

## #18 THE DUTY OF FAIR REPRESENTATION

### I. INTRODUCTION

When a union becomes the exclusive bargaining agent for a unit of employees, it normally negotiates a collective agreement with the employer. Unions enforce collective agreements by filing grievances - often on behalf of individual employees. Grievances allege the employer has violated the terms of the agreement. If a grievance cannot be resolved, a union may choose to take a grievance to arbitration. *See: Section 153.*

Unions have a large amount of discretion when they deal with grievances. For example, unions may settle or drop grievances even if the affected employee disagrees. To counterbalance this power, the *Labour Relations Code* requires unions to fairly treat all members of a bargaining unit.

This **duty of fair representation** requires unions to act in good faith. This means unions may not act arbitrarily or discriminatorily. Employees or former employees who feel their union has not fairly represented them cannot bring court action. Instead, they may file a duty of fair representation complaint with the Labour Relations Board. Unions covered by the *Public Service Employee Relations Act* have a similar obligation under common law that is enforced through the courts.

When a complaint is made, the Labour Relations Board examines the fairness of the union's conduct. The question before the Board in these is, did the union deal fairly with the employee's grievance? This is an examination of the union's behaviour - not an appeal of the union's decision. Grievances are dealt with through the grievance and arbitration process outlined in the collective agreement.

The Board does not have the power to rule on the employee's grievance. It is, however, often necessary for the Board to review and understand the facts of a grievance. This is because the Board must assess whether the union's investigation reflected the worthiness and seriousness of the employee's case. Again, this is an examination of the union's behaviour and not an appeal of the union's decision.

If the Board finds that the union has breached the duty of fair representation, it can order a number of remedies. These include extending the timelines of the grievance process, giving a declaration that the union breached its duty, or awarding damages. This Bulletin explains the duty of fair representation. It then explores how complaints are filed and resolved.

## II. THE DUTY OF FAIR REPRESENTATION

The *Labour Relations Code* requires unions to fairly represent all employees in a bargaining unit. This is called the duty of fair representation. The Supreme Court of Canada has set the principal features of the duty in five points:

- The exclusive power conferred on a union to act as spokesperson for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent employees comprised in the unit.
- When... the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
- This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and for the union on the other.
- The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
- The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

*See: Noel v. Societe d'energie de la Bate James. [2001] S.C.J. Decision No. 41; Canadian Merchant Service Guild v. Gagnon [1984] 84 CLLC 14,043 (S.C.C.); Darius L'Heureux v. CSU 52 and the City of Edmonton [1993] Alta.L.R.B.R. 556; Rita Vickers et al. v. HSAA and the University of Alberta Hospitals [1997] Alta.L.R.B.R. 11.*

In essence, this means unions have a large amount of discretion when they deal with grievances. For example, unions may settle or drop grievances even if the affected employee disagrees. To counterbalance this power, the *Labour Relations Code* requires unions to fairly treat all members of a bargaining unit. This duty of fair representation requires unions to exercise this power in good faith. This usually means unions must carefully examine grievances. The union must also consider the significance of the case and its consequences for the union and the employee. The representation by the union must be fair, genuine and not merely apparent. The union must act with integrity and competence as well as without serious or major negligence. The union must act without hostility towards the employee. This also means the union's decision must not be arbitrary, capricious, discriminatory or wrongful.

The duty of fair representation involves rights and obligations for **both** trade unions and employees. These are explained below.

## III. EMPLOYEES' RESPONSIBILITIES

Employees must protect their own interests. Employees do this by filing grievances, co-operating with the union, and minimizing their losses. If employees do not protect their own interests, claims of a breach of the duty of fair representation may not succeed.

Employees must follow the grievance procedure in the collective agreement. They must report the problem to the union and co-operate with the union. In most collective agreements, employees do not have the absolute right to have grievances taken to arbitration. A union normally has the right to settle or drop a grievance even if the individual grievor disagrees. This is so even in discipline and discharge cases. The union has the right to make these decisions but must do so according to the considerations set out above.

