



ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **3038-24-U**

Alana Kotler, Applicant v Ontario Secondary School Teachers' Federation, Responding Party v Toronto District School Board, Intervenor

BEFORE: Peigi Ross, Vice-Chair

DECISION OF THE BOARD: August 29, 2025

1. This is an application filed under section 96 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") alleging a violation of section 74.
2. The responding party's correct name is "Ontario Secondary School Teachers' Federation". The title of proceedings is amended accordingly. I will refer to the responding party as "OSSTF".
3. The purpose of this decision is to address the respective motions to dismiss filed by OSSTF and the intervenor, Toronto District School Board ("TDSB"). Those parties assert that this application does not make out a *prima facie* violation of the Act.
4. Section 74 of the Act provides as follows:

74 A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.
5. The Board in *Switzer v CAWCanada*, 1999 CarswellOnt 4438 defined the three elements of unacceptable conduct in section 74 in the following terms:

21. ... To constitute a breach of the Act, a union's conduct must be more than just wrong. It must be arbitrary, discriminatory, or in bad faith. These terms have been interpreted by the Board as follows:

- a) "arbitrary" means conduct which is capricious, implausible, or unreasonable in the circumstances. This is often demonstrated by a failure by the union to properly direct its mind to a situation, or to conduct a proper and meaningful investigation when one appears to be called for;
- b) "discriminatory" means distinguishing between or treating employees differently without good reason;
- c) "bad faith" is conduct motivated by hostility, malice, ill-will or dishonesty.

6. The Board has authority to dismiss an application without a hearing or a consultation pursuant to Rule 39.1 of the Board's Rules of Procedure:

39.1 Where the Board considers that an application does not make out a case for the orders or remedies requested, even if all of the facts stated in the application are assumed to be true, the Board may dismiss the application or part of the application without a hearing or consultation. In its decision, the Board will set out its reasons.

7. In order to plead a *prima facie* case, an applicant must set out facts capable of supporting a conclusion that the union owes a duty of fair representation under section 74 of the Act and that it breached that duty in a manner that is arbitrary, discriminatory or in bad faith. In making this determination, the Board must assume the Applicant's allegations are true and could be established if the matter proceeded to a hearing or consultation. The Board is however not required to accept facts that are obviously false or obviously wrong, and it can take into account facts that are not disputed and/or documents that clearly exist; see, *Crossby-Dewar Projects Inc.*, 2018 CanLII 31042 (ON LRB). Accordingly, the test is high on a party seeking to have an application dismissed for failing to plead a *prima facie* case.

8. This application was filed on March 18, 2025. The TDSB filed its response on April 2, 2025, and OSSTF's response was filed on April 8, 2025. On April 9, 2025, the applicant, Alana Kotler, filed what she

calls a "Supplementary Complaint". Ms. Kotler says the purpose of her Supplementary Complaint is twofold: "to respond to positions advanced by the Respondents, and to further articulate and substantiate the Applicant's position regarding the Union's administration of its *Policy for Approval of Legal Assistance: Request for Legal Assistance: Human Rights Tribunal Complaints, 2024-2025*." I will refer to this document as the "Policy".

9. Although the Board had yet to direct submissions in response to the motions to dismiss, the Board will accept the Supplementary Complaint as a response to those motions.

10. In her application Ms. Kotler says that OSSTF failed to provide her with representation in (1) her internal complaint of discrimination filed with the TDSB, and (2) in her complaint filed with the Human Rights Tribunal of Ontario ("HRTO"). She further asserts that the OSSTF "colluded" with the TDSB in providing legal representation to the two bargaining unit employee respondents (the "teachers") to her complaints to the TDSB and the HRTO. By way of a remedy Ms. Kotler asks that the Board order OSSTF to provide her with appropriate legal representation in both of her complaints but because of what she says is a conflict of interest given what she says is OSSTF's representation of the teachers, she asks that she be represented by a law firm of her choosing. Further, if either of her human rights complaints are dismissed, she asks for a monetary remedy from OSSTF.

11. By way of her Supplementary Complaint, Ms. Kotler acknowledges, as asserted by OSSTF as the basis of its motion, that OSSTF's duty of fair representation under section 74 of the Act does not extend to the requirement to represent her in her application before the HRTO; see, *Jeffrey Forde*, 2010 CanLII 13048 (ON LRB) at paragraph 12, and *District School Board of Niagara*, [2016] O.L.R.B. No. 185 at paragraphs 31-32. She therefore does not ask that OSSTF be compelled to provide her with representation. This is something that the Board could not do in any event given the scope of section 74.

12. By way of an email dated March 21, 2025 Ms. Nicole Gauthier advised that she would be the applicant's contact in respect to her internal TDSB complaint. Ms. Kotler acknowledged receipt of that email the same day she received it. It is clear that Ms. Kotler has been granted the representation that she seeks by way of this application. In any event, any complaint as it relates to OSSTF's representation as it relates to the internal complaint is premature given that it has not advanced beyond the compliant stage.

13. The foregoing is sufficient for the Board to find that the application fails to make out a *prima facie* violation of the Act and for it to be dismissed. That the applicant has an OSSTF representative in her internal TDSB complaint and that section 74 does not extend to require OSSTF to provide legal representation to the applicant in her complaint before the HRTO is a complete answer to the application. I therefore find that the application fails to make out a *prima facie* violation and must be dismissed.

