

DUTY OF FAIR REPRESENTATION

INTRODUCTION

When a trade union becomes certified, it gains the exclusive authority to bargain collectively on behalf of a unit of employees. The Labour Relations Code grants unions a monopoly over representation. To counterbalance this power, the Code imposes a duty on unions to perform their representative functions fairly. Employees or former employees may complain to the Labour Relations Board if they believe a union has not fairly represented them.

The Board's role in duty of fair representation cases is to examine and decide whether the union represented the employee fairly—that is, without discrimination, arbitrariness, bad faith, or serious negligence. Unlike other jurisdictions, the Code obliges unions to fairly represent employees and former employees in the bargaining unit only with respect to their rights under the collective agreement. The duty does not, for example, apply to a union's actions during collective bargaining.

When the Board looks at the complaint, it examines the union's conduct in handling the grievance and at the circumstances surrounding its decisions to determine if they were made fairly, in light of existing circumstances. The Board does not second guess the decisions made by the union or attempt to substitute its own decisions on the handling of the grievance. A union is not required to pursue every grievance or take every grievance to arbitration.

Some of the factors that the Board looks at in duty of fair representation cases are:

- the nature and seriousness of the grievance;
- the extent of the union's investigation;
- the involvement of the employee;
- the extent of any meetings and discussions on settlement;
- whether the union sought legal advice;
- whether the union looked at reasonable considerations and information when it made its decisions to resolve or not pursue a grievance; and
- whether the union had an internal or external appeal or review process which was followed.

For a good discussion of the duty of fair representation, see: [*Noel v. Societe d'energie de la Bate James* [2001] S.C.J. No. 41, online: QL (SCJ); *Canadian Merchant Service Guild v. Gagnon* [1984] 1 S.C.R. 509].

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, or awarding damages. This policy describes:

- the statutory provisions;
- union appeal or review processes;
- processing applications;
- dispute resolution approaches; and
- remedies.

STATUTORY PROVISIONS

Section 153 of the *Code* describes the duty of fair representation, limits on a union's liability, and the remedies the Board can impose. These are discussed below.

The Duty of Fair Representation

The *Code* requires unions to fairly treat all employees in a bargaining unit. Section 153(1) reads:

153(1) No trade union or person acting on behalf of a trade union shall deny an employee or former employee who is or was in the bargaining unit the right to be fairly represented by the trade union with respect to the employee's or former employee's rights under the collective agreement.

This places the duty of fair representation exclusively on the union but only in relation to those rights outlined in the collective agreement. The section does not extend to the union's conduct in, or the results of collective bargaining. See: [*Gallagher and Lougheed v. Hotel Employees* 47 [1992] Alta.L.R.B.R. 459 and [1993] Alta.L.R.B.R. 287 Q.B.]. This section also excludes rights arising outside of a collective agreement (e.g., *Workers' Compensation Act*, *Alberta Human Rights Act*, union constitutions, etc.).

The Limits on Liability

The *Code* limits the financial liability of unions. Section 153(2) reads:

153(2) Subsection (1) does not render a trade union liable to an employee for financial loss to the employee if

- (a) the trade union acted in good faith in representing the employee, or
- (b) the loss was as the result of the employee's own conduct.

This subsection creates two defences for a union. The first protects the union from financial loss when, despite a breach of the duty, it acted throughout in good faith. The second defence protects unions from paying an employee's financial loss where the loss is caused by the employee's own conduct.

The Remedy

The Board has a remedial (rather than punitive) role to play in duty of fair representation cases. Section 153(3) reads:

153(3) When a complaint is made in respect of an alleged denial of fair representation by a trade union under subsection (1), the Board may extend the time for the taking of any step in the grievance procedure under a collective agreement, notwithstanding the expiration of that time, subject to any conditions that the Board may prescribe, if the Board is satisfied that

- (a) the denial of fair representation has resulted in loss of employment or substantial amounts of work by the employee or former employee,
- (b) there are reasonable grounds for the extension, and
- (c) the employer will not be substantially prejudiced by the extension, either as a result of an order that the trade union compensate the employer for any financial loss or otherwise.

This section only applies when **all** three conditions are met. The Board can extend time limits in the grievance procedure and order a grievance to arbitration under certain conditions despite missed time limits.

Union Appeal or Review Process

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

Under section 153(6) 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 right under the *Alberta Human Rights Act* or enactments relating to employment matters. The guidelines available on the Board's website also outline the application process, and the requirement of the union to file and have approved by the Board any amendments to an already approved process.

Union's with approved processes are listed in the Board's website. Having a Board approved process impacts how the Board handles duty of fair representation complaints.

PROCESSING APPLICATIONS

This section outlines how the Board handles preliminary inquiries and duty of fair representation complaints. It also discusses timeliness and notifying the affected parties.

Preliminary Inquiries

Often, employees call the Board for advice when experiencing difficulties in getting their grievances heard. Board staff provide quick, flexible and informal assistance. Callers should recognize:

- the importance of the collective agreement's provisions and the possibility of loss being caused by missed time limits;
- the employee's right to fair representation;
- the union's right, under most agreements, and after proper investigation, to decide whether to proceed or not; and
- the importance of utilizing a union appeal or review process if one exists.

