

CITATION: Johnston v. Ontario Labour Relations Board, 2025 ONSC 6105
DIVISIONAL COURT FILE NO.: DC-25-00000-450-00JR
DATE: 20251031

ONTARIO

**SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

Stevenson S.F.J., Sachs and Mew JJ.

BETWEEN:

DAVID JOHNSTON

Applicant

– and –

ONTARIO LABOUR RELATIONS
BOARD, UNIFOR, LOCAL 1987 AND
PAN-OSTON LTD.

Respondents

)
)
) Self represented
)
)

) *Andrea Bowker and Aaron Hart*, for the
) Respondent, Ontario Labour Relations Board

) *Farah Baloo*, for the Respondent, Unifor,
) Local 1987

) *Frank Cesario and Kimberley T. Dias*, for
) the Respondent, Pan-Oston Ltd.
)
)

) **HEARD:** 14 October 2025, at Toronto (by
) videoconference)
)

REASONS FOR DECISION

MEW J.

[1] At all times material to this application for judicial review, the applicant, David Johnston, was employed by Pan-Oston Ltd. (the “Employer”) as a Relief Operator. Pan-Oston manufactures retail store fixtures at a plant in Peterborough, Ontario.

[2] Mr. Johnston was a member of Unifor Local 1987 (the “Union”). His terms and conditions of work were governed by a collective agreement between the Employer and the Union.

[3] Mr. Johnston seeks judicial review of a decision by the Ontario Labour Relations Board (the “OLRB” or the “Board”) dated 10 July 2024, which dismissed a Duty of Fair Representation complaint brought by him against the Union, as well as a decision of the OLRB on 25 March 2025 not to reconsider his complaint.

Background

[4] In May 2022, the Employer arranged for training sessions for employees including Mr. Johnston that would be funded by the Canada-Ontario Job Grant (“COJG”). The training session was to be conducted by a third party on 31 May to 2 June 2022. Its purpose was to develop new skills for Press Brake Operators and Relief Operators to enable the Employer to expand the scope of its work.

[5] To qualify for the COJG, participants in the training had to complete a registration form which required them to provide their name, address, social insurance number, education history and immigration status. The Employer pre-populated this information on each participant’s registration form.

[6] Mr. Johnston refused to sign the COJG registration form, citing privacy concerns about the information that was being included on the forms.

[7] The Employer issued a verbal warning to Mr. Johnston, which was then followed by a written warning and one-day suspension. In the meantime, in response to the privacy concerns that Mr. Johnston and other employees had raised, the Union’s legal department was consulted. It responded that it had no concerns about the information required on the COJG form.

[8] Notwithstanding advice from the Union’s lawyers, Mr. Johnston and several other employees continued to refuse to sign the form.

[9] The Employer then issued a three-day suspension for insubordination and alleged that the employees, including Mr. Johnston, were participating in an unlawful strike.

[10] The Union grieved all instances of discipline issued to Mr. Johnston. It also filed an unfair labour practice complaint with the OLRB alleging that the Employer had applied discipline against in-plant Union representatives in a discriminatory manner in retaliation against employees enforcing their statutory rights and to undermine the Union.

[11] Several of the grievances pertaining to Mr. Johnston were subsequently settled as part of a global settlement that resolved numerous disputes between the Union and the Employer, including the unfair labour practice complaint. Other grievances were withdrawn, and still others remained outstanding and were proceeding to arbitration.

[12] On 29 June 2023, Mr. Johnston filed a Duty of Fair Representation complaint with the OLRB pursuant to section 74 of the *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A, asserting that the Union had mishandled and prematurely withdrawn several grievances pertaining

to him without communication, had misrepresented their status to the OLRB, and had failed to follow grievance procedures as required by the collective agreement.

[13] The Union filed its response on 13 July 2023. It explained that after considering the benefits of entering into the global settlement, and the weakness of Mr. Johnston's individual grievances, it had reasonably concluded that, on balance, there was more to be gained for the bargaining unit as a whole by entering into a global settlement, than from proceeding with Mr. Johnston's individual grievances arising out of the May 2022 COJG form dispute. The Union also noted that it was still dealing with other outstanding discipline grievances pertaining to Mr. Johnston and, accordingly, that his complaint was untimely in respect of those grievances.

