initiative" ("PEI") to employees, though there is no agreement regarding the process or approval of individuals, nor is it something which can be grieved. The union also alleges that its Membership Secretary Alyssa Walker was denied reimbursement for courses subsequent to having provided testimony on behalf of the union in proceedings against the employer, and it alleges that this was in violation of the Act. Finally it asserts that the employer terminated several other individuals, Shawn Koza, Stacey Tamblin and Jeff Westin, due to union activity.

2860-20-U

8. Board File Number No: 2860-20-U (the "employer ULP") is an application filed by the employer, in which it alleges that the union has violated sections 76 and 96(7) of the Act.

9. The employer alleges that the union has abused the "Full Time Book Offs" of President Boggs and chief steward Mulhall, who have been excused from their full-time duties as employees in order to fulfill their obligations to the union, because they did not attend special events it expected them to attend, and was slow in providing it with a draft of the

collective agreement. It also alleges that President Boggs was slow in providing it with a reconciliation of paid time off for union members on union business, and she under-reported members' time off for union business. It alleges that with respect to the implementation of the above-noted arbitral award, the union encouraged members to inundate supervisors with requests regarding work hours, and that union President Boggs told the workers to blind copy the union on all such requests, using an email address it had set up "surreptitiously" to monitor the requests and responses, without permission from the employer. Finally, it alleges that Cheryl Wing "verbally berated and challenged the authority" of senior management in front of staff at the above-noted meetings it convened to discuss the arbitral award with employees, and that President Boggs had Emily Visser do the same. It alleges that the union engaged in a "transparent scheme to thwart the implementation" of the award in violation of the Act. It also alleged that in making allegations about the meetings in ULP 1, the union resiled on its commitments in relation to a Memorandum of Agreement (MOA) it signed regarding the award. It further alleges that the union commenced ULP 1 for the improper purpose of intimidating the employer and its leadership, and using it as a propaganda tool. It also provides its response to allegations contained in ULP 1. It alleges that the union has abused the mediation process, citing a lengthy unsuccessful mediation for which it paid. It alleges that the union's communications regarding the PEI were coercive and intimidated employees, causing fear and anxiety in order to thwart the implementation of the PEI.

10. The employer filed a request to amend its application, providing additional allegations. The first additional allegation it seeks to provide is that the union has filed the ULP for the purpose of interfering with the employer's leadership elections. It also makes two additional allegations which do not directly relate to the union's ULPs or issues raised therein. In particular, it alleges that the union attempted to gain access to privileged information by virtue of its choice of law firms, and also alleges that the union disclosed confidential settlement discussions.

0134-21-U

11. In 0134-21-U ("ULP 2"), the union alleges that the employer violated sections 70, 72, 73, and 76 of the Act.

12. It alleges that the employer engaged in bad faith negotiations, because during an extension for filing a response, the employer made offers of full-time employment to approximately 24 temporary

employees, without posting the positions. It also alleges that the employer failed to provide it with answers about the hires, preventing it from being able to advise and represent its members. It alleges that two temporary employees have now filed Duty of Fair Referral complaints against it, due to the employer having violated the Act.

13. The union alleges that president Boggs sent an email to the employer's counsel regarding litigation and that he responded, copying members of Boggs' union executive, in an effort to embarrass union President Boggs.

14. The union alleges that after April 21, 2021, the employer sent an email to employees in which it made "barely veiled accusations that the union has disputed OPSEU's assignment of permanent jobs (in clear violation of the Collective Agreement) because they are trying to uphold white supremacy". It alleges that this is continued interference and undermining of the union, contrary to the Act.

Grievances

15. The parties are bound by a Collective Agreement which expires on March 9, 2022. Article 32.01 of the Collective Agreement provides as follows:

> 32.01 Discrimination
> There shall be no discrimination, restraint, or intimidation practised or permitted by the Employer or the Union or any of the officials or officers of the Employer or the Union against any employee because of sex, sexual orientation, gender identity, gender expression, age, martial status, race, colour, creed, ancestry, place of origin, political opinions, ethnic origin, citizenship, family status, receipt of public assistance, record of offences, on account of any Union activity, or because of disability or upon any other grounds referenced in the Ontario Human Rights Code.
>
> 32.02 Harassment
> There shall be no discrimination, restraint, or intimidation practised or permitted by the Employer or the Union or any of the officials or officers of the Employer or the Union against any employee because of sex, sexual orientation, gender identity, gender expression, age, marital status, race, colour, creed, ancestry, place of origin, political opinions, ethnic origin, citizenship, family status, receipt of public assistance, record of offences, on account of any

> Union activity, or because of disability or upon any other grounds referenced in the Ontario Human Rights Code.