Timeliness

Section 16(2) says the Board can refuse to accept a complaint made more than 90 days after the applicant knew or ought to have known of the actions or circumstance giving rise to the complaint. Employees seeking to file a complaint outside the 90-day guideline must give the Board a satisfactory explanation for the time delay if they hope to proceed. See: [*Toppin v. PPF Local 488*, [2006] *Alta. L.R.B.R.* 31].

Where the union has a Board approved internal or external appeal or review process, the time limit is different. In that case, a 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 an application filed outside this time limit and has no authority to extend this time limit.

Reviewing the Application

A person wishing to file a duty of fair representation complaint must use the mandatory form available from the Board. A letter may be attached to the form to provide further information.

An officer reviews the complaint. If hand delivered, meet with the complainant immediately.

Explain what the Code allows and does not allow the Board to do in these cases. It is the fairness of the union procedure, not the merits of the grievance that the Board examines. Explain that the union does not have to be right; it has only to act reasonably and fairly. Make it clear what aspects of the union's conduct are scrutinized (i.e., fairness, honesty, not arbitrary, etc.) and the degree that the conduct is scrutinized (i.e., the procedural fairness rather than a rehearing of the merits of the grievance).

Check the complaint for completeness, including:

- The complainant's name, address, telephone number, their lawyer, if any, the employer, and trade union. The union's contact information should include the union local number.

- Who is the complaint against—is it the union or someone acting on behalf of the trade union or both? Do both a parent and a local have involvement in process the grievance? If yes, the complainant may want to file the complaint against both. See: [Jan Dezentje v IBEW et al [1999]. Alta.L.R.B.R 267, overturned on other grounds [2000] Alta.L.R.B.R. 276 (Q.B.)].
- Is the person a member of the bargaining unit, now or in the past?
- The nature of the grievance including what section of the collective agreement is alleged to have been violated.
- The details of when, how and why the complainant believed the union failed in its representation including names, dates, description of events and how specifically the union did not fairly represent them. See: [*Particulars, Chapter 12(c)*].
- The names of any union officials involved.
- The names of any other employee affected by the union's actions.
- At what stage is the grievance process? Has the person followed the time limits in the collective agreement?
- Information concerning any appeal or review process, including: whether the union has a Board approved appeal or review process; if so, has the complainant used the process (is a copy of their appeal or application attached?); and if so, whether the appeal or review is concluded (is a copy of any decision attached?).
- What remedy is the individual requesting, including any request to extend timelines that might affect the employer? See: [*Remedies, Chapter 12(e)*].
- Copies of any documents the complainant intends to rely upon during a hearing.
- A statement confirming the complaint has been served on the union. See: [*Rule 5.1*]. (Duty of fair representation complaints should not be served on the employer. The employer is notified of the complaint when and if the Board directs it to a formal hearing).

Stamp the complaint as received by the Board.

The Board's administrative staff enters the matter on the database and creates a process file. The Director of Settlement may refuse to accept an application for lack of particulars. The Director may also request further information and recommend proceeding, only once the complainant has provided these particulars. See: [*Rule 22; Particulars, Chapter 12(c)*].

Notifying the Parties

When a duty of fair representation complaint is received and accepted after review by the Director of Settlement, a letter is sent to the complainant and the union requesting a written response from the union. See: [*Standard Letters and Documents, Chapter 24(h)*].

The employer may be affected by any remedies the Board orders. However, employers are not notified prior to the documentary review stage of the Board's process to avoid their involvement unnecessarily. The employer is only served with the complaint and all submissions and documents (subject to any disclosure concerns), and permitted to participate in the complaint if the Board

determines after documentary review that the complaint should proceed to hearing.

Individuals filing a complaint with the Board may be identified by name as the Board processes the matter, 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 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 will be disclosed. This request should be made early on in the processing of the complaint and will be decided by a Board panel after getting a response to the request from the union.

The Union's Reply

It is essential that unions provide a comprehensive written response to a duty of fair representation complaint to ensure fair and efficient handling of the complaint. The Union is given the chance to request additional particulars about the complaint. The Board sets a deadline for such requests, and if no request is made, the union files its response in accordance with the established deadline.

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 conclusion it did on how to handle the complainant's concerns; and the steps it took to communicate with the complainant to ensure that they remained informed as the process unfolded.

The Board requires 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. This disclosure must include 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.

Failure to provide this material with the reply will lead to a conference with a Chair/Vice-Chair. This may result in direct referral of the complaint to a hearing.

When 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 complaint is provided with the opportunity to reply to the union's submission. The complaint should use this opportunity to indicate if they disagree with any of the information presented by the union. This is important because the documentary review carried out by a Panel of the Board does 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 the information in support of their complaint before the documentary review and should not hold information or submission back on the assumption that there will be an in-person hearing.

Any further submissions from the union or the complainant require the consent of the Director of Settlement who has the power to limit the number of submissions.