[14] On 27 July 2023, the employer filed an intervention to the application.

The Grievances

[15] There was some confusion, and disagreement, about the status of various grievances in dispute. On 17 November 2023, the OLRB issued a decision directing Mr. Johnston to list all of the grievances that were relevant to his Duty of Fair Representation complaint, providing his understanding of the status of each grievance, and explaining why the OLRB should enquire into any outstanding grievances before they were settled or resolved.

[16] In response to the OLRB's directions, Mr. Johnston filed a written submission identifying nine grievances, and indicating his understanding of the status of each one. The OLRB then invited the other parties to file responding written submissions, and also provided for Mr. Johnston to reply to those submissions.

[17] The parties' positions, and the OLRB's findings, regarding the status of each grievance is tabulated as follows.

Grievance No.	Applicant [Mr. Johnston]'s Position	Respondent Union's Position	Board Decision
22	Improperly combined with Grievance 28 and withdrawn	Outstanding, not coupled with Grievance 28; outside the scope of complaint	Outside the scope of complaint
28	Not filed by the applicant, withdrawn	Not related to the applicant's complaint	Not considered because it was not filed by the applicant
30	Outstanding	Settled pursuant to mediation	Settled – undisputed by applicant
38	Improperly withdrawn as part of settlement	Withdrawn as part of global settlement	Withdrawal not a violation of DFR
41	Improperly withdrawn as part of settlement	Withdrawn as part of global settlement	Withdrawal not a violation of DFR
49	Outstanding	Outstanding	Outstanding – proceeding to arbitration
51	Outstanding	Outstanding	Outstanding – proceeding to arbitration
52	Withdrawn without notice	Withdrawn because it lacked merit	Duplicative of 49 & 51, not disputed by applicant
53	Withdrawn without notice	Withdrawn because it lacked merit	Duplicative of 49 & 51, not disputed by applicant

The OLRB's Decisions

[18] In its 10 July 2024 decision, the OLRB dismissed the Duty of Fair Representation application in respect of all of the grievances, with the exception of grievances 49 and 51, the status of which needed to be confirmed. Those grievances were subsequently confirmed as being outstanding and proceeding to arbitration. Accordingly, on 17 September 2024, the complaint concerning those grievances was also dismissed.

[19] On 16 October 2024, Mr. Johnston applied for reconsideration of the OLRB's decision. His application was dismissed because it was deemed to have been made beyond the 20-day time limit to apply for reconsideration. Nevertheless, in its 25 March 2025 reconsideration decision, the OLRB said that even if it had considered the request for reconsideration on its merits, it would have been dismissed, as it did not meet the grounds for reconsideration.

Issues

[20] The principal issues raised on this application for judicial review are the following:

- a) Is affidavit evidence which Mr. Johnston filed for the first time on this judicial review application admissible?
- b) Were the decisions to dismiss the Duty of Fair Representation complaint and reconsideration request reasonable?
- c) Were the decisions to dismiss the Duty of Fair Representation complaint and reconsideration request procedurally fair?

The Standard of Review

[21] All parties accept that the reasonableness standard of review applies to judicial review of the OLRB's decisions: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

[22] In the context of decisions of the OLRB, s. 116 of the *Labour Relations Act* contains a strongly worded privative clause which reflects the legislative intent that judicial review of the OLRB's decisions must be afforded great deference. The application of the reasonableness standard of review and these statutory provisions underscores the importance of judicial restraint and respect for the OLRB's interpretation of its home statute: *Mulmer Services Ltd. v. LIUNA, Local 183*, 2023 ONSC 4716 (Div. Ct.), at para. 34.

[23] The application of the reasonableness standard requires a reviewing court to consider only whether the actual decisions under review, including both the rationale for the decisions and the outcome to which they led, were unreasonable: *Vavilov*, at para. 83, *Mulmer Services*, at para. 56.

