

REMEDIES

INTRODUCTION

The [Labour Relations Code](#) gives rights to employers, employees and trade unions. These rights are only as effective as the remedies that enforce them. The Code gives the Board a corresponding authority to grant remedies to rectify violations of those rights. This is a general policy about unfair labour practice remedies. It covers:

- the statutory remedial powers;
- labour relations remedial principles;
- the types of remedies; and
- the importance of mitigating one's losses.

There are also specific policies covering remedies for certain types of complaints. See: [[Duty of Fair Representation, Chapter 33\(f\)](#); [Bad Faith Bargaining, Chapter 27\(d\)](#)]. Two special remedies also have specific policies. See: [[Directed Certification, Chapter 19\(f\)](#); [Costs, Chapter 19\(e\)](#)]. See also: Information Bulletin #23 – Remedies and Costs.

Board staff need to understand the remedies the Board may fashion to inform the dispute resolution strategy selected for a complaint. See: [[Dispute Resolution Initiatives, Chapter 19\(c\)](#)]. Informed officers can better advise the parties of possible remedies to complaints. This helps the parties decide what course of action to take in settling the complaint before the hearing.

STATUTORY REMEDIAL POWERS

Section 16(8) is the most broadly worded remedial provision of the [Code](#). It allows the Board to give any remedy appropriate to a complaint, reference or application. It states:

16(8) Subject to section 17(2), when the Board makes a decision with respect to a complaint, reference or application, it may by order or directive give any remedy that is appropriate to the matter or necessary to ensure compliance with and enforcement of this Act.

Section 17(1) is specific to complaints. It gives the Board the general power to rectify breaches of the Code:

17(1) When the Board is satisfied after an inquiry that an employer, employers' organization, employee, trade union or other person has failed to comply with any provision of this Act that is specified in a complaint, the Board may issue a directive to rectify the act in respect of which the complaint was made (...)

Section 17(1) then continues to set out the specific remedial powers the Board most often uses to rectify a breach of the [Code](#). The list of remedial powers is not exhaustive. Section 17(1) describes

the powers to be “without restricting the generality of the foregoing” general power of rectification. It says that the Board:

17(1)

(a) may issue a directive or interim directive to the employer, employers' organization, employee, trade union or other person concerned to cease doing the act in respect of which the complaint was made;

(b) may issue a directive to require the employer, employers' organization, employee, trade union or other person

(i) to reinstate any employee suspended or discharged contrary to this Act;

(ii) to pay to an employee or former employee suspended or discharged contrary to this Act compensation not exceeding a sum that, in the opinion of the Board, would have been paid by the employer to the employee, together with a sum not exceeding the amount of interest paid by the employee on money borrowed to support the employee and the employee's family, during the time the employee was so suspended or discharged;

(iii) to reinstate or admit a person as a member of a trade union;

(iv) to rescind any disciplinary action taken or pecuniary or other penalty imposed contrary to this Act;

(v) to pay to a person compensation not exceeding a sum that, in the opinion of the Board, is equivalent to the pecuniary or other penalty imposed on a person contrary to this Act;

(vi) in respect of a contravention of section 148 or 149, to pay to an employee compensation not exceeding a sum that, in the opinion of the Board, is equivalent to the remuneration that would have been paid to the employee by the employer if the employer had not contravened that section;

(d) may, subject to subsection (2) but notwithstanding any other provision of this Act,

(i) certify or refuse to certify a trade union as the bargaining agent for a unit of employees;

(ii) revoke or refuse to revoke the certification of a bargaining agent;

(iii) revoke or refuse to revoke the bargaining rights of a bargaining agent voluntarily recognized;

(iv) register or refuse to register an employers' organization as an agent for collective bargaining on behalf of employers in a trade jurisdiction and sector in the construction industry;

(v) cancel or refuse to cancel the registration certificate of a registered employers' organization.

Section 17(2) provides that the Board may not make any remedial order to certify a trade union or revoke a trade union's bargaining rights without a confirming employee vote. *See: [Directed Certification, Chapter 19(f)].*

LABOUR RELATIONS REMEDIAL PRINCIPLES

The Board's remedial powers are broad enough to effectively respond to a wide variety of unfair labour practices. Sections 16(8) and 17(1) give ample room for the Board to fashion innovative remedial orders. The Board resists developing standard remedies that do not take account of the nuances of the individual complaint.