Employees must act to minimize their losses. This means they must do everything required of them in pursuing their grievance. They must not sit on any rights they have that would advance their cases. They must, if they suffer losses, take reasonable steps to minimize those losses. For example, they must seek new employment if they are dismissed. A Board order for compensation will be for actual losses. This means losses that the complainant could not avoid by taking reasonable steps to protect his or her own interest. The Code protects unions from losses caused by the employee's own conduct. *See: Section 153(2)(b).*

#### **IV. THE UNION'S DUTIES**

Unions must consider several things when making decisions about grievances.

##### **Union's Discretion in Handling Grievances**

Many complaints allege that a union arbitrarily abandoned or settled a grievance. There is no exhaustive list of items that unions must consider in deciding whether or not to take a grievance to arbitration. The following extract from a British Columbia case offers some guidance.

*The judgment in particular cases depends on the cumulative effect of several relevant features: how critical is the subject matter of the grievance to the interest of the employee concerned? How much validity does (the employee's) claim appear to have, either under the language of the agreement or the available evidence of what has occurred, and how carefully has the union investigated these? What has been the previous practice respecting this type of case and what expectations does the employee reasonably have for the treatment of earlier grievances? What contrary interest of other employees or of the bargaining unit as a whole have led the union to take a position against the grievor and how much weight should be attached to them? See: Rayonier Canada Ltd. [1975] 2 Can. L.R.B.R. 196 at 204 (B.C.L.R.B.)*

A union should address these questions when deciding to abandon or settle a grievance.

##### **Unions Must Avoid Ill Will**

Decisions must not be motivated by ill will. Union officers must not let personal feelings influence whether or how to pursue a grievance. Decisions influenced by personal hostility, revenge or dishonesty may violate the Code.

##### **Unions Must Not Discriminate**

A union must fairly represent all employees in a bargaining unit. This means a union must not discriminate on the basis of union membership and factors such as, race, religion, sex or age should not influence the way a union handles a grievance. Each member should receive individual treatment. Favouritism and prejudice should play no part in grievance handling. Unions should consider only relevant and lawful matters when deciding whether or not to file or continue grievances.

## **Unions Must Not be Arbitrary**

In deciding whether or not to pursue a grievance, a union must avoid arbitrary, capricious, discriminatory or wrongful conduct. It must not act in bad faith.

It is arbitrary to give only superficial attention to the facts or matters in issue. It is arbitrary to decide without concern for the employee's needs and interests. *See: W. Litousky and HSAA [1996] Alta.L.R.B.R. 480 and [1997] Alta.L.R.B.R. 255 and HSAA v. Labour Relations Board and W. Litousky [1997] Alta.L.R.B.R. (QB) 591; D. L'Heureux v. CSU 52 and City of Edmonton [1991] Alta.L.R.B.R. 736 and [1993] Alta.L.R.B.R. 556 and [1994] Alta.L.R.B.R. 150 - quashed on other grounds.*

It is arbitrary not to investigate.

It is arbitrary to make no effort to discover the circumstances surrounding a grievance. It is arbitrary to fail to assess the merits of an employee's grievance.

A union should thoroughly investigate all of the facts and evaluate the probable outcome of arbitration before deciding to abandon or settle a grievance. This includes a review of the merits of the grievance and of arbitration decisions for similar grievances. This becomes more important where an employee faces serious discipline or dismissal, particularly a senior employee.

Union officials can make honest mistakes. Proof that a union has acted negligently in the handling of a grievance or complaint does not necessarily amount to arbitrary conduct. A union can also wrongly assess a grievance, yet not act arbitrarily.

The Board will uphold the union's decision if it concludes that the union:

- investigated the grievance and obtained full details of the case, including the employee's side of the story;
- put its mind to the merits of the claim; and
- made a reasoned judgment about the disposition of the grievance.

