

## #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 a 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 cases 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 or the employer's actions. 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 or the employer's actions.

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 Baie James, [2001] 2 S.C.R. 207; Canadian Merchant Service Guild v. Gagnon, [1984] 1 S.C.R. 509; 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, [1997] Alta. L.R.B.R. 255; HSAA v. Labour Relations Board and W. Litousky, [1997] Alta. L.R.B.R. 591 (QB); D. L'Heureux v. CSU 52 and City of Edmonton, [1991] Alta. L.R.B.R. 736, [1993] Alta. L.R.B.R. 556, [1994] Alta. L.R.B.R. 150.*

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] 1 S.C.R. 1330.*

### **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: Alberta Human Rights 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 *Alberta Human Rights 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, [1990] 1 S.C.R. 1298; 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. An internal or external appeal mechanism which is approved by the Board will affect how the Board processes a duty of fair representation complaint.

### **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.

## **Appeal or Review Processes**

An effective internal or external appeal or review process reduces complaints. However, it is not mandatory for a union to have such a process.

A union may apply to the Board to approve its internal or external appeal or review process. The Board publishes guidelines it uses to determine whether a process should be approved. The purpose is to ensure the process is sufficiently robust to fairly assess the merits of a grievance, investigate the grievance and the sufficiency and quality of any prior investigation, and assess an employee's rights under the *Alberta Human Rights Act* or enactments relating to employment matters.

Unions with approved processes are listed on the Board's website. Having an approved process impacts how the Board handles duty of fair representation complaints.

Where a union has an approved process, the Board cannot accept any duty of fair representation complaint unless the complainant has appealed or applied under the approved process. In exceptional circumstances, a complainant may apply in advance under section 153(4) for prior consent of the Board to file a duty of fair representation complaint without having to appeal or apply under the union's approved process. Once the approved process has begun, the Board cannot accept any duty of fair representation complaint unless:

- the appeal or review under the approved process is complete, or
- the complainant alleges the appeal or review has been outstanding for longer than is reasonable in the circumstances. Pursuant to the Board's Rules, the Board will not accept any complaint where the appeal or review has been outstanding for less than 90 days.

Where the union has an approved appeal or review process, any duty of fair representation complaint must be filed with the Board within 45 days after the complainant was notified of the conclusion of the appeal or review. The Board will not accept applications attempted to be filed outside this time limit. The Board has no authority under the *Code* to extend this time limit.

The Board shall consider the results of any approved appeal or review process in assessing a duty of fair representation complaint.

Where the union has an internal appeal process which has not been approved by the Board, the Board will still consider the process relevant to the Board's assessment of the union's representation. The Board will not automatically dismiss cases only because the grievor has not followed an available (unapproved) 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 six-step process:

1. A complaint is filed by an employee or former employee.
2. The complaint is reviewed to determine if it meets time limits, contains adequate particulars and might amount to a breach of section 153 of the Labour Relations Code. Complaints that do not relate to matters covered by section 153 will not be accepted. If the complaint is potentially untimely, the party may be required to address that issue in their complaint: see “Deadlines” below.
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.
4. Board staff and/or members may attempt to resolve the dispute informally.
5. An administrative panel of the Board conducts a documentary review. The panel assesses the case based upon the documents received and the submissions of the parties. The review is based on any unchallenged facts raised by either party, and if there is disagreement relies on the facts asserted by the complainant. The question is whether the complaint appears to have arguable merit. If not, the complaint is summarily dismissed.
6. If the administrative panel decides the complaint appears to have arguable merit, a Board hearing is scheduled. In advance of a hearing, the Board will hold a resolution conference. 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.

This section provides additional information about how complaints are filed and processed.

The Director of Settlement may depart from the normal process in unique circumstances; for example, the Director may determine a preliminary issue should be addressed first. Information about other processes the Board may use in handling complaints can be found in Information Bulletin #2.

A complaint may be withdrawn at any time.

### Deadlines

Generally, 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 deadline under section 16(2) must include the reasons for filing late. *See: Section 16(2); Toppin v. PPF Local 488, [2006] Alta. L.R.B.R. 31.*

An additional stricter deadline applies under section 153(4) where the union has a Board approved internal or external appeal or review process. The duty of fair representation complaint



must be filed with the Board within **45 days** after the complainant was notified of the conclusion of the appeal or review. The Board cannot accept applications outside this time limit, and has no authority under the *Code* to extend this time limit.

This additional deadline where there is an approved process does not mean the Board cannot dismiss a complaint as untimely under section 16(2) if the complainant did not diligently take steps to address their concerns about fair representation. Where the complainant diligently took steps, but could not file their complaint with the Board because they needed to pursue the approved process, this is a relevant reason under the *Toppin* analysis to extend the section 16(2) deadline: See [\*MacPherson v. International Union of Operating Engineers, Local Union No. 955\*](#), [2021] Alta. L.R.B.R. 281.

