

fair representation contrary to s. 74 of the *Labour Relations Act, 1995*, S.O. 1995, c.1 Sched. “A” (the “Act”). Specifically, Ms. Gu alleged that Unifor unfairly refused her request to file an individual grievance with her employer, CultureLink Settlement and Community Services (“CultureLink”), and in doing so, acted in a discriminatory and harassing manner.

[2] The Board considered the parties’ extensive written submissions and ultimately, on February 6, 2024, dismissed the application without an oral hearing on the basis that Ms. Gu had not made out the case for the orders or remedies requested (the “decision”).

[3] Ms. Gu filed a request for reconsideration of the Board’s decision, which was also reviewed by the Board and dismissed on April 27, 2024 (the “reconsideration decision”).

[4] Ms. Gu seeks judicial review of both decisions.

[5] In support of her application for judicial review, Ms. Gu claims that the Board’s decision to dismiss her application is unreasonable for many reasons, including:

- a. The Board erred in finding that it was beyond its jurisdiction to adjudicate certain allegations of discrimination.
- b. The Board ignored relevant facts and failed to consider the complete context of her complaints.
- c. The Board’s conclusion, that the application failed to disclose a *prima facie* case that Unifor acted in an arbitrary, discriminatory, or bad faith manner in its representation of her is unreasonable.
- d. The Board made incorrect factual findings.
- e. The dismissal of her application without a hearing was procedurally unfair.

[6] With respect to the reconsideration decision, Ms. Gu raises substantively the same objections.

[7] For the following reasons, the application for judicial review is dismissed.

Background

[8] The facts that prompted Ms. Gu's application to the Board alleging Unifor engaged in unfair representation are largely not in dispute.

[9] Ms. Gu was hired by CultureLink on November 25, 2019 for a temporary contract position as a library settlement and partnership settlement worker. The temporary contract expired on November 20, 2020.

[10] Ms. Gu was then hired into a permanent position performing the same role on November 23, 2020.

[11] On February 18, 2021, CultureLink informed Ms. Gu that a more senior employee who was being laid off had elected to engage "bumping rights" under the collective agreement and move into Ms. Gu's position. CultureLink informed Ms. Gu that she would have the right to "bump" a less senior employee and retain her employment. However, Ms. Gu was subsequently informed that she was not entitled to bumping rights because she was still a probationary employee and would be laid off effective March 31, 2021. This was contrary to Ms. Gu's understanding of the collective agreement and how seniority was to be calculated at CultureLink.

[12] On March 4, 2021, Ms. Gu requested that Unifor file an individual grievance with CultureLink on her behalf objecting to the layoff on the grounds that she should have all the benefits of a permanent employee effective from her original date of hire, including bumping rights and a salary increase.

[13] Unifor advised Ms. Gu that it would not submit an individual grievance as requested because it did not agree with Ms. Gu's interpretation of the collective agreement and, in any event, Unifor would be filing a policy grievance that would resolve the bumping rights issue for everyone impacted, including Ms. Gu.

[14] Since several CultureLink employees were impacted by the layoffs, Unifor filed a policy grievance on March 15, 2021 which resulted in a resolution that provided Ms. Gu with most of the relief she sought individually including bumping rights that allowed her to maintain employment, albeit in a new position, effective April 1, 2021. Further, Ms. Gu's salary was increased by CultureLink in the manner that was requested.

[15] Ms. Gu continued to challenge Unifor's refusal to file an individual grievance by attempting to appeal the decision within Unifor internally. For an extended period, Ms. Gu advanced her complaints to the national level of the organization. Unifor maintained its position.

[16] On July 25, 2023, Ms. Gu filed an application with the Board alleging that Unifor violated s. 74 of the *Act* by failing to represent her fairly. As noted above, the Board dismissed her application without a hearing on February 6, 2024. That decision was upheld in the reconsideration decision released on April 27, 2024.

Standard of Review

[17] The applicable standard of review is reasonableness. To succeed on her application for judicial review, Ms. Gu must demonstrate, and the court must accept, that there are:

...sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 100.

[18] While the standard of review is reasonableness, it is worth noting that decision makers in the labour relations context are owed a particularly high degree of deference due to their specialized expertise: *Maystar General Contractors Inc. v. International Union of Painters and Allied Trades, Local 1819*, 2008 ONCA 265 at para. 42; *Turkiewicz (Tomasz Turkiewicz Custom*

Masonry Homes) v. Bricklayers, Masons Independent Union of Canada, Local 1, 2022 ONCA 780 at para. 92.

[19] Insofar as Ms. Gu raises concerns about the fairness of the Board’s process, there is no standard of review. If Ms. Gu can establish that she was not afforded procedural fairness by the Board, the decisions cannot stand.

Analysis

- (i) Was the Board’s decision with respect to jurisdiction reasonable?