16. Article 8.05 of the Collective Agreement permits that grievances related to Articles 32.01 and 32.02 may be filed in a reasonable period of time after the alleged discrimination or harassment occurred.

17. The parties agree that the union has filed grievances regarding the following:

- The termination of Cheryl Wing - ongoing grievance alleging unjust termination and violation of Article 32;

- The termination of Emily Visser - first day of arbitration grievance scheduled, alleging unjust termination and a violation of Article 32;

- Alleged change in practice of sharing discipline and hiring/contract extension letters - grievance referred to arbitration under section 49 of the Act;

- Employer's requirement that Union President and Chief Steward return their computer equipment and phones to OPSEU - grievance includes allegation of violation of Article 32, grievances held in abeyance at union request pending resolution of related grievances currently ongoing;

- Alleged change in practice regarding vacation approval process – grievance ongoing;

- Alleged failure to post and fill vacancies referenced in ULP 1 and 2 – grievance ongoing;

- Employer's announcement of Pandemic Exit Initiative – no parallel grievance, PEI suspended by employer, but Union has filed 10 grievances on behalf of individuals to whom it says employer should have extended payment – first day of arbitration scheduled, grievance includes allegation of violation of Section 32;

- Grievances on behalf of Shawn Koza, Stacey Tomblin, and Jeff Weston – Koza's termination grievance and grievance of violation of section 32, award pending; Tomblin suspension and dismissal grievances both ongoing; Weston grievance regarding dismissal ongoing;

- Awarding of permanent positions to temporary staff, referenced in ULP 2 - first hearing day scheduled; additional grievances filed on behalf of individuals who awarded permanent positions but had the offers revoked - first hearing day scheduled;

Amendments to ULP 1

18. The union has now written to the Board advising that the parties have settled some of the issues contained in ULP 1 and that they have agreed to remove those allegations from the pleadings. In particular, the parties have agreed that the following allegations be removed from ULP 1: the allegation that the termination of Cheryl Wing was due to her participation in a trade union; the allegation that the termination of Emily Visser was due to her participation in a trade union; and the allegation that Jeff Weston was terminated contrary to the Act. Further, the union no longer seeks an order that the employer reinstate Ms. Wing, Ms. Visser, or Ms. Weston and make them whole.

19. The parties' request that ULP 1 be amended to remove the above-noted allegations and various references to them in ULP 1, is granted.

Decision regarding Deferral

20. The employer submits that the Board's practice of deferral encourages the practice and procedure of collective bargaining under the Act and the dispute resolution mechanism contained in the collective agreement and it cites Board decisions including *Valdi Inc.,* 1980 CanLII 884 ("*Valdi"*), *INVISTA Canada Company,* 2008 CanLII 4768 (ON LRB) ("*INVISTA"*), and *Maple Leaf Consumer Foods Inc.,* 2006 CanLII 37797, (ON LRB) ("*Maple Leaf Consumer Foods"),* and *Conestoga College,* 2004 CanLII 13850 ("*Conestoga*"). The employer submits that the Board only departs from its general practice of deferring a dispute to arbitration in exceptional cases, such as where the arbitration process is unavailable or unsuitable to resolving issues in dispute. It cites *Montebello Metal*

Inc., 1982 CanLII 998 (ON LRB) ("*Montebello")*. It submits that the Board's practice is founded on a preference to avoid a multiplicity of proceedings and to promote the expeditious and efficient determination of labour relations disputes. It submits that the potential for inconsistent findings of fact is also a "critical consideration".

21. It submits that the fact that the union has raised a series of complaints against the employer is not a sufficient reason for the Board to hear the complaint. It submits that the Board must be satisfied that the arbitration process is clearly unavailable or unsuitable to resolving the issues in dispute, and it cites *Dupont Canada Inc.,* 2001 CanLII 9561 (ON LRB) ("*Dupont"*).

22. It submits that deferral would promote the most efficient determination of the disputes and would avoid the potential for inconsistent findings of fact. It also submits that there is no doubt that a labour arbitrator appointed under a collective agreement can deal with the alleged breaches of the Act with the same force and effect as can the Board, and it cites *INVISTA*, especially as here where Article 32 prohibits discrimination on the basis of Union membership or activity.

