

#22 DETERMINATIONS

I. INTRODUCTION

The Board may determine a number of matters, including whether persons are employers and employees within the meaning of the *Labour Relations Code* and the *Public Service Employee Relations Act* and whether or not an employee falls within a bargaining unit. See: Sections 12(3)(a), (b), (o); PSERA Sections 3(2)(b), (p).

Determinations are often made as part of another matter such as a certification application. They may also be made as the result of a determination application. Parties to a difference over any determination question should first meet and attempt to resolve the issue themselves. If the matter cannot be resolved, the parties should next consider using the arbitration procedures in their collective agreement. If necessary, the Board may hear the application.

This Bulletin deals with determination applications filed under Section 12(3) of the Code or Section 3(2) of the Act. It describes how a party files a determination application and how the Board processes those applications. Finally, as they are the most common applications of this type, the Bulletin specifically deals with employee and true employer determinations.

II. A DISCRETIONARY ROLE

When two parties differ over any determination question, they should first meet and attempt to resolve the issue themselves. In the event the matter cannot be resolved, the parties should next consider using their collective agreement's arbitration procedures. For example, if a collective agreement's scope clause is the same as the unit description, the question of a person's managerial status might be arbitrated. If necessary, the Board may hear the application. The Board may defer to arbitration under Section 16(4)(d) or find a decision is not necessary "for the purposes of the Act," and refuse the application.

III. WHO CAN APPLY?

Only an affected party may file a determination application. An affected party has a tangible and demonstrated direct legal interest in the outcome of an application. The Board has made several decisions about Section 12(3) applications. Some of the key ones include:

- An affected party or person includes the employer or the employee(s) concerned. It also includes the trade union holding the certificate or voluntary recognition for the unit.
- A trade union cannot, through a determination application, challenge or ask the Board to reconsider the certificate of another trade union.

- Some determinations involve multiple bargaining units, for example, a hospital or municipality. In such cases, a trade union cannot encroach upon the rights of other bargaining agents. For example, a trade union cannot ask the Board to include in its unit, and simultaneously remove from another certified unit, classifications specifically covered in the other certificate.
- Trade unions are entitled to notice and standing of applications that affect their units. The Board limits these affected unions in their representations to protecting the rights and interests of the employees they represent. They cannot attempt to expand their units in this way.
- A union can ask the Board to determine whether a person is included in a unit even though another trade union has over-bargained its certificate to capture the person in their collective agreement scope clause.
- An employee affected by a certificate, the trade union, and the employer have status to ask for a determination about whether that person is included in or excluded from the unit.
- A third-party employer may seek a determination about whether they are bound by a registration certificate or collective agreement.

See: Section 16(8); Bulletin 2; IBEW Local 1007 v. City of Edmonton [1985] Alta. L.R.B. 85-047; Pasek and Ennis v. AARNA, HSAA and Calgary General Hospital [1982] Alta. L.R.B. 82-001, upheld Alta. Q.B., April 23, 1982, Chrumka; J. Burnco Rock Products v. Teamsters 362 [1993] Alta.L.R.B.R. 89, upheld Alta. Q.B., August 12, 1993, Dixon J.

IV. FILING AND PROCESSING THE APPLICATION

Any affected party or individual can apply for a determination using a letter setting out the information required.

Before filing an application with the Board, the applicant must serve a copy of the application on any other affected persons (e.g., trade union, employer, etc.). The applicant must provide proof of the service in a form acceptable to the Board. The Board will direct how the employees will be notified-usually by posting of a notice at the worksite. *See: Rules of Procedure, Rules 5.1, 6; Bulletin 2.*

On applications affecting hospitals, nursing homes and community health employers, the applicant should serve all unions having a bargaining relationship with the employer as well as the HBA Services (Health Boards of Alberta). This complies with a long-standing decision of the Board to give these parties notice of all determination applications in hospitals, nursing homes and community health because of the potential impact on the standard bargaining unit structure.

Applications affecting the construction and related industries should also be served on the Construction Labour Relations - an Alberta Association and the Building Trades Council.