A union can fulfill its duty by taking a reasonable view of the grievance. This means it must consider all of the facts surrounding the grievance. It must weigh the conflicting interests of the union and the employee. It should then make a thoughtful judgment about the grievance.

## **Union's Right to Consider Other Factors**

A union can consider legitimate factors other than the grievor's interests. For example, the union may have promised the employer that it would not advance a particular interpretation of the contract. Or the union may be concerned that a victory would have an adverse effect on the other employees in the unit. A union may also decide that cost of achieving the resolution the grievor seeks is too high given the issue at hand. The union must weigh these factors fairly against the wishes of the grievor.

Sometimes conflict arises between the interests of a grievor and the bargaining unit. For example, unions and employers may settle an ongoing grievance in exchange for bargaining concessions. This is not forbidden. It may, however, amount to unfair conduct if the grievance concerns serious discipline or dismissal. *See: Centre Hospitalier Regina Ltee v. Labour Court (1990) 90 CLLC 14,019 (S.C.C.)*.

### **Unions Need Not Hire Counsel**

A union may use its own staff to arbitrate a grievance. A union with adequate internal resources does not have to hire a lawyer.

The Board rarely examines union conduct at arbitration. Usually it does so only in cases involving major abuse or bad faith. Arbitrators are primarily responsible for the conduct in a hearing.

### **Union's Handling of Conflicting Grievances**

Often the rights of the grievor will conflict with the rights of other bargaining unit members. This often occurs in cases involving seniority rights on promotion or layoff. It also happens in cases involving a reinstatement that triggers the displacement of another employee.

In deciding whether or not to arbitrate such grievances, the union must act fairly. If it has done so, the union need not represent each affected employee.

### **Union's Duty to Advise Employees of Hearings**

The union must advise all employees of any hearings that may affect their positions. It must clearly tell them that they can attend and can have their own representative. The attendance of such a representative is subject to the decision of the arbitrator. The union need not provide a representative for the employee. A union is not required to pay for any representative the employees choose for themselves.

## **V. UNION'S RESPONSIBILITIES OUTSIDE OF THE COLLECTIVE AGREEMENT**

The duty of fair representation is not the only factor governing a union's relationship with the employees it represents. An employee may have rights flowing from the union's constitution or rules, from other statutes and from other sections of the *Labour Relations Code*. These matters lie outside the Board's jurisdiction over the duty of fair representation. *See: Human Rights, Citizenship and Multiculturalism Act*.

### **Union Constitution or Rules**

Hiring hall rights usually stem from union hiring hall rules. These rules are not usually part of a collective agreement. In these cases, the matter lies outside the Board's jurisdiction over the duty of fair representation.

### **Other Statutes**

Other statutes also may bind unions and employees. For example, the *Human Rights, Citizenship and Multiculturalism Act* prohibits certain forms of discrimination. Complaints about these forms of discrimination should be directed to the Alberta Human Rights Commission.

The *Workers' Compensation Act* gives employees rights. These rights stem from this Act and not a collective agreement. Unions often help employees with workers' compensation claims. They are not, however, obligated to assist employees by the *Labour Relations Code*. This is because these rights do not arise from the collective agreement. The only exception may be in relation to supplementary workers' compensation benefits outlined in the collective agreement.

### **Other Sections of the *Labour Relations Code***

Sections 151(h)(i) and 152 of the *Labour Relations Code* address issues of union discipline and the fair application of union rules. Employees may file unfair labour practice complaints with the Board against trade unions under these sections. For more information contact the Board offices. *See: Sections 151(h)(i), 152.*

### **Legal or Professional Charges**

Unions are not required to pursue issues not covered in a collective agreement. For example, unions do not have to pay for a lawyer to represent employees facing criminal charges. This also applies to employment-related lawsuits, professional discipline proceedings or fatality inquiries.