[24] With respect to the applicant's procedural fairness complaints, the court must consider the factors set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

Analysis

(a) Admissibility of Affidavit Evidence

[25] Mr. Johnston submitted two affidavits in support of his application for judicial review. Generally speaking, on applications for judicial review, affidavits containing material that was not before the decision maker are not admissible: *Misra v Canadian Union of Public Employees (CUPE) Local 79*, 2016 ONSC 5713, at para 5. In the event, however, Mr. Johnson did not rely on the contents of either of his affidavits in the course of his submissions to the court. Accordingly, I do not consider it necessary to consider the respondents' objections to the admissibility of these affidavits.

(b) Reasonableness of the Decisions Under Review

[26] The OLRB decision reviewed each of the grievances identified by the applicant.

[27] Grievances numbers 22 and 28 concerned the Employer's alleged failure to provide Mr. Johnston with any Registered Retirement Savings Plan contributions during his short-term leave. His complaint was that the Union had withdrawn both grievances. Upon examination of the applicant's submissions, he was only concerned with pursuing grievance number 22. With respect to that grievance, the OLRB concluded that the applicant had attempted to bolt on an additional grievance, that had nothing to do with his original application, which was concerned with how the Union had handled his disciplinary grievances following his refusal to sign the CEJG registration form. Accordingly, the grievance was struck as being beyond the scope of Mr. Johnston's application.

[28] Grievance number 30 was struck because the applicant had been a participant in the settlement of that grievance, which had occurred during a mediation. The OLRB applied the well-established principle that, absent rare circumstances, such as fraud, coercion or misrepresentation, it would not look behind a settlement.

[29] Grievance number 38 concerned the one-day suspension that was issued to Mr. Johnston due to his refusal to sign the COJG registration form. Grievance number 41 concerned the further three-day suspension that he was given as a result of his ongoing refusal to sign the registration form. These grievances had been withdrawn by the Union pursuant to a memorandum of settlement which also resolved the unfair labour practices complaint, alleging overzealous discipline against Mr. Johnston and the other employees who had refused to sign the registration form as well as a grievance filed by the Employer alleging that the employees were engaged in an unlawful strike, and seeking compensation for the loss of government funding that resulted from their refusal to sign the registration form.

[30] In its consideration of grievances numbers 38 and 41, the OLRB reviewed the principles applicable to a trade union's duty of fair representation as set out in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 508, at 527, as well as other OLRB jurisprudence dealing with the meaning of the terms "arbitrary", "discriminatory", and "bad faith" and a union's obligations

under section 74 of the *Labour Relations Act*. The Board concluded that the duty of fair representation does not require a union to take every grievance to arbitration. Nor does the fact that a trade union has not taken a grievance to arbitration constitute a *prima facie* case of a violation of section 74. In order to obtain maximum benefits from its membership, a union may make choices and trade-offs that affect its members unequally, and lead to a less advantageous result for one group, or individual, than for another.

[31] Applying these principles, the OLRB concluded that the applicant had failed to establish a *prima facie* violation of section 74 of the *Labour Relations Act* respecting grievances numbers 38 and 41. The Board found that the fact that Mr. Johnston maintained his own subjective beliefs for why he felt it necessary to continue refusing to sign the form did not render the Union's overall conclusion arbitrary, discriminatory, or made in bad faith. The OLRB addressed concerns raised by Mr. Johnston that the registration form was fraudulently prepared because his name was initially misspelled on the form, concluding that he had not established that the Union had neglected to reasonably investigate the issue prior to arriving at its conclusion.

[32] As already noted, after further investigation, it was concluded that at the time of his Duty of Fair Representation application, grievances numbers 49 and 51 had been scheduled for arbitration or mediation and, thus, should be dismissed, without prejudice to Mr. Johnston filing a fresh application at the appropriate time in the event that he believed that the Union had violated its duty of fair representation in respect of those grievances.

[33] Grievances numbers 52 and 53 were struck from the application because they were duplicative of grievances numbers 49 and 51.

[34] The OLRB rejected Mr. Johnston's reconsideration request because it was made outside the 20-day time limit for such requests, measured from 10 July 2024. Mr. Johnston argued that the 20-day time period should have run from 17 September 2024, when grievances 49 and 51 were finally addressed, in which case he would have been within time. Although the OLRB did not accept that argument, and did not exercise its discretion to extend the timeline, it nevertheless held that it would have dismissed the application for reconsideration on its merits because "new facts" asserted by Mr. Johnston did not contain any new information, let alone information that could not have been brought at the initial hearing.