A party seeking a determination must include in the application all of the information set out in Rule of Procedure 6 plus:

- the specific subsection of the Code or Act covering the determination;
- details of the bargaining relationship;
- for employee determinations, the name of the person(s) in question and the date the duties were created or assigned;

- where available, documents supporting the application, such as job descriptions and organizational charts, or documents which identify the employer; and
- a description of the efforts made by the affected parties to resolve the dispute. Applicants should always consult with other affected parties and try to resolve the dispute before bringing the application. Parties are expected to exchange information about a new position or duties concerning the role of the person(s) in respect of the matters enumerated in the checklists below and other duties they consider relevant. Parties are also expected to exchange any documents relevant to those matters well in advance of any hearing and to contact the Board if they cannot agree on disclosure of documents.

See: Rules of Procedure, Rules 5.1, 6.

The Director of Settlement reviews all applications for completeness and may refuse to process any application lacking sufficient information or may ask the applicant to provide further particulars. All respondents must file a reply and serve it on the other parties. *See: Rules of Procedure, Rules 5.1, 8; Bulletin 2.*

Applications for employee determinations may be rejected by the Board as premature if the position is less than six months old unless there are compelling reasons to accept the application. *See: HSA v. Misericordia Hospital [1995] Alta.L.R.B.R. 533.*

The Board does not usually assign an officer to investigate the facts relating to determination, but officers or Board members may become involved in informal settlement efforts. *See: Section 11; Rules of Procedure, Rules 31-33; Bulletins 2, 4.*

In most instances, if the parties are unable to resolve the matters between themselves, the Director of Settlement schedules the application directly to hearing. Frequently a Chair or Vice-Chair alone will decide these matters and may hold the hearing at the worksite.

V. EMPLOYEE DETERMINATIONS

The Board sometimes determines who is an employee. This may occur when unions apply for certification. To order a vote, the Board must be satisfied on the basis of the Board Officer's investigation, that 40% of the employees in the bargaining unit applied for support the application. Who is an employee can affect if there is a vote and who is eligible to cast a ballot. The Board also decides employee status for some revocation and determination applications. *See: Sections 12(3), 33, 51(2).*

The *Labour Relations Code* defines an employee as anyone employed to do work and who is in receipt of or entitled to receive wages. The Code also lists a number of exceptions. For example, managers are not employees. *See: Section 1(l)(i).*

Changes in a workforce make it difficult to determine who is an employee. For example, are workers on parental leave employees? Sometimes it is also unclear if an employee is in a specific bargaining unit. The Board has developed rules about who is an employee for voting purposes. These rules also guide decisions about who is considered an employee for the purposes of voting in a certification application. Some employees may fall within a bargaining unit but may not be eligible to vote because of the Board's voting rules. These rules are not absolute. When

appropriate, the Board departs from them. *See: Voting Rules, Rules 16, 17; CJA 1325 v. Stuart Olson Contracting Inc [2000] Alta. L.R.B.R. 674.*

Types of Employees

Employers have different types of employees. Some may be full-time while others regular, part-time or casual. The Board distinguishes between three categories of employees. *See: CUPE 417 v. Westerner Exposition Association [1986] Alta. L.R.B.R. 273.*

Full-time employees are employed on a regular basis. For example, they may be employed Monday to Friday, 8:30 to 4:30. Shift workers scheduled for a full-shift for a full period are also considered full-time employees.

Regularly scheduled part-time employees are employed on a regular basis but do not work full-time. This could include a person who works only Saturdays and Sundays while the normal days of work are Monday to Friday.

Casual employees work irregularly or on a call-in basis. A casual employee includes someone who has the right to refuse work and is generally not directed to be at work on a specific day(s) and time(s).

The Code provides no direction about how casual and part-time employees are treated in certification applications. The Board uses its voting rules to determine whether there is the necessary support to order a vote and who is eligible to vote. Full-time and part-time workers are treated as employees assuming they worked on the date of the application, or:

- worked in the 30 days prior to the application (14 days in construction); and
- worked or are expected to work in the 30 days after the application (14 days in construction).

See: Voting Rules, Rules 16(1)(a), (b), 17.

This means most full-time and part-time workers are eligible to vote and support a union even if they were absent the day of the application because of casual illness, annual vacation or temporary layoff. Those absent on long-term disability, extended sick leave, long-term lay-off, major disciplinary suspension or lengthy education or vacation leaves are not eligible to vote (but may be in the bargaining unit). Full-time and part-time workers absent on parental leave are eligible to vote.

Casual employees are eligible to support a union if they worked on the date of the application. Casual employees not working on the application date are not subject to the 30/30 rule outlined above.