[20] Section 74 of the *Act* provides that a union 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.”

[21] The Board decided that it had jurisdiction to deal with allegations of discrimination related to the Unifor’s decision not to pursue an individual grievance on Ms. Gu’s behalf, but not allegations of discrimination advanced by Ms. Gu related to internal union procedures or allegations of discrimination against third parties.

[22] Before the Board, Ms. Gu alleged that her employer, CultureLink, engaged in racial or ethnic discriminatory practices towards her and other Chinese employees. The Board’s decision to decline jurisdiction to consider this issue is consistent with the scope of s. 74, which relates to the actions of a union not an employer.

[23] Ms. Gu advanced separate allegations in relation to her dealings with Unifor in what the Board referred to as “human rights complaints”, including the delay in processing her internal complaint and her allegations of discrimination more generally.

[24] In considering the issue of jurisdiction on a s. 74 application, the Board referenced *Re CSAO National (Inc.) and Oakville Trafalgar Memorial Hospital Association*, 1972 CanLII 563 (ON CA) and *Najib Mankal and Others v. Unifor*, 2018 CanLII 2091 (ON LRB), which

confirm that the Board does not have jurisdiction over a union's internal processes, by-laws, or constitutions. The Board drew a distinction between allegations arising from Unifor's representation of Ms. Gu and allegations arising from Unifor's internal processes, including Ms. Gu's internal appeal. I find the Board's decision to refuse to exercise jurisdiction over the latter was reasonable.

(ii) Did the Board render a decision on incomplete facts or incomplete context?

[25] Ms. Gu prepared and relied on a detailed chronology of her interactions with Unifor that she alleges are evidence of discrimination that the Board failed to consider. Throughout the judicial review hearing, Ms. Gu frequently referenced the chronology titled "Shared Link for Respond to the Board Decision dated October 13". From reviewing Ms. Gu's chronology, and detailed attached exhibits, it is clear that the bulk of her complaints relate to Unifor's internal appeal process and events that occurred after the policy grievance was resolved, mostly in Ms. Gu's favour.

[26] Ms. Gu's allegation that the Board failed to consider the full context stems from her disagreement with the Board's decision regarding jurisdiction. Given my finding that the Board's decision to decline jurisdiction over Ms. Gu's complaints about the internal union processes was reasonable, any assertion centered around questioning that decision must fail.

(iii) Is the Board's conclusion, that Ms. Gu's application failed to disclose a *prima facie* case that Unifor acted in an arbitrary, discriminatory, or bad faith manner, reasonable?

[27] Ms. Gu alleges that discrimination can be inferred from Unifor's refusal to pursue her individual grievance in the face of compelling evidence that established that her interpretation of the collective agreement was correct, including past practice of bumping rights. Further, Ms. Gu alleges that arbitrariness, discrimination, and/or bad faith on the part of Unifor can be inferred from the following: (i) Unifor's refusal to permit Ms. Gu to record a Zoom meeting; (ii) an initial comment from a Unifor representative that Ms. Gu could not launch an internal review based on "no grounds, no grievance"; and (iii) the delay in processing her internal appeal.

[28] The Board considered each of these allegations.

[29] With respect to Unifor's refusal to pursue Ms. Gu's individual grievance, the Board cited the Supreme Court of Canada's decision in *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509, 1984 CanLII 18 which confirms a union's discretion to decide whether to pursue a grievance to arbitration. In this case, Unifor disagreed with Ms. Gu's interpretation of the collective agreement. Specifically, Unifor believed the collective agreement was unambiguous with respect to how seniority was to be calculated and when employees would become eligible to exercise bumping rights. Given this, Unifor did not believe evidence of past practice would be admissible or relevant at an arbitration.

[30] The Board reasonably concluded that Unifor's response to Ms. Gu's circumstances was not arbitrary, discriminatory, or taken in bad faith. The Union had discretion to decide if and how to pursue a grievance. The Board reasonably held that there was nothing improper about the Union's decision to pursue a policy grievance instead of an individual grievance in this case.

[31] In relation to Ms. Gu's argument that Unifor discriminated against her because it declined to allow her to record a Zoom meeting, I am satisfied the Board's decision that this was not evidence of discrimination is reasonable. Ms. Gu requested permission from Unifor to record a Zoom meeting that was held on March 26, 2021 wherein Unifor's decision not to pursue an individual grievance was discussed. Ms. Gu alleges that she made the request because English is not her first language and that she wanted to collect evidence. The Board cited various good reasons why participants may decline to consent to a meeting being recorded and noted that this meeting occurred after the policy grievance was resolved. On this basis, the Board reasonably concluded that Unifor's refusal to allow Ms. Gu to record the meeting did not prove discriminatory conduct in Unifor's representation of her.