### **Collective Bargaining Process**

Unions are not bound by the duty of fair representation during negotiations. Negotiations may lead to decisions some employees see as against their interests. In these cases, the matter lies outside the Board's jurisdiction. Employees may be able to sue a union in the Courts for unfair representation at the collective bargaining stage. Whether negotiating could involve union liability would be a Court, not a Labour Board, matter. *See: Gendron v. Supply & Services Union 90 CLLC 14,020 (S.C.C.); Rita Vickers et al. v. HSAA and the University of Alberta Hospitals [1997] Alta.L.R.B.R. 11.*

## **VI. INTERNAL UNION PROCEDURES**

When the Board hears a duty of fair representation complaint, it reviews the union's procedures for fairness. A union can reduce its potential liability by taking some simple steps.

### **Training**

Training grievance-handlers decreases the chance of breaching the union's duty. Shop stewards, business agents, and grievance committees should all fully understand their grievance procedures and their duty of fair representation.

### **Allowing Grievors to Address the Decision Makers**

Some unions have the local membership decide whether to arbitrate or abandon grievances. Grievors should have a chance to address the membership before a decision is made.

### **Keeping Records**

Records of how a grievance has been dealt with are useful, particularly when the union is responsible for starting the grievance under the collective agreement. If employees decide not to file a grievance, it is useful to have them make a statement to that effect. This provides a record in case the employees later change their minds.

### **Dealing With Time Limits**

A union should make a reasonable effort to inform employees of time limits. Extensions should be applied for if it is not possible to meet a time limit. The Board may hold accountable unions that do not seek extensions (especially where extensions are provided for in a collective agreement). All extensions should be confirmed in writing. The Board may not hold a union accountable where its failure to act was not deliberate.

### **Internal Appeal Procedures**

An effective internal appeal mechanism reduces complaints. The use of appeal mechanisms is not mandatory. The Board will not automatically dismiss cases because the grievor has not followed an available internal appeal route.

### **Independent Advice**

Unions uncertain about how to proceed often seek advice from a lawyer or other person. Some unions find this option saves the expense of an arbitration hearing or of defending their actions before the Board.

## **VII. FILING A COMPLAINT**

Duty of fair representation complaints generally follow a seven-step process:

1. A complaint is filed by an employee or former employee.
2. The complaint is reviewed to determine if it contains adequate particulars and might amount to a breach of Section 153 of the *Labour Relations Code*. Complaints that do not appear to violate this section are not accepted.
3. If a complaint is accepted, a Board Officer contacts the parties involved and asks for responses. If the affected collective agreement is one where the responsibility for processing a grievance is shared between the union local and the national or international, it is the responsibility of the union to inform the Board so notice of the complaint can be given to both. *[amended January 2014]*
4. Board staff and/or members may attempt to resolve the dispute informally.
5. A Board Officer may investigate the complaint. The Officer may write a report outlining the facts and/or ask the parties for additional information.
6. An administrative panel of the Board conducts a documentary review. The panel assesses the case based upon the documents received to decide if it appears to have merit. If not, the complaint is dismissed.
7. If the administrative panel decides the complaint appears to have merit, a Board hearing is scheduled. At the hearing, each party presents evidence that supports its case. Evidence includes testimony from witnesses and documents related to the complaint. Sometimes past Board decisions are presented to demonstrate how the Board has handled similar cases. The members of the panel hearing the application may ask questions of those present at the

hearing. The panel leaves the hearing and makes a decision in private. Most decisions are made public within 90 days of the hearing.

A complaint may be withdrawn at any time. This section provides additional information about how complaints are filed and processed.