Exemptions

Certain workers are not “employees” for the purposes of the statute.

Managers are excluded to avoid a conflict of interest. Employers must manage their staff. They must also negotiate and enforce collective agreements. To do this, employers need staff not subject to union influence. Excluding managers also helps unions operate free of employer influence. *See: Section 1(l)(i).*

The Board determines who performs managerial functions on a case-by-case basis. The nature of the industry, the size of the institution, and the particular employer organization can all affect a determination. The Code neither defines the term “managerial functions” nor does it list any specific criteria that the Board must consider. Over the years, the Board has developed a general approach to assist it in reaching a conclusion in a given case. Persons excluded because they exercise managerial functions generally fall into two categories: those who supervise and those who do not.

Supervising others does not automatically mean a person has managerial responsibilities. The person must exercise effective control over the employees they supervise. At the least, they must make effective recommendations that materially affect the economic lives of employees. Effective recommendations are serious recommendations that are consistently acted upon. Effective recommendations are not merely input into or consultation about the decision-making process or the implementation of pre-determined policies. The following checklist is a useful guide for determining whether managerial functions are being exercised.

- **Supervision:** Does the person exercise supervisory responsibility over other employees? How many employees? How significant is the supervision?
- **Hiring and Promotion:** Does the person make these decisions or at least make effective recommendations to others?
- **Discipline and Discharge:** What is the extent of the person's role in making these key decisions?
- **Directing Work:** Is the person responsible for the operation of an organizational unit? Who has ultimate authority for assigning work and ensuring that the quality of work meets expectations?
- **Independence:** Does the person exercise considerable managerial discretion?
- **Labour Relations Input:** Does the person represent management in responding to grievances and interpreting the collective agreement? Does the person have meaningful input into management bargaining proposals?
- **Supervising Subordinate Supervisors:** Does the person oversee a junior supervisor who is in the bargaining unit?
- **Evaluating Employee Performance:** Determine the person's role in assessing the performance of others. Can the person have an important impact on another's career through such evaluations? Are the evaluations acted upon?
- **Ordering Overtime/Granting Time Off:** What is the financial impact of these decisions? Does the person exercise independent discretion?
- **Policy Setting:** What role does the person have in establishing company policy or altering it?
- **Job vs. a Function:** The Board examines the person's functions in their entirety, rather than looking at any one function in isolation.
- **Job Titles:** The Board is not persuaded by job titles alone, but focuses instead on what duties the person actually performs in practice.
- **Professional/Technical Roles:** The Board will try to determine whether the additional responsibilities are true managerial functions or merely a natural reflection of the person's greater experience and skill or inherent in the exercise of the person's professional and technical skills.

See: UNA 176 v. Central Park Lodges [1996] Alta.L.R.B.R. 428; Capital Care Group v. UNA [1997] Alta.L.R.B.R. 316; UNA et al. v. AHA et al., [1986] Alta.L.R.B.R. 610; Okanagan Telephone Co. [1977] 2 Can. L.R.B.R. 428.

Even if a person does not directly impact the terms and conditions of other's employment through supervision, they may still exercise managerial functions. People who are involved in **matters of policy** or the running of the organization may be excluded. This decision is based upon

- whether or not they exercise independent decision making responsibilities
- that impact the employment relationship.

See: AHA et al v. UNA 151, 96, 64 and 74 et al. [1986] 15 C.L.R.B.R. (N.S.) 277 (Alta. L.R.B., HSAA v. Foothills Provincial General Hospital 1984 P.S.E.R.B.R. 581).

If both of these conditions are met, they are excluded. Provided the person has independent discretion, the exclusion operates across all aspects of typical managerial decision making. This includes budgeting, marketing, financial control and the like. The power to merely make effective recommendation in such areas, where there is no direct impact on the employment relationship, is not sufficient to justify excluding persons as managerial.

Employees performing confidential labour relations functions are also excluded. This exclusion is to avoid a conflict of interest. Some staff will be entrusted with confidential information. This exclusion ensures the employer can rely upon them to keep this information confidential. Similarly, a person's interest as a member of the bargaining unit might interfere with the performance of their job functions on behalf of the employer.

The Board narrowly interprets this exclusion. A three-fold test is normally applied.

- the person's duties must involve labour relations activities, information handling or strategy;
- involvement with this information is on a regular basis; and
- disclosure of this information would adversely affect the employer.