14. The Supplementary Complaint addresses an argument not raised in the original application, namely that the Policy creates a “voluntary framework which goes beyond the minimum statutory requirements of the ‘Act’ and as such can be subject to review by this Board under Section 74 if shown that their ‘Policy’ was administered in an arbitrary, discriminatory, or bad faith manner”. The Supplementary Complaint contains further submissions about what Ms. Kotler says are the flaws in that policy and the improper manner in which the application was applied.

15. The Board will not generally permit an applicant to attempt to correct deficiencies relied upon by the responding party in seeking a dismissal of the application. To do so would be manifestly unfair. Rule 5.1 requires a party to set out “a detailed statement of all material facts relied upon”, including, in this case, the argument raised for the first time in the Supplementary Complaint that OSSTF violated the Act in the manner in which it is alleged to have applied the Policy.

16. Although this application has already been dismissed, I will nonetheless briefly address the Supplemental Complaint.

17. Ms. Kotler relies upon *Hargrave v Ontario English Catholic Teachers’ Association*, [2009] O.L.R.D. No. 30 for the proposition that the Board has previously held that a trade union’s discretionary policy on legal assistance must be “applied fairly and in good faith, with a meaningful case-by-case assessment, regardless of whether a statutory obligation exists.” The Supplementary Complaint then sets out submissions about how, in Ms. Kotler’s view, about how the Policy is unfair and how OSSTF applied the Policy in a manner that was arbitrary, discriminatory and in bad faith. The Policy expressly states that as a general matter OSSTF does not provide “legal assistance to members seeking to make an application or complaint to the Human Rights Tribunal of Ontario as those issues can usually be addressed through the collective agreement and the grievance/arbitration process” but that

it may provide assistance to members who are respondents in a human rights complaint.

18. The difficulty here is that no such case could be located by the Board. The Board was able to locate *Micheal Lind v. International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, Local 873*, **[2009] O.L.R.D. No. 30 [emphasis added]**, the same locator as the case Ms. Kolter purposes to rely upon. That decision is a brief procedural decision of the Board granted an extension of time in which to file submissions but does not address the proposition relied upon by Ms. Kotler.

19. Similarly, the applicant cites the following cases, none of which, as cited, could be located by the Board or OSSTF:

- *Brisette v. Amalgamated Transit Union, Local 113*, [2010] O.L.R.D. No. 2142
- *Latreille v. Ontario Secondary School Teachers' Federation*, [2008] O.L.R.D. No. 1918
- *Kanellopoulos v. Canadian Union of Public Employees, Local 1000*, [2012] O.L.R.D. No. 166
- *Holmes v. CUPE, Local 4092*, [2015] O.L.R.D. No. 1751
- *Latreille v. Canadian Union of Public Employees*, (2002) 110 L.A.C. (4th) 289
- *Hargrave v. CUPE, Local 2544*, 2012 OLRD No. 3055
- *Lenahan v. Canadian Auto Workers, Local 222*, 2003 CanLII 55779 (ON LRB)
- *Blouin Drywall Ltd.*; [1983] OLRB Rep. June 1057
- *Figueroa v. Canadian Union of Postal Workers*, 2014 CIRB 748
- *Harley v. Canadian Union of Postal Workers*, 2010 CHRT 4
- *Rosati v. Teamsters Local Union No. 879*, [2012] OLRD No. 2072
- *Millen v. OSSTF District 25*, [2001] OLRB Rep. May/June 485
- *Clare v. CAW, Local 222* (Unreported OLRB Decision)
- *IAMAW, District Lodge 140* (2023 CIRB Decision)

20. In response to OSSTF's request for physical copies of the above cases or confirmation that they are hallucinated cases retrieved through artificial intelligence searches, Ms. Kolter acknowledged that she may

have erred in her case citations and stated that she was in the process of correcting those purported errors, but that she would await the Board's further direction before doing so. She objected to providing physical copies.

21. The Board cannot consider cases that either do not exist or cannot be located.

22. The Supplementary Complaint relates exclusively to internal union affairs and the manner in which it applied its own Policy. Contrary to the proposition put forth by Ms. Kolter (albeit on the basis of a case that does not exist), the Board has consistently held that the union's obligations under section 74 of the Act are in relation to the union member's employer and that section 74 of the Act does not extend to the internal affairs or processes of trade unions. The Board has repeatedly stated that it does not police a union's internal processes or those under its Constitution and by-laws (see *Halton Elementary Unit of the Ontario English Catholic Teachers Association (OECTA) v. Ontario English Catholic Teachers Association (OECTA)* 2013 CanLII 9950 (ON LRB); *Park v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 385*, 2010 CanLII 60784 (ON LRB); *Dudley Wright* [2007] OLRB Rep. September/October 862).

23. Finally, I simply note that the materials filed by the applicant make clear that the unionized employee respondents to her various complaints are represented at the HRTO by the TDSB. The applicant offers no support for her contention that the OSSTF somehow colluded with the TDSB in the representation of these individuals.

24. This application is hereby dismissed.

"Peigi Ross"
for the Board