### **Filing a Complaint**

Employees must file their duty of fair representation complaint using the mandatory form available from the Board, and provide the information required by the form. A letter may be attached to the form to provide further information. 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;
- a description of 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;
- information concerning any appeal or review process, including:
  - whether the union has an approved appeal or review process;
  - if so, whether the employee has appealed or applied under that process, attaching a copy of their appeal or application;
  - if so, whether the appeal or review is concluded, attaching a copy of any decision;
- 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 application must be accompanied by a statement confirming the application has been served on the union. Complainants should not serve a copy of the application on the employer. *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 the union requesting a response.

The employer may become an affected party because it may be affected by any remedies the Board orders. However, to reduce concerns that the employer may unnecessarily obtain information about the Union's position concerning the grievance, employers are not notified prior to the documentary review stage of the Board's process. The employer will only be served with the complaint and all submissions and documents, and permitted to participate further in the complaint, if the Board determines after documentary review that the complaint should not be summarily dismissed.

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.

### **The Union's Reply**

As will be discussed below, the Board holds a documentary review of material filed by the parties to decide whether the matter should be summarily dismissed or sent to a full hearing of the Board.

The Board has previously stated 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 the complainant's 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 union's 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 by the union is particularly important at the document review stage. Simply put, the Board can only assess whether a matter should be summarily dismissed where it is comfortable it fully understands the facts of the case and is satisfied there is no arguable case that should be sent to hearing.

The Board's *Rules of Procedure* require the union to provide with its response to the application, copied to the complainant, any and all documents in its possession which are relevant and material to the union's representation of the complainant concerning the matters raised in the complaint. The Board's direction to provide this disclosure includes a copy of the relevant collective agreement, communications with the complainant, investigation materials, notes of union representatives, any grievances commenced and documents concerning the grievance, and

any responses to the grievance by the employer. The obligation that the union provide all such documents is necessary to continue the Board's documentary review process in light of section 16(7.3) of the *Code*. Failure to provide this material with the reply may result in direct referral of the complaint to a hearing.

Where privilege is asserted over documents, the nature of the claim of privilege should be disclosed in the response. A union which does not want the employer to potentially obtain a copy of a legal opinion may assert privilege over the opinion, although by doing so the union cannot rely upon the contents of the opinion (as opposed to the fact one was obtained) in its defence to the complaint.

### **Response Submissions**

The complainant is permitted to respond to the union's submissions.

The complainant should indicate where they disagree with any of the information presented by the union. This is important because the documentary review is based upon any unchallenged facts raised by either party, and if the parties disagree on a fact, the facts asserted by the complainant are accepted for the documentary review. The reply submission is the last chance the complainant has to make submissions before the documentary review, which may dismiss the complaint. Complainants should reveal all information in support of their complaint before the documentary review, and should not hold information or submissions back on the assumption there will be an in-person hearing.

The Board's Rules permit the Director of Settlement to limit the number of submissions, and that any further submissions require the consent of the Director.

### **Documentary Review**

This process is often referred to in Board decisions as administrative review. Administrative review is intended to identify complaints that lack a realistic prospect of success at an early stage so that they can be summarily dismissed before the time and resources of the parties and the Board are engaged by a full hearing. When conducting an administrative review, the panel considers only the documentation filed by the parties. There is no "in person" hearing. The review is based on any unchallenged or undisputed facts, and if a party disagrees with the facts put forward, the Board relies on the facts asserted by the complainant.

However, there must be an "air of reality" to these facts, and a complainant cannot escape summary dismissal by simply denying or opposing the facts put forward by the union. Where the documentary evidence plainly supports a particular version of events, there must be something in the complaint or reply that shows why the documentary evidence may be unreliable. Bald assertions that documentary evidence has been forged, surreptitiously altered, or otherwise prepared in bad faith will generally fail to meet this threshold. Documents that, on their face, appear to be prepared in the ordinary course of labour relations business by the parties' authorized representatives will generally be treated as genuine and accurate unless there is a reason to question them, and the Board may rely on these documents to reach a conclusion that contrary assertions of fact lack an air of reality: see *Complainant and the Alberta Union of Provincial Employees*, [2021] Alta. L.R.B.R. 1.

At the conclusion of the documentary review process, complaints that appear to be without merit or appear to be frivolous, trivial, vexatious, filed with improper motive, or that are an abuse of

process will be summarily dismissed and will not proceed to a hearing. Otherwise, the complaint will be referred to a full hearing.

