

DISCIPLINE

RIGHTS TO UNION REPRESENTATION

DUE PROCESS

The principle of due process underlies our justice system and is well established in the area of administrative law. It has been imported into the workplace, with the collective agreement giving meaning and substance to the right. The concept of due process has been described as penetrating “to the heart of the relationship of the employer and the employee”.¹ The employer’s methods of collecting evidence and dealing with an employee accused of misconduct must be consistent with notions of fairness.

Unfairness may compromise the process and lead to the discipline being overturned, as described in the leading case of *Hickeson-Langs Supply Co.*,² where Arbitrator Burkett stated:

“These safeguards are in the nature of contractual due process. While it may seem unfair to the employer to have its actions found to have been null and void, the due process provisions are central to the representation provided under the collective agreement and, in our view, there is no other way to give real meaning to them.”

This means that the employer must take an employee’s rights to union representation seriously. Ultimately, the overturning of any disciplinary sanction will depend on two things - the particular circumstances surrounding a claim of abuse of representational rights, and what the parties to the collective agreement have negotiated.

NEGOTIATED REPRESENTATIONAL RIGHTS

Collective agreement language describing rights to union representation in matters of discipline varies in its strength and scope. Most collective agreements covering PSAC members contain a provision providing an employee with the right to union representation at the time s/he is interviewed regarding allegations of misconduct, or alternatively, at the time discipline is imposed. Some agreements oblige the employer to remind the employee of his/her rights to representation. Or, an employer may be required to notify both the union and the employee in advance of the meeting, and to indicate its purpose. The employer may be required to furnish grounds to an employee prior to imposing a disciplinary measure. Other language refers to time limits for placing items of a disciplinary nature on an employee's file, and notifying the employee of whether or not the file will be used at the meeting.

The scope of representational rights is found in the precise wording of the collective agreement.

TRENDS IN ARBITRAL JURISPRUDENCE

Brown and Beatty, *Canadian Labour Arbitration* (Third Edition), at p. 7-8, 7:2100, notes that arbitrators in more recent cases are inquiring into the purpose and importance of the obligation, rather than focusing on details such as whether the word "shall" was used, or whether the consequences of non-compliance were expressly described in the agreement. This has been described as the "purposive approach".

According to Arbitrator Mervin Chertkow³:

"The purposive approach to interpretation of union representational rights has now gained wide recognition ... The Industrial Relations Council of British Columbia in *Fording Coal Ltd.*⁴ characterized representational rights as 'substantive, mandatory and fundamental'. In *Highland Valley Copper*,⁵ I adopted the reasoning of the Council in *Fording Coal*:

Where there are provisions in a collective agreement granting such representational rights, they are substantive. They ought to be given a broad, purposeful interpretation. I agree that the purpose of such representational rights is to give the employee advice and support that is akin to and which, in other circumstances, would be found between a lawyer and his client. That is so, in my view, both before the actual decision to discipline an employee is made as well as at the time discipline is imposed. Simply put, where the contract language so provides, an employee is entitled to have a union representative present to assist him in explaining the circumstances surrounding the incident, to plead on his behalf that either an employment offence did not occur or if it has occurred, to argue for a quantum of discipline as minimal as the company would be prepared to accept. That is the purpose for granting such representational rights. For the reasons set out in the *Fording*⁴ decision, such rights serve a constructive and useful purpose for both parties in furthering a harmonious relationship between an employer and a union.”

RESULTS OF NON-COMPLIANCE

Where supported by the collective agreement, an abuse of an employee’s rights to representation will likely result in the disciplinary measure being overturned. In *Wendy Evans*⁶, where the collective agreement provided for representation “when an employee is required to attend a meeting, the purpose of which is to render a disciplinary decision ...”, Adjudicator Tarte found that the employer’s actions violated the grievor’s representational rights. In ruling the discharge null and void, he stated:

“The right to representation in such circumstances is a substantive one whose breach cannot be cured at some later date by a hearing de novo. Unlike *Tipple* (Federal Court of Appeal A-66-85), this case is involved with more than simple procedural fairness. Given the nature and purpose of such rights, they ought to be interpreted liberally for the benefit and protection of the employee.

The weight of arbitral authority in situations such as this is to declare the discipline imposed ‘void *ab initio*’*. Employees who must attend meetings

concerning the imposition of disciplinary sanctions are extremely vulnerable and in many cases incapable, in those trying moments, of properly representing themselves. Unfairness must not be allowed to be part of the disciplinary process. An employer must ensure strict compliance with a clause such as 34.03. Failure to observe its edicts must of necessity vitiate and render null the disciplinary sanction imposed.”

* void *ab initio* is a Latin phrase meaning to render meaningless *from the beginning*.

DISCIPLINE: SECOND TIME AROUND

If the discipline is nullified as a result of a breach of due process, can an employer re-impose discipline?

Arbitrator Bird in *Canham*⁷ expressed the view that the employer ought not be allowed to benefit the second time around by relying on admissions or confessions obtained in violation of the employee’s representational rights, or enjoy any other advantage based on such violation.