### **Deadlines**

Complaints must be filed within **90 days** of when the complainant knew or ought to have known of the actions or circumstances causing the complaint. Complaints filed after this 90-day period must include the reasons for filing late. *See: Section 16(2); Don MacDonald v. CUPE Locals 709 & 37 and City of Calgary [1995] Alta.L.R.B.R. 340; Vijay Gulerya v. ATU [1994] Alta.L.R.B.R. 495.*

### **Filing a Complaint**

Employees can file their complaint by writing a letter or filling out a form available from the Board. The complaint must include:

- the name, address and telephone number of the employee;
- the name, address and telephone number of the employee's lawyer, if any;
- the name, local number, address and telephone number of the union;
- the name, address, and telephone number of the employer;
- the section of the *Labour Relations Code* complained under;
- the nature of the grievance;
- the details of when, how and why the employee believes the union has failed in its representation;
- the names of any union officials involved;
- the names of any other employee affected by the union's actions;
- a statement of the relief the employee seeks, including any request of extended time limits that might affect the employer; and
- copies of any documents the complainant intends to rely upon during a hearing.
- *See: Rules of Procedure, Rule 6.*

The applications must be accompanied by a statement confirming the application has been served on any parties known to be affected by the proceeding (such as the union, a person acting for a union, and the employer) or subsequently added by the Board. *See: Rules of Procedure, Rule 5.1; Bulletin 2.*

Once a complaint is filed, the Director of Settlement reviews it. The Director is an employee of the Board. The Board also employs a number of Officers. All Board employees are impartial and act to assist the Board in understanding and processing a complaint. The Board's staff does not advocate on the behalf of employees, unions or employers. *See: Rules of Procedure, Rules 22, 29; Bulletin 2.*

The Director reviews each complaint for two reasons. First, the Director ensures each complaint is complete. Second, the Director evaluates the allegations to determine if they might amount to a breach of Section 153. If so, the Director accepts the complaint and a letter is sent to all affected parties requesting a response. Unions often respond by, for example, outlining the steps they took when handling the grievance and provide a copy of the relevant collective agreement as well as any documents they intend to rely upon during any hearing. Employers are alerted



because they may be affected by any remedy the Board orders.

Note: Individuals filing applications, complaints or references may be identified by name at various stages of the Board's procedures including in Board decisions, on the Board's website, and in print and online reporting services that publish the Board's decisions. An exception to this general practice may be made, at the discretion of the Board, in cases where sensitive personal information will be disclosed. Individuals wishing to have their names masked may apply to the Board by letter setting out the reasons for the request including what sensitive personal information will be disclosed. This request should be made early on in the processing of the application.

*[amended August, 2012]*

### The Union's Reply

It is essential that unions provide a comprehensive reply to any duty of fair representation complaint to ensure a fair and efficient handling of the complaint. This reply should include a detailed review of the factual history surrounding the complaint with a view to demonstrating the union has exercised its discretion in dealing with its members' concerns in good faith, objectively and honestly, after a thorough study of the grievance and the case, and taking into account the significance of the grievance and its consequences for both the employee and the union.

The factual history should include how and when the union became aware of the complainant's concerns; what steps the union took to investigate and evaluate the complaint; what steps it took, if any, to attempt to resolve the matter; the reasons for reaching the conclusions it did on how to handle the complainant's concerns; and the steps it took to communicate with the complainant to ensure he or she remained informed as this process unfolded.

A proper review of the facts at this stage is particularly important in cases where the union is seeking to have the complaint summarily dismissed at the document review stage. Simply put, the Board will only be able to reach the conclusion a matter should be summarily dismissed where it is comfortable it fully understands the facts of the case and is confident the union has met its obligations to fairly represent its members.

### **Dispute Resolution**

The Director recommends a dispute resolution procedure. Dispute resolution is designed to resolve a complaint before a hearing. This can entail the parties attending a settlement meeting with a Board Officer. Alternately, the parties may be asked to attend a resolution conference held by a Chair or Vice-Chair.