The Board's remedial powers, however, are not unlimited. Following are the major principles the Board observes in fashioning remedies:

- **Remedies must relate to the complaint:** There must be a clear relationship between the illegal act found and the remedy imposed. Remedies must respond to the damage caused by the specific unfair labour practice in issue. They cannot, for example, address past incidents that do not relate to the present dispute or are stale from the passage of time.
- **Remedies should be appropriate to a continuing relationship:** The parties to an unfair labour practice dispute usually must continue their relationship after the dispute ends. The Board resists giving remedies that may be destructive of this relationship. At the same time, the Board recognizes that an unfair labour practice may damage the bargaining relationship, not just the parties' individual interests. Remedies should, where possible, try to repair such damage and enhance the future prospects of the bargaining relationship.
- **Remedies must be restorative:** Section 17(1) allows the Board to rectify a violation of the [Code](#). To rectify means to correct or to restore to an original state. In a labour relations context, it means to undo as far as possible the damage caused by the unfair labour practice. Individual parties should get relief from damage directly caused to them. Successful complainants should be in the position they would have been in had there been no violation of the statute. Compensating parties for loss caused by an unfair labour practice goes beyond compensating for lost wages. Remedies should be fair and fully compensatory, and this sometimes requires the Board to compensate for non-wage losses that are real but hard to quantify.
- **Remedies may consider principles of deterrence:** *Deterrence* is a principle that suggests remedies should discourage repetitions of the illegal act. *Special* deterrence means discouraging the offender from breaking the law again. *General* deterrence means discouraging other members of the community from acting the same way. Deterrence is only a secondary aim of labour relations remedies. It cannot be pursued to the point that the remedy departs from the principle of compensation and becomes an exercise in punishment (Although see Practice Note on Section 112). Where the Board has a number of reasonable remedial options and all options are essentially compensatory, it may choose among its options by considering which option best advances the principles of deterrence.
- **Remedies may not be punitive:** A remedy becomes *punitive* when it so exceeds what is necessary to restore and compensate, that one must conclude the intent is to punish the violator of the Code simply for having violated it. The [Code](#) does not generally permit the

Board to grant punitive remedies. The public interest is in harmonious labour relations, not labour relations aggravated by considerations of retribution and punishment. Instead, the rarely used “Prosecution” sections of the [Code](#) (Division 25) serve the public interest in punishing those who defy the Code.

- **Damage must not be too remote:** *Remoteness* is another principle that suggests the Board should grant remedies only for damage that is reasonably foreseeable from the violation of the [Code](#). The Board will not consider remedies for damage too far removed from the unfair labour practice.
- **The effect of remedies on third parties should be heard and considered:** Remedies sometimes affect third parties. They may benefit them, like an order for a trade union to return to employees dues collected under a collective agreement voided by the union’s unfair labour practice. The Board has authority to issue such an order even though it benefits a party who did not seek the relief. Other remedies may affect a third party adversely. If a remedial Board order significantly and directly affects a third party, then that party should have an opportunity to be heard before an order affecting it issues.

TYPES OF REMEDIES

A complaint or reference before the Board must clearly state the relief or remedy sought. The Board is not bound by the remedies asked for by the parties. It may fashion any remedy it determines appropriate as long as it follows the remedial principles discussed above.

Following are the remedies the Board most often grants.

Declarations & Directives

When the Board issues a declaration, it indicates that someone (or organization) has violated the [Code](#). The Board is more often asked to issue a directive under Section 17(1):

17(1)(a) may issue a directive or interim directive to the employer, employers’ organization, employee, trade union or other person concerned to cease doing the act in respect of which the complaint was made; (...)

A directive is an order from the Board to do or cease doing an act in order to, as far as possible, restore the parties to a situation as if the unfair labour practice had not occurred. We often think of directives in the context of cease and desist orders for illegal strikes or lockouts. See: [[Cease and Desist, Chapter 30](#)]. But Board directives can cover other issues, like:

- **Organizing drives:** The Board may issue directives allowing unions to speak to employee meetings, on employer time and at the place of work. This kind of directive is used to counteract employer threats during an organizing campaign. See: [[Directed Certification, Chapter 19\(f\)](#)].
- **Freeze periods:** Where there is a breach of the collective bargaining freeze period, the Board has ordered a similar freeze to cover a new period of bargaining. This tries to restore

the statute's intention that there be a bargaining period free of the destabilizing effect of unexpected changes to terms and conditions of employment.