[32] During the same March 26, 2021 meeting, Ms. Gu alleges that a Unifor representative told her that she was unable to appeal Unifor's decision not to pursue her individual grievance on the basis of "no grounds, no grievance". The Board noted that this position reflected Unifor's interpretation of the collective agreement and its position that Ms. Gu lacked grounds for an individual grievance. While the Unifor representative was mistaken in saying that Ms. Gu could

not appeal this decision internally, the Board reasonably held that this was insufficient to establish a breach of Unifor's duty to provide Ms. Gu with fair representation pursuant to s. 74 of the *Act*.

[33] On the issue of timeliness of the internal Unifor appeal, for the reasons set out above, the Board reasonably found that it did not have jurisdiction to consider this issue in the context of a s. 74 application.

[34] The Board considered Ms. Gu's allegations that were within its jurisdiction to adjudicate and explained that, while Unifor's actions may not have been perfect, Ms. Gu's application and supporting documentation demonstrated that Unifor "did not act in a manner that was arbitrary, discriminatory, or in bad faith". I find that the Board's decision was reasonable.

(iv) Did the Board make incorrect factual findings?

[35] In her request for reconsideration, Ms. Gu alleged that the Board made at least seven factual errors in the original decision dismissing her application. The Board's reconsideration decision addressed the allegations by maintaining its characterization of the evidence, or dismissing discrepancies as irrelevant.

[36] Absent exceptional circumstances, a reviewing court will not interfere with the factual findings of a decision maker: *Vavilov* at para. 125. Ms. Gu has not demonstrated that her allegations regarding the Board's factual findings fall within an exceptional circumstance that would justify this court's intervention.

(v) Was Ms. Gu afforded procedural fairness by the Board?

[37] Ms. Gu alleges that the summary dismissal of her application without a hearing was procedurally unfair.

[38] The application is governed by the *Act*, which confirms that the Board has exclusive jurisdiction to respond to complaints that a union breached its duty of fair representation under s. 74. In doing so, at s. 99(3), the *Act* states that a Board is not required to hold a hearing.

[39] The discretion not to hold a hearing is also found in the Board's *Rules of Procedure*:

R. 39.1: Where the Board considers that an application does not make out a case for the orders or remedies requested, even if all 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.

R. 41.2: In order to expedite proceedings, the Board or Registrar may, on such terms as either considers advisable, consult with the parties, conduct a pre-hearing conference, issue any practice direction, shorten or lengthen any time period, change any filing or delivery requirement, schedule a hearing, if any, on short notice, or cancel such hearing, or make or cause to be made such examination of records, or other inquiries as either considers necessary in the circumstances.

R. 41.3: Where the Board is satisfied that a case or part of a case can be decided on the basis of the material before it, and having regard to the need for expedition in labour relations matters, the Board may decide an application by limiting the parties' opportunities to present their evidence or to make their submissions, or without a hearing.

[40] In this case, the Board received extensive written materials from Ms. Gu and Unifor. The Board requested and considered supplementary submissions from each party on several additional issues raised by the Board. Even if all Ms. Gu's allegations against Unifor were taken to be true, the Board explained why Ms. Gu's application failed to establish that Unifor breached its duty of fair representation.

[41] This court has confirmed the Board's wide discretion to dispose of s. 74 applications in a summary fashion: *Thomas v. United Food*, 2021 ONSC 3015 at para. 31. I find that Ms. Gu has not established that the Board breached procedural fairness when it dismissed her application without holding a hearing.

Reconsideration decision

[42] Other than raising alleged factual errors, which the Board addressed, in the request for reconsideration Ms. Gu attempted to re-litigate the same issues and repeat her disagreement with the Board's decision to dismiss her application. Given my finding that the Board's original

decision was reasonable, I further find that the Board's dismissal of Ms. Gu's request for reconsideration was also reasonable.

[43] Ms. Gu did not raise any allegations of procedural unfairness with respect to the reconsideration decision.

Conclusion / Costs

[44] The application for judicial review is dismissed.

[45] Unifor requested nominal costs in the amount of \$2,000 inclusive of HST and disbursements if successful on the application. I find those costs are fair and reasonable. Ms. Gu shall pay Unifor its costs of the judicial review fixed in the amount of \$2,000.

Muszynski J.

I agree: _____
Sachs J.

I agree: _____
Davies J.

Date: February 3, 2025

CITATION: Gu v. Unifor Local 40, 2025 ONSC 669
COURT FILE NO.: 306/24
DATE: 20250203

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Sachs, Davies, Muszynski JJ.

BETWEEN:

YAN GU

Applicant

– and –

UNIFOR, UNIFOR LOCAL 40

Respondent

– and –

CULTURELINK SETTLEMENT AND
COMMUNITY SERVICES

Respondent

– and –

ONTARIO LABOUR RELATIONS BOARD

Respondent

REASONS FOR DECISION

MUSZYNSKI J.

Date of Release: February 3, 2025