These meetings allow both sides to have their concerns heard and may fully or partly resolve a complaint. Confidential resolution conferences also give both sides a chance to hear the opinion of a Board member as to the likely outcome of their complaint should it progress to a full hearing. If the matter goes to a full hearing, the information provided and opinions expressed in the resolution conference are not shared without the agreement of both parties. This confidentiality encourages frank discussion about the complaint. *See: Section 11; Rules of Procedure, Rules 22, 23, 30-33.*

A Board Officer may also investigate a complaint. An Officer's report sets out the facts surrounding the complaint. This report is provided to everyone involved in the complaint. Anyone involved in the proceedings may object to the contents of the report. Objections must be sent to the Board and the other parties within the time limits set out by the Director of Settlement. If the objecting party does not follow this procedure, the Board may proceed without considering the objections. *See: Rules of Procedure, Rule 26; Bulletin 3.*

### **Documentary Review, Board Hearings and Decisions**

If resolution is not possible, the matter is usually sent to a documentary review panel. This panel decides whether a complaint should proceed to a full Board hearing or be dismissed. The panel considers only the documentation that has been filed by the parties. All parties are advised when a file is being sent to documentary review and have an opportunity to provide further written submissions.

Complaints that appear to be without merit or appear to be frivolous, trivial or vexatious are normally dismissed. If the documentary review panel decides the case appears to have merit, a formal hearing may be held. Hearings normally take place in the Board offices in Calgary or Edmonton. The hearing panel normally consists of three Board members. Hearings are open to the public.

At the hearing, each party presents evidence to support its case. This includes testimony from witnesses. The Board has the power to compel witnesses to attend and require the production of documents. Documents related to the complaint may also be introduced.

The parties use this evidence to make arguments. Sometimes, past decisions of labour boards are also presented. These decisions are used to demonstrate how other boards have handled similar cases. These cases are available on the CanLII website at: <http://www.canlii.ca/en/index.html>. The Board members may also ask questions.

Often, a party will hire a lawyer to represent it at these hearings. A lawyer is not required but legal knowledge and experience may be useful in successfully making a case that a union has violated its duty of fair representation.

Once the hearing is over, the panel leaves the room. The decision is made in private. Most decisions are made public within 90 days of the hearing. Often, the Board will discuss the evidence presented in the case in its written decision. Parties should be aware that the Board publishes these decisions and, therefore, the evidence submitted may become public knowledge.

## **VIII. REMEDIES**

Each complaint must contain the remedy sought by the employee. The *Labour Relations Code* allows the Board only to review the fairness of the union's conduct. It does not allow an appeal of the union's decision on a grievance. It also does not give the Board the power to rule on the employee's grievance.

If the Board finds a breach of a union's duty, it can remedy the matter. The Board can extend the time limits of the grievance procedure. The Board can also give a declaration the union violated its duty, or award damages. For the Board to overrule mandatory time limits outlined in a

collective agreement, it must be satisfied that:

1. there is a loss of employment or substantial amounts of work by the complainant;
2. there are reasonable grounds for the extension; and
3. substantial prejudice will not flow to the employer.

*See: Section 153(3).*

What the grievor has lost may only be the right to have the grievance heard and determined. It is not necessarily everything claimed in the grievance. This is particularly so where the complaint is about a mishandled or abandoned grievance.

When the Board assesses the loss suffered it looks at the chances of the grievance having succeeded. This means the Board may have to consider the merits of the original grievance.

In determining the extent of any loss suffered, the Board considers the employee's effort to minimize that loss.

The Board's power to redress a complaint does not include the power to award punitive damages. It cannot award monies for emotional damages or unspecified general damages.

*See also:*

Information Bulletins 1, 2, 3 and 4  
Rules of Procedure

*For further information or answers to any questions regarding this or any other Information Bulletin please contact:*

Director of Settlement  
Labour Relations Board  
501, 10808 99 Avenue  
Edmonton, Alberta T5K 0G5  
Telephone: (780) 422-5926

Manager of Settlement  
Labour Relations Board  
308, 1212 31 Avenue NE  
Calgary, Alberta T2E 7S8  
Telephone: (403) 297-4334

Email: [alrb.info@gov.ab.ca](mailto:alrb.info@gov.ab.ca)

Website: [alrb.gov.ab.ca](http://alrb.gov.ab.ca)