- **Posting and mailing of unfair labour practice notices and decisions:** By directive, the Board can require an employer or trade union to post or mail notices and Board decisions. This shows employees that there has been a breach of the Code. It shows the Board requires compliance from the respondent in the future. Posting notices or publishing decisions helps dispel fear or confusion created by an unfair labour practice. It assures other employees that employers cannot ignore the law and it assures other union members that trade unions must abide by the [Code](#). It helps individuals realize that someone more authoritative than the employer or the union has a voice in determining what the individual's workplace rights are.
- **Interim directives:** Under Section 12(2)(e) the Board can grant an interim *preservative* directive to preserve a party's rights pending a prohibited practice hearing. See: [[Interim Directives, Chapter 19\(g\)](#)]. The Board can also issue an interim directive as a remedy under Section 17 of the Code. The Board may give an interim remedial directive only after it has found a breach of the Code. Interim remedial directives can be used as a first step in resolving an unfair labour practice complaint. An interim remedial directive may be appropriate where the damage caused by the unfair labour practice remains unclear because the labour relations situation is in a state of flux.
- **Staged Remedies:** The Board may order a staged remedy whereby certain portions of remedy come into play at certain times or contingent upon certain events.

Reinstatement

Under Section 17(1)(b)(i) the Board:

17(1)(b) may issue a directive to require the employer, employers' organization, employee, trade union or other person

(i) to reinstate any employee suspended or discharged contrary to this Act; (...)

Reinstatement with back pay is a common remedy applied to employer unfair labour practices. The usual approach of this Board is to reinstate an employee so long as employer anti-union motive played any role in the decision to terminate or lay off the employee. An employee is entitled to a decision free of anti-union considerations.

Reinstatement, however, is not automatic when the Board has found an unfair labour practice. Rectifying the unfair practice neither means freeing the employee from all the consequences of acts worthy of discipline nor insulating the complainant from other developments in the workplace. The Board can order another suitable remedy if it is not appropriate to reinstate an employee. For example, it may partially compensate, but not reinstate, an employee if a legitimate general layoff has occurred in the meantime.

Compensation

Section 17(1)(b)(v) and (vi) states the Board can order a respondent:

17(1)(b)(v) to pay to a person compensation not exceeding a sum that, in the opinion of the Board, is equivalent to the pecuniary or other penalty imposed on a person contrary to this Act;

(vi) in respect of a contravention of section 148 or 149, to pay to an employee compensation not exceeding a sum that, in the opinion of the Board, is equivalent to the remuneration that would have been paid to the employee by the employer if the employer had not contravened that section;

The remedies noted in Section 17(1)(b)(v) apply to any complaint under the [Code](#). It most often applies to complaints against trade unions. Section 17(1)(b)(vi) relates specifically to prohibited practice complaints against an employer.

Compensable losses include:

- **Lost wages:** Back pay is the most common form of monetary relief. Often the Board orders compensation for lost wages only in general terms, and offers the parties a chance to agree on the amount. The Board reserves authority to rule on the amount if there is no agreement. See: [*Brewery, Beverage and Softdrink Workers 205 v. The Brick* [1993] Alta.L.R.B.R. 203].
- **Union dues:** The Board can order reimbursement of union dues to employees where a union collected them as a result of an unfair labour practice. See: [*Westfair Foods #2 v. Teamsters 987, above*].
- **Losses from strike or lockout:** The Board has the authority to award compensation for economic loss from an illegal strike or lockout. See: [[Deferral to Other Procedures, Chapter 19\(a\)](#)].
- **Interest.** Section 17(1)(b)(ii) of the Code states the Board can order compensation not exceeding the sum that would have been paid by the employer to the employee “together with a sum not exceeding the amount of interest paid by the employee on money borrowed to support the employee and the employee’s family, during the time the employee was so suspended or discharged...”.

Reinstatement To Trade Union Membership

Section 17(1)(b)(iii) states the Board can order a respondent:

17(1)(b)(iii) to reinstate or admit a person as a member of a trade union; (...)