Documentary Review

Once the Board has received all responses from the complainant and the union, this material is sent to an administrative panel of the Board for a documentary review. See: *[Hearings and Scheduling, Chapter 8(a)]*. The review does not involve an in-person hearing.

The panel decides whether a complaint should proceed to a full Board hearing or be summarily dismissed. The Board only considers the documentation that has been filed by the complainant and the union. Complaints that appear to be without merit or frivolous, trivial or vexatious will be summarily dismissed without any further hearing. If the complaint is directed to hearing, the Board panel will notify the Board Officer assigned to the file and a letter will be sent to the parties and a hearing scheduled. If the complaint is being summarily dismissed, the Board will communicate the reasons for the dismissal in a letter decision signed by the Chair or Vice-Chair of the panel.

Settlement Efforts and Resolution Conferences

The Board Officer assigned to the file may set a meeting with the parties to attempt to mediate and settle the dispute. This can occur before the documentary review.

Following a documentary review, if the Board directs the complaint be scheduled for a formal Board hearing, it will usually direct that the parties attend a Resolution Conference. 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. Resolution Conferences are typically conducted by the Chair or a Vice-Chair. See: *[Dispute Resolution Initiatives, Chapter 12(d)]*.

Unless the parties agree, the Chair or Vice-Chair who attends the Resolution Conference will not be a member of the hearing panel at the formal hearing.

Once the matter has been directed to a formal hearing, the employer is notified of the complaint and sent a copy of the complaint and all submissions and documents. If the parties have raised disclosure concerns earlier in the process and have submitted redacted documents to the Board, the employer will be provided with the redacted documents. They will be given the opportunity to raise with the Board any concerns they have with the redactions. The employer is encouraged to participate in the Resolution Conference and attend the formal hearing as it may be affected by any remedies or Board orders. See: *[Standard Letters and Documents, Chapter 24(h)]*.

DISPUTE RESOLUTION STRATEGIES

Once the Board accepts the complaint, the Director of Settlement will choose a dispute resolution strategy appropriate to the complaint. See: [*Dispute Resolution Initiatives, Chapter 12(d)*]. This type of complaint requires a problem-solving approach. The officer assigned to the file takes an active role in resolving the matters, and may use more than one tactic. Consequently, the officer and the Director of Settlement must monitor both the strategy and the tactics, and update the database entries as necessary. Prepare an acknowledgment letter and send them to the complainant and the union. The dispute resolution strategy will vary with the circumstances of each case. Some options include:

- **Try to effect a settlement before a hearing.** The Director of Settlement and the officer should be alert to settlement opportunities. Discussing the matter with the union can sometimes resolve it. Having the parties meet face-to-face with a neutral third party may also lead to resolution. Even a conference call may have the same effect. Other settlement strategies might include a settlement meeting, a Section 11 Board-member hearing or a resolution conference. See: [*Rule of Procedure 30; Dispute Resolution Initiatives, Chapter 12(d); Information Bulletin #3*].
- **Set the matter directly to a documentary review panel with directions or conditions.** If a complaint is difficult to understand even if additional particulars have been requested and provided, or if the Director of Settlement determines that a preliminary issue should be addressed first, it should be sent to a documentary review panel. A documentary review panel determines 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. Advise the parties of this step and request any further written submissions.

REMEDIES

If the Board finds the union has failed in its duty, it can impose remedies. The Board power does not extend to awarding damages for emotional or unspecified losses. See: [*Remedies, Chapter 12(e)*]. In determining remedy, the Board examines the chances of the grievance succeeding and the efforts made by the employee to minimize the loss. See: [*L. Detz, and HREU 47 [1992] Alta.L.R.B.R. 512*].

Subsection 153(3) allows the Board to set aside time limits in a collective agreement if the complainant satisfies the Board that:

- there is a loss of employment or substantial amounts of work;
- there are reasonable grounds for the extension; and
- the employer will not be substantially affected.

Under this Section, the Board can:

- Extend time limits in the grievance procedure.
- Order a grievance to arbitration, see: [*D. L'Heureux and CSU 52 and City of Edmonton* [1991] Alta.L.R.B.R. 736].
- Award damages where it is found the union has breached its duty. The Board may find referring the matter to arbitration is not the best remedy in the circumstances. For example, the complainant may not want the job back, but may have incurred losses. The Board looks not merely at the losses, but at the lost opportunity to win at arbitration. The union, by breaching the Code, denies the complainant the chance to win at arbitration, not the win itself. The Board may, therefore, award the employee damages calculated using the actual losses and the Board's estimated chance of winning the grievance had it gone to arbitration. See: [*Barry Martin and AFCW 397*, [1985] Alta.L.R.B. 85-048; *Jan Dezentje v. IBEW et al.* [1999] Alta.L.R.B.R. 267, overturned on other grounds [2000] Alta.L.R.B.R. 276 (Q.B.); *Glinz, above*].
- Order measures that are reasonable and appropriate. For example, a complainant had his seniority reinstated after an Ontario Board found that the union had given incorrect advice. See: [*Timothy W. Smith et al* [1983] Ont. L.R.B.R. Dec. 1947].