### **Dismissal for Refusal to Accept Fair and Reasonable Settlement Offer**

Section 153(3.1) of the *Code* allows the Board to dismiss a complaint summarily, without a hearing, where the complainant refuses to accept a settlement that is fair and reasonable. Permitting the Board to assess the reasonableness of settlement offers and to dismiss complaints where a reasonable offer is refused preserves scarce adjudicative resources and promotes the fair and efficient resolution of complaints.

The Board does not apply section 153(3.1) to settlement offers a complainant may have refused in the past. Rather, the settlement offer must be open for acceptance when the section 153(3.1) application is made, and must remain open to be accepted by the complainant for two weeks after any decision by the Board that it is a fair and reasonable offer.

Key elements of the Board's consideration of these applications are set out in [Samuel Howell v. International Association of Heat and Frost Insulators and Allied Workers, Local 110 and Aluma Systems](#) [2021] Alta. L.R.B.R. 227.

#### *Procedural Aspects of Section 153(3.1) Applications:*

- The Board will only consider one section 153(3.1) application in the course of a duty of fair representation complaint.
- The deadline for making a section 153(3.1) application is two weeks following the date of the Board's Resolution Conference.
- Section 153(3.1) applications shall be made by letter to the Board's Director of Settlement and must contain the exact content of the offer being made to the complainant, along with any corresponding written submissions.
- Parties making offers should carefully consider whether they can provide what is offered without agreement of any other interested party to the complaint. In most cases, unions and employers should consult before an offer is made under this section.
- If the Board's ruling on the offer determines that it is fair and reasonable, the offer must remain open for acceptance until two weeks following the date of the Board's decision, and the complainant may accept the offer during this time.
- If the offer is not accepted, the duty of fair representation complaint will be summarily dismissed.
- If the Board finds that an offer is not fair or reasonable, the Board will not issue a written decision as it is not appropriate for the Board to opine on the merits of a contested case that has been referred to a hearing.

#### *Substantive Aspects of Section 153(3.1) Applications:*

- Whether an offer is fair and reasonable depends on whether it provides reasonable compensation or other remedies in light of what the Board would likely order if the duty of fair representation complaint was found to be justified. This includes monetary settlement offers.
- Other elements of an offer under section 153(3.1) might, depending on the context, include:

- admissions of a breach of section 153(1);
- agreements to extend time limitations for grievances to permit further investigation;
- agreements to proceed, in whole or in part, to arbitration; or
- changes to discipline, agreements regarding reinstatement.
- While an admission of breach or liability is a possible aspect of settlement offer, this is not a requirement for an application under section 153(3.1).
- Offers under section 153(3.1) remain settlement privileged, except to the limited extent necessary to permit the parties to make submissions concerning the offers, and to permit the Board to refer to these offers in decisions determining the fairness and reasonableness of the offer.

The Board has confirmed that, when assessing the fairness and reasonableness of a settlement offer under section 153(3.1), it assumes the allegations in the duty of fair representation complaint would be proven.

The Board has also cautioned parties about the appropriateness of seeking a “general” release, unrelated to the circumstances surrounding the duty of fair representation complaint, in the context of a section 153(3.1) application. Overbroad releases are likely to result in the Board finding that a settlement offer is not fair or reasonable: [See \*General Teamsters, Local Union No. 362 and Anna Caterina Middleton\*, \[2022\] Alta. L.R.B.R 34.](#)

### **Resolution Conferences and Hearings**

If the documentary review panel decides the case appears to have arguable merit, the panel will send the matter to a formal hearing. Dates for a hearing are not set until after the Board’s Resolution Conference, and not until the deadline for any section 153(3.1) settlement offer has passed or any section 153(3.1) application has been determined.

In advance of any hearing, the Board requires the parties to attend a resolution conference. Resolution conferences are held between the parties, their counsel (if any), and a senior representative of the Board, typically the Chair or a Vice-Chair. The purpose of a Resolution Conference is to determine whether there is any basis for settlement of the dispute, and if not to assist the parties with case management for the upcoming hearing. To assist the parties, the representative of the Board may express an opinion on the likely strength of a party’s case. Unless the parties agree, the Chair or Vice-Chair who attends the Resolution Conference will not be a member of a hearing panel at any hearing.

In-person hearings take place in the Board offices in Calgary or Edmonton. The hearing panel usually consists of three Board members, which will include the Chair or a Vice-Chair. Hearings are open to the public. The Board also conducts hearings remotely using the Zoom platform. Whether a hearing will proceed in-person or remotely is determined in accordance with the guidelines contained in *Information Bulletin #4: Board Hearings*.

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 fact that a document or statement was included in previous submissions to the Board does not mean it is in evidence at the hearing. The hearing is a new process. Anything the party wants the hearing panel to know must be presented as evidence at the hearing.

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. 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:*

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