In *Fording Coal Limited* (Burton grievance)⁸, Arbitrator Hope stated:

“That does not mean that the employer could not initiate further proceedings against the grievor with respect to any misconduct deemed to amount to just cause for his dismissal and to seek to support it on other evidence. It is to say that this dismissal, which was based entirely on the admission made by the grievor in a meeting in which he was entitled to union representation, was void by reason of the fact that he was not afforded an opportunity to be represented.”

Given that the burden of proof in disciplinary situations rests with the employer, the exclusion of tainted evidence may mean that the employer could not, with credibility, present a case to justify a second disciplinary sanction.

Providing the employer a second chance to proceed on the same grounds may very well violate the “doctrine of *res judicata*”**. For example, in *Valdi*

*Foods*⁹, an employee was accused of stealing. Her manager had two discussions with her with no union representative present. The union steward was present at the third meeting where disciplinary action was taken. Because there was no steward present at the first two disciplinary meetings, the discharge was set aside and the employee reinstated. The arbitrator found that the decision to discharge flowed, in part at least, from a meeting where the employee was unrepresented. The evidence did not indicate there was any further investigation into the matter and for all intents and purposes, the grievor was discharged at the time her representational rights were violated. Immediately following the employee's reinstatement, she was again discharged. A second grievance was filed and the second arbitrator ruled:

*"Therefore I find that not only did the two cases involve the same parties, the same collective agreement, the same grievor, but the factual basis upon which the two cases rest and the claims in both, that the grievor was discharged for cash manipulation on May 31, 1990 were the same, and therefore, res judicata** is applicable with the effect that the matter has already been adjudicated. As the first discharge was null and void and the defect was not curable, the second discharge which rests upon the same facts is also null and void... Counsel for the company suggested that the case before me was different than the case before Arbitrator Brent because the merits of the discharge had not been dealt with. I find however, that Arbitrator Brent did deal with the merits of the discharge, although not with the incidents that gave rise to the discharge."*

However, some arbitrators have found that, where the lack of representation caused no prejudice to the employee, the employer can take a second try and mount a credible case to justify discipline the second time around.

** *res judicata* is a Latin term. It is a rule of finality. It means that a case cannot be decided again as the matter has already been adjudicated.

PROTECTING REPRESENTATIONAL RIGHTS

From the case law on this issue, we can conclude:

- (i) There is a distinction between operational meetings and those that are disciplinary in nature. An employee can have no reasonable expectation of representation "... where a supervisor seeks only to make a work assignment, to provide instruction or to do any of a myriad of things that are inherent in the day to day relationship between an employee and his supervisor".⁹ In other words, representational rights do not exist for meetings of an operational nature unless the collective agreement so provides.
- (ii) The scope of representational rights is found in the wording of the collective agreement. Most PSAC agreements, at a minimum, cover disciplinary hearings and meetings where a disciplinary decision is rendered. Should an employee suspect discussions may be disciplinary in nature s/he should request union representation. Failure to do so may be interpreted as waiving rights to representation if the evidence suggests there was a reasonable basis to conclude that discussions could lead to discipline.
- (iii) When an interview, meeting or discussion is initiated by management for the purpose of eliciting information from the employee that could result in discipline, they become disciplinary in nature. This being said, there may be situations where an employee's discussion with the employer might lead to discipline when it had no intention to do so. If in doubt, an employee should seek clarification and request union representation in the event that it might.
- (iv) Where the union believes there is a violation of an employee's representational rights, it should be raised during the grievance procedure. Failure to do so may result in an allegation that there was a conscious recognition on the part of the union that a substantive right was being waived.

- (v) An abuse of an employee's rights to representation results in a fundamentally flawed process that cannot stand. Any grievance concerning the disciplinary action must also address the alleged violation of representational rights. At the outset of any hearing, the union representative should start with a preliminary objection. This means that the union is objecting to a hearing on the merits of the alleged wrongdoing and subsequent discipline because the denial of representational rights renders the discipline null and void.
- (vi) Should the employer re-impose discipline, a new grievance should be filed. The burden of proving just cause rests with the employer and it would be the union's position that any evidence obtained when representational rights were violated cannot be used to support any subsequent actions of the employer.

¹ *York University (Day Grievance)*, unreported, December 3, 1974 (O'Shea)

² *Hickeson-Langs Supply Co.* (1985), 19 L.A.C. (3d)379 (Burkett)

³ *Mandatory Union Representation at Discipline: An Arbitrator's Perspective* (1993 Labour Arbitration Yearbook)

⁴ *Fording Coal Ltd.*, unreported, I.R.C. No. C39/88, February 11, 1988, at 12 of the award

⁵ *Highland Valley Copper*, unreported, April 19, 1988 (Chertkow)

⁶ *Wendy Evans v. Treasury Board*, PSSRB file 166-2-25641, October 21, 1994 (Tarte) at page 10

⁷ *Government of Province of British Columbia (Personnel Services Division)* (1991) 21 L.A.C. (4th) 325 (Bird)

⁸ *Fording Coal Limited* (Burton arbitration), unreported decision of September 12, 1988, at page 47 (Hope)

⁹ *Valdi Foods and United Food and Commercial Workers, Local 175* (1991), 19 L.A.C. (4th) 114 (Kirkwood)