This remedy is typically given to a complainant who successfully establishes a complaint of discriminatory application of the union’s membership rules or disciplinary standards under Sections 151(h) or (i), or 152(1) of the Code. See: [*James Johnson v. Boilermakers 146(#2)* [1986] Alta.L.R.B.R. 417].

Rescission of Disciplinary Action

Section 17(1)(b)(iv) states the Board can order a respondent:

17(1)(b)(iv) to rescind any disciplinary action taken or pecuniary or other penalty imposed contrary to this Act; (...)

This remedy is appropriate for both employer and union discipline. The Board may use it to order tainted disciplinary proceedings, like warning letters and suspensions, removed from an employee's employment record. Where a union imposes the discipline under its constitution, the Board may override and either cancel or modify the penalty imposed. See: [*James Johnson, above*].

Access Orders

Serious employer unfair labour practices can severely damage communication between employees and their bargaining agent. In a proper case, the Board might order relief granting the union access to the names and addresses of all bargaining unit employees. The Board can direct union access to employees on company time and premises. Or the Board can allow union access to bulletin boards at the worksite. This can help restore the employee-bargaining agent relationship as nearly as possible to the pre-complaint position and remove the unfair advantage created by the employers' illegal actions.

In some circumstances, like projects in remote sites, an employer may interfere with the representation of employees by a bargaining agent of their choice simply by asserting its power to exclude union representatives from the site. Blind enforcement of property rights where employees seeking union representation have no alternative to on-site organizing can be an unfair labour practice. In such an exceptional case the Board has expressed willingness to grant site access orders for organizing purposes.

Plant Shut-Down and Relocation Orders

At times an employer has shut down or moved its operations to avoid a trade union and collective bargaining. In *United Electrical Workers 504 and Westinghouse Canada Ltd.* [1980] 2 Can.L.R.B.R. 469 (O.L.R.B.), the Ontario Board ordered affected employees access to vacancies in nearby operations of the same employer. They combined this with an order for the employer to absorb employees' relocation costs and to protect seniority of relocated employees. So far, the Alberta Board has not ordered this remedy.

MITIGATION OF LOSS

The general law of damages is that an innocent party must make reasonable efforts to mitigate the loss suffered. The innocent party may not be idle and allow avoidable loss to accumulate at the wrongdoer's expense. A wrongdoer can show that the innocent party failed to mitigate its loss and have the damages award reduced. This reflects that the innocent party has contributed to its loss.

Mitigation is an important principle in the law of wrongful dismissal. The case law related to wrongful dismissal clearly requires an employee to reduce losses by seeking reasonable alternative work. This is partly because reinstatement is not an option in wrongful dismissal actions. The employee must always seek other work.

Reinstatement is an option, however, when remedying an unfair labour practice. Is the law of mitigation in wrongful dismissal cases applicable to unfair labour practice remedies? The answer is it is generally applicable, but the duty to mitigate is a duty to take *reasonable* steps to avoid loss. The Board must apply the principle with a sense of what is reasonable in a collectively bargained relationship rather than an individual employment relationship.

In an unfair labour practice, just like a wrongful dismissal case, the onus is on the complainant to prove damages. The respondent must show the employee's failure to mitigate, and why this should reduce Board-ordered damages. If the Board accepts that a complainant should have mitigated his or her losses, it reviews several factors. Delay in filing a complaint may reduce the compensation payable. If an employee has turned down or failed to pursue reasonable alternative employment opportunities, the Board may reduce the compensation award by a lump sum. It may cut the compensation off at a specified date, if it can identify a date on which roughly comparable employment elsewhere was refused. The Board, however, is not likely to penalize an employee for failure to mitigate loss if the employee had good cause to believe they would not be hired.

Labour boards have also recognized that an employee's expectation of reinstatement when fired for union activity is not unrealistic. Employees may reasonably wait a certain period of time for a reinstatement order without holding themselves out as available to other employers.

Mitigation arises as an issue most often in employee dismissal complaints. It may be applicable, though, to other unfair labour practice compensation orders as well. For example, one would expect the Board to require mitigation from an employer seeking damages for economic loss from an illegal work stoppage. A failure to seek a timely cease and desist order from the Board may, of itself, be a failure to mitigate.