23. The employer submits that the parties have completed many hearing days over the above-noted grievances, and have expended considerable time and resources in those grievance processes. The employer submits that this is duplicative litigation and that there is no purpose in proceeding, but that in any event, the matters ought to be deferred to arbitration. It does not submit that the matters ought to be dismissed outright, but that it is appropriate for the Board to "stand down" the ULPs and retain jurisdiction to deal with any residual issues that may not be resolved through the grievance arbitration process.

24. The employer submits that the union's submission that, as it alleges a pattern of behaviour, the Board should not defer, is not a relevant consideration under the Board's deferral process. It submits that simply labelling allegations as a pattern is not probative in determining whether to defer. Rather, it submits that according to *Valdi*, the Board should be persuaded by the fact that the parties have a dispute resolution process in place, and that the parties have and continue to deal with their disputes under the mechanisms provided under the collective agreement. The employer submits that the process under the collective agreement is working and that nothing has been done to stand in the way of that process. It also noted that in *Valdi,* the probationary employee did not have access to the arbitration provisions, and the Board declined to defer as it was not satisfied that there was

another process available. The employer notes that that is not the case here.

25. The employer noted that in *Dupont,* the Board deferred where there were numerous allegations of wrongdoing by the employer. It noted that the Board noted that the parties' relationship was a longstanding one, as is the one here. It submits that labelling disparate events as a pattern of conduct does not change the analysis of whether deferral is appropriate.

26. The employer also submits that in large part, the remedies sought by the union at arbitration are remedies it seeks from the Board in the ULPs. It submits that where the grievances make reference to Article 32 of the collective agreement, the arbitrator's analysis will be very similar to that which the Board would undertake and the arbitrator will determine whether anti-union animus has tainted the employer's actions.

27. The union submits that in its ULPs it describes a pattern of conduct in which the Employer has engaged, which has had the effect of, among other things, undermining the Union and interfering with its administration in violation of the Act. It submits that it is not a series of isolated incidents which can be examined independently of each other, as at arbitration the employer's pattern of conduct would not be addressed. It cites *Ontario Public Service Employees Union,* 2016 CanLII 81077 (ON LRB) ("*Ontario Public Service Employees Union"*), where the Board declined to defer. It submits that by leaving the various allegations to the grievance process, they would be heard separately by different arbitrators and the "pattern of behaviour would not be addressed". It submits that while some allegations may appear less serious than others, in the context of all of the allegations together, it becomes clear that the employer's actions have amounted to violations of the Act. It submits that the allegations all relate to a common workplace dispute and should be before one adjudicator.

28. It submits that in *Ontario Public Service Employees Union,* the allegations were of a "broad and concerted effort of illegal activity, involving numerous aspects, in order to undermine the staff union and punish members for exercising their rights under the Act". The Board in that case stated that "…given the broad scope of alleged misconduct, which falls squarely within the Board's jurisdiction, this was not an appropriate case to defer" and the Union submits that the same reasoning ought to be applied in this case. It submits that the parties here are the same as the ones in that case and similarly, there were

complaints of "widespread misconduct". It submits that here, as there, the allegations relate to a "broad and concerted effort" to interfere with rights under the Act.

29. The union also submits that where Article 32 has been referenced in grievances, certain remedies available under the Act are not before the arbitrators for consideration. It submits that it has an obligation to represent its members and that "one of the primary aspects of the duty is to file grievances" on behalf of its members. It submits that if it had not done so, it would have "lost the right to represent" its members. It also submits that some allegations listed in the ULPs are not before arbitrators.

30. The union submits that the employer seeks to rely on jurisprudence where a there was a "single issue ULP" which was deferred in the face of arbitration, for example *Maple Leaf Consumer Foods*. The union submits that such a situation is very different from these applications. The union submits that this is "not an ordinary labour relations conflict that can adequately be dealt with" by arbitration. The union submits that the Board should prefer the decision in *Ontario Public Service Employees Union* over the approach taken in *Dupont* and *Montebello.*

31. With respect to remedies sought, the union acknowledges that it has asked for some of the same remedies in various grievances as it seeks from the Board, but submits that the declaratory remedies it seeks at the Board are important to the union.