See: ATU 569 v. City of Edmonton et al. [1990] Alta. L.R.B.R. 486; Christenson v. County of Parkland et al. [1989] Alta. L.R.B.R. 155; Labour Relations Board for B.C. et al. v. Canada Safeway Ltd. 53 C.L.L.C. 15,058 at pp. 174-175 (S.C.C.); Crown in right of Alberta v. Donna Hudj et al. [1996] Alta L.R.B.R. 125.

Members of the medical, dental, architectural, engineering and legal professions are excluded when they are employees working in their professional capacity. Other employees commonly considered professionals such as accountants are not excluded by the Code. *See: Section 1(l)(ii).*

Persons training in their profession may fall outside of the Code as "students" or within the Code as "employees" depending on the facts of the case. *See: University Hospitals Board and Professional Association of Interns and Residents of Alberta [1981] 3 Can. L.R.B.R. 477 (Alta. P.S.E.R.B.); St. Paul's Hospital and Professional Association of Residents and Interns [1976] 2 Can. L.R.B.R. 161 (B.C.L.R.B.).*

For professionals who are employees, the professional exclusion operates only if three conditions exist:

1. They are members of their profession. This means they must have membership in their professional governing body.
2. They must qualify to practice their profession under the laws of Alberta. This requirement goes beyond the requirement of membership in the profession. Some professions offer classes of membership to persons who do not fully qualify to practice.

3. Their employer must employ them in their professional capacity. For example, the Board will not exclude a fully qualified engineer who does not provide engineering services but rather works in a maintenance job.

Which Bargaining Unit?

The Board frequently decides if an employee is a member of a specific bargaining unit. The Board does not make determinations about a classification or a position. There must be a person in the position. The Board determines whether a person is a member of a bargaining unit using the prime function test. This test evaluates the functions performed by the employee during a reasonable period of time surrounding the date of the application. See: *RE: City of Edmonton Bargaining Units [1993] Alta.L.R.B.R. 362.*

When determining which bargaining unit an employee may fall into, the Board considers:

- the unit description(s);
- the nature and organization of the employer's business;
- the prime function of each employee: what functions does the employee perform? What skills does the employee use? What tools? What materials? Does the employee do the work or assist? What percentage of time this work involves out of the total duties?; and
- job qualifications to the extent they help the Board decide what a person is doing.

See: *Brauns Construction Ltd. v. Labourers' Local 92 [1992] Alta.L.R.B.R. 10.*

VI. EMPLOYER DETERMINATIONS

The Board occasionally determines the identity of an employee's true employer. The main test used by the Board is described in the Ontario Labour Relations Board decision *K-Mart Canada Ltd. v. Teamsters 419 (1983) 3 C.L.R.B.R. (NS) 224.*

K-Mart sets out a seven-fold test for use in determining if an entity is a true employer:

- **Who has direction and control over how the work is done?** Who selects the employees to do the job? Who controls the way the work is completed? Who controls hours of work and attendance? Who controls operating expenses and purchases? Who provides the equipment, materials, business license and insurance (i.e., liability insurance, property insurance, workers compensation, etc.)?
- **Who has the burden of remuneration?** What is the wage flow? Who pays the workers whose status is at issue? Who bears the ultimate burden of remuneration? The means of remuneration both primarily and ultimately, are important factors in determining who is the employer. Who controls the payment of wages?
- **Who imposes discipline?** Who demotes, suspends or issues warnings to their employees? Do they need permission from a higher authority? If yes, who? Who conducts employee evaluations independently?
- **Who hires?**
- **Who fires?**
- **Who do the employees think is the employer?** Who do the employees think directs their daily work on the job site? Who do they think controls their livelihood?
- **Did an intention to create an employer/employee relationship exist?**

The Board looks at who has "overriding control" of these factors when determining if an entity is a true employer.

See: Plumbers 488 and OE 955 v. Midwest Pipeline Contractors Ltd. [1989] Alta. L.R.B.R. 166; OE 955 v. Peter Kiewit and Sons Co. Ltd., Kiewit Management Limited and Mead Construction Ltd. [1987] Alta. L.R.B.R. 79; Labourers 1111, Plumbers 488, OE 955 et al vs Sie-Mac Pipeline Contractors Ltd. and Spear Construction Inc. [1991] Alta. L.R.B.R. 847.

See also:

Section 12
Rules of Procedure
Information Bulletins 2 and 4

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