[35] It can be seen that the arguments advanced by Mr. Johnston on his application for judicial review centre around the merits of his grievances themselves, or the merits of his Duty of Fair Representation complaint, rather than the reasonableness of the OLRB's decision. While he asserts that the decisions were untenable in light of the evidence before the OLRB, he does not directly point to evidence on any material point that was contrary to the findings which were made.

[36] I agree with the Union that Mr. Johnston's submissions amount to an attempt to re-litigate his Duty of Fair Representation complaint, based on similar arguments to those raised by him before the OLRB.

[37] To the extent that Mr. Johnston addresses the reasonableness standard, his submission is that the decisions were unreasonable because they rested on inaccuracies, lacked evidence, and

ignored statutory provisions. However, these generalised assertions are not borne out by a review of the record. Furthermore, as the OLRB commented, the Union's handling of Mr. Johnston's grievances should not be held to a standard of perfection.

[38] The OLRB's review included a detailed analysis that was responsive to Mr. Johnston's submissions and was based on the facts at hand and the relevant case law. Each individual grievance was addressed and assessed, as were the procedural status and merits of the grievances.

[39] Similarly, the reconsideration decision was consistent with the well-established approach precluding parties from re-litigating their cases in the absence of new evidence that could not have been obtained sooner, and which would have affected the outcome.

[40] I am satisfied that the OLRB's decisions were reasonable. Both decisions were justified and intelligible in light of the applicable statutory provisions and jurisprudence.

(c) Procedural Fairness

[41] Mr. Johnston claims that the OLRB's failure to engage with his core claims demonstrated disregard for the context and impact of the decision it was making, and was a breach of natural justice. He further argues that the decision lacked procedural fairness because of the acceptance of the Union's arguments, which included reference to Mr. Johnston's subsequent termination by the Employer, despite Mr. Johnston's termination letter not being part of the evidentiary record. He further complains that the decision was procedurally unfair as it determined credibility issues without cross-examination.

[42] Mr. Johnston's complaints are unfounded. His bald assertions of procedural unfairness fail to explain how the Board failed to engage with his claims, or how, as a result, there was a breach of natural justice.

[43] The OLRB has a broad power to control its own processes in handling a Duty of Fair Representation complaint. Specifically, section 99 of the *Labour Relations Act* recognises that the Board is not required to hold a hearing. Furthermore, procedural fairness will be achieved where the parties have been provided with a full opportunity to present their cases through written submissions: *Harrison v Ontario Labour Relations Board*, 2015 ONSC 3275.

[44] In my view, the OLRB gave all parties a full and fair opportunity to present their cases. Mr. Johnston was able to submit a reply to the submissions of the Union and the Employer. In particular, he was given the opportunity to clarify which grievances were at issue, and to make additional submissions. The OLRB gave comprehensive reasons for its decisions, and the procedures followed accorded with the Board's practices and governing statute.

Costs

[45] The Union asks for costs, but failed, without excuse, to provide a costs summary. It submits that Mr. Johnston should pay a nominal amount of \$2,000 in costs.

[46] Mr. Johnston would not, if he had been successful, have sought costs. Nor, he submits, should he be ordered to pay costs, noting that he is currently unemployed and dependent on Ontario Works.

[47] The Employer seeks partial indemnity costs of \$8,281.91.

[48] I would not award costs in favour of the Union given Mr. Johnston's economic circumstances, as well as the Union's failure to file a costs summary.

[49] Following the approach taken by Kiteley J. in *Houle v. Sudbury Mine, Mill & Smelter Worker's Union, Local 598/Unifor*, 2017 ONSC 6054, at para. 27, I would also not award costs to the Employer, which has participated throughout as an intervenor.

Decision

[50] For the foregoing reasons, I would dismiss Mr. Johnston's application without costs.

Mew J.

I agree: _____
Stevenson S.F.J.

I agree: _____
Sachs J.

Date: 31 October 2025

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Respondents

REASONS FOR DECISION

MEW J.

Date: 31 October 2025