32. In reply, the employer submits that the volume of complaints should not be determinative, as that would encourage litigants to "pad their complaints and add issues that are not complaints". It also notes that though there are numerous allegations, they have not been proven and cannot be presumed to have merit. The employer cites *Montebello* and notes the Board's interest in avoiding using its resources where there is parallel litigation, as well as the Board's interest in avoiding inconsistent findings of fact and law.

Decision

33. The Board finds that this is an appropriate case for deferral to the arbitration process.

34. At paragraph 7 of *Valdi*, the Board canvassed a number of factors that the Board will take into account in deciding whether to defer to arbitration:

> 7. … However, where key provisions of *The Labour Relations Act* require important elaboration and application or where the employer's or trade union's conduct represents a total repudiation of the collective bargaining process, it becomes more difficult to characterize the complaint as essentially contractual. It is in these situations that the Board has asserted its jurisdiction. The former situation is reflected in *Thomas Built Buses Ltd.,* [1980] OLRB Rep. Feb. 264 and the latter can be seen in *New Gregory House,* [1977] OLRB Rep. Sept. 584. Other circumstances in which the Board has been unwilling to defer to grievance arbitration involve cases where arbitration may have been unavailable to the complainant or where relief in that forum could have been inadequate. See *Wallace Barnes Company Ltd.,* (1961), 61 CLLC ¶16,198 and the general discussion in *Imperial Tobacco Products (Ontario) Limited, supra.* Moreover, where the Board defers to the arbitration process it will nevertheless retain jurisdiction as the NLRB in order to insure (a) that the dispute over the meaning of the collective agreement is resolved with reasonable promptness; (b) that the arbitration procedures have been fair; and (c) that the outcome of arbitration is neither repugnant to the purposes of the Act nor remedially inadequate. See *Imperial Tobacco Products (Ontario) Limited, supra,* for a full discussion of these subsidiary principles. We are also of the view similar to positions taken in *Banyard* and *Stephenson, supra,* that the Board will not defer or will exercise its retained jurisdiction where the grievance or board of arbitration fails to deal directly and explicitly with the unfair labour practice issues.

35. The union relies heavily upon *Ontario Public Service Employees Union* in which it says a similar situation, involving these same parties, resulted in a decision not to defer. It is evident from that decision that the various allegations against the employer dated from a compressed period of approximately two months, at which time the parties were engaged in bargaining. The allegations were that during that time period, "four employees were discharged, five employees of the I.T. department were suspended indefinitely, and other employees were called into meetings with management and it is alleged were threatened." In addition, there were allegations that "the applicant's officials were excluded from the employer's office, among other things".

The Board stated that it found there were approximately 6 arbitration proceedings either ongoing or about to be started, but stated that there was "no practical way for the union to rely on volume and pattern of alleged misconduct as evidence of a general scheme". The Board also stated that "while not a total repudiation of the collective agreement, the allegations against the employer are akin to that".

36. The union's allegations in ULP 1 and ULP2 span a period of close to one year and are varied. It is not evident that the allegations presented in these ULPs support an inference of complete repudiation of the collective agreement, or something akin to that, as the allegations from a two-month period during bargaining, were found to have been done in *Ontario Public Service Employees Union.* The parties have a long-standing bargaining relationship which appears to be a functioning one. The parties are experienced in matters of labour relations and have a dispute resolution process in the collective agreement which the union has engaged to deal with the matters which are before the Board. While the Board in *Ontario Public Service Employees Union* found that there was no practical way for the union to rely on the "volume and pattern of alleged misconduct" at arbitration, it cannot be that a large number of allegations over a more extended period, without more, will automatically render arbitration insufficient for the resolution of disputes.

37. Many of the allegations are also the subject of current arbitration proceedings which appear to be fairly advanced in the process. In addition to the general preference to avoid multiplicity of proceedings, the risk of disparate findings of fact is accentuated in such circumstances. Further, many of the allegations are contractual in nature, for example, failure to post vacancies, the process for vacation approval, and terminations of employment, and as such are amenable to grievance arbitration. In my view, there is no need for elaboration regarding a key provision of the Act, nor is there conduct representing a total repudiation of the bargaining process.

38. Given the inter-relatedness of the union's ULPs and the employer's ULP, it is also appropriate to defer consideration of the employer's application.

39. The applications are adjourned for a period of eighteen months from the date of this decision. Unless within that period any party requests that the Board process the applications or extend the period of adjournment, the application may be terminated without further notice to the parties.

40. I am not seized.

"Maureen Doyle"
for the Board