

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 [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; and
- whether the union looked at reasonable considerations and information when it made its decisions to resolve or not pursue a grievance,

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;
- processing applications;
- dispute resolution approaches; and
- remedies.

STATUTORY PROVISIONS

Section 153 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 [Labour Relations 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](#), 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.

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; and
- the union's right, under most agreements, and after proper investigation, to decide whether to proceed or not.

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.

Reviewing The Application

A person may file a complaint on the Board-issued form or by letter. 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:

- Name, address, telephone number of complainant, employer, and trade union.
- 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?
- What section of the collective agreement is alleged to have been violated?
- Is the matter grievable?
- At what stage is the grievance process? Has the person followed the time limits in the collective agreement?
- What are the specifics of the complaint? Get names, dates, description of events, and how the complainant feels the union did not fairly represent them. See: [[Particulars, Chapter 19\(b\)](#)].
- What remedy is the individual requesting? See: [[Remedies, Chapter 19\(d\)](#)].
- Has a copy been properly served on the union, someone acting for it, or both, and the employer?

Stamp the complaint as received by the Board. Enter the matter on the database and create 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 19\(h\)](#)].

Notifying The Parties

When a duty of fair representation complaint is received, ensure the complainants understand that they must inform the affected union(s) and their employer or former employer. The outcome of the complaint may directly affect the employer. They may, therefore, wish to attend any hearing into the matter. It is important to explain this requirement to complainants as they may be unaware of their obligations. Send the standard letter explaining the process and the information each party needs to provide. This letter asks for a response from the union and also the employer.

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 Initiative, Chapter 19\(c\)](#)]. 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 letters appropriate to the strategy selected and send them to the affected parties. 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 19\(c\)](#); [Information Bulletin #3](#)].
- **Set the matter directly to a documentary review panel with directions or conditions.** If a complaint is difficult to understand or remains unresolved, 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. 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].