

# UNION REPRESENTATIVE IMMUNITY

## What is it?

Union representative “immunity” refers to the latitude a representative enjoys in dealing with management. It means that a union representative can vigorously advocate on behalf of the membership with actions or words that might otherwise attract discipline or some other kind of penalty. However, the immunity is not absolute. There are limits.

## Limits

The union representative must be acting in his or her official capacity. S/he must be engaging in lawful activity. The representative’s conduct must not cross the boundary between forceful advocacy and rude, aggressive conduct that genuinely threatens or intimidates another individual. The boundary is also crossed when a union representative makes statements that are malicious in the sense that they are knowingly or recklessly false, or that amount to a deliberate campaign to harass, or publicly denounce or attack a member of management.

## Some leading cases

Arbitrators have generally agreed on the need for protection for union representatives in the discharge of their responsibilities:

*In our view, the question of whether a union official is entitled to immunity from discipline must depend on the facts of each case. The starting point must be that there must be a recognition that once an employee is elected to union office his status in the workplace changes substantially. He has a dual role. As an employee, he must conform to the same rules and policies as his co-workers. However, when acting in his union capacity he is an integral part of the collective bargaining regime that governs the workplace on a day-to-day basis. He is then on an equal footing with members of management when carrying out his union duties.*

*He must be free to police the collective agreement for compliance, and enforce it with vigour. In so doing, it is unavoidable that he will be required to take a higher profile than his fellow workers. Inevitably from time to time he will encounter areas of conflict with members of management. Regardless of the individual's degree of tact and diplomacy, it comes with the territory that on occasion he will be bordering the line between vigorously representing his fellow workers and engaging in insubordination towards members of management. Given this difficult role undertaken, the right of a union official to properly carry out his duties must be strictly protected except in the most extreme cases. Mere militancy or overzealousness should not result in penalty. A union official must be able to press his point of view with as much vigour and emotion as he wishes, even though it may turn out in the end that his point of view was wrong.<sup>1</sup>*

In another case dealing with abusive statements in a union newsletter, the arbitrator referred to the political dynamics associated with a union representative's status and the degree of protection that should be afforded to a representative's statements:

*A chief steward often operates within a political process. Elected by his fellow employees, he may be required one day to speak harsh words to management and another day to speak harsh words about management to employees in an effort to inform or rally them. He may posture his communications both with management and with the employees. In that he is not unlike other elected officials.*

*While generally a company may be entitled to expect a degree of faithfulness and respect from employees in statements which they make after working hours, it is clear that an employer cannot hold employees to a standard of unquestioning loyalty, especially where union business is concerned. It would be unrealistic not to expect that a union steward will, whether in a speech or a newsletter, occasionally express strong disagreement with the company and its officers, and do so in vivid and unflattering terms. Being at the forward edge of encounters with management, the shop steward becomes particularly vulnerable in the area of discipline...*

*If union stewards are to have the freedom to discharge their responsibilities in an adversarial collective bargaining system, they must not be muzzled into quiet complacency by the threat of discipline at the hands of their employer. In our view the principles developed by the arbitral awards canvassed above and by the Court in the Linn case disclose the standard to be applied. The statements of union stewards must be protected, but that protection does not extend to statements that are malicious in that they are knowingly or recklessly false. The privilege that must be accorded to the statements of union stewards made in the course of their duties is not an absolute licence or an immunity from discipline in all cases. A steward who openly exhorts employees to participate in an illegal strike obviously cannot expect that his union office will shield him from discipline... Similarly, a steward may not use his union office and a union newsletter to recruit and direct employees in a deliberate campaign to harass a member of management... Conduct so obviously illegal or malicious is outside the bounds of lawful union duty and can have no immunity or protection.<sup>2</sup>*

While the parties might wish for an idealized world of civil and respectful communications, the emotional nature of the adversarial relationship does not always make this possible. Arbitrators have readily acknowledged the role of immunity in facilitating a free and frank exchange between union and management representatives to resolve disputes:

*I recognize... the general abhorrence of management and union officials alike of needless exchanges of unpleasantries and abuses in both negotiations and grievances, which can only exacerbate the situations rather than further a settlement, which is the purpose of such meetings...*

*In my view, such conduct does not have a place in grievance proceedings, but when this type of conduct arises it is not an offence for which discipline can be imposed under the collective agreement. To allow the imposition of discipline in such circumstances, would require consideration of whether it was an extreme or mild form of abusive language, which would then*

*depend on the degree of abuse. The occasional use of swear words without rancour is not usually objectionable. But to attempt to curb emotional outbursts, even though of an objectionable nature, through the imposition of disciplinary penalties is not justifiable under the collective agreement, and could seriously impede a full and frank discussion which is supposed to occur in the interest of settling disputes during the grievance procedure. The intent of grievance meetings between the parties is to attempt a resolution of their differences and there cannot be complete strictures or a code of conduct for participants in such meetings applicable to both union and management representatives.<sup>3</sup>*

One of the important PSAC cases dealt with negative comments in a union representative's performance appraisal describing the representative's exchange with management. In ordering the comments to be removed:

*It has long been recognized that a union official, in the course of his duties, may engage with impunity in certain types of conduct which would normally attract disciplinary action by the employer. Union officials, in the performance of their duties, enjoy a certain degree of immunity vis-à-vis their employer. There are limits, of course. However, I have no doubt that speaking in a demanding or aggressive manner - assuming, for the moment, that the complainant did behave in that manner - does not fall beyond those limits.*

*...Thus, the question posed in the penultimate paragraph above comes down to the following: Can the employer make it a condition of future advancement or of continued employment that a union officer conduct union business in a manner that is acceptable to the employer? It is sufficient merely to state the question in this form for the answer to be obvious. That answer is, resoundingly, in the negative.<sup>4</sup>*

## In summary

All this means that stewards and other union officers can vigorously represent their members' interests. They can do so with confidence, protected by the cloak of immunity from employer sanctions, as long as they are acting in their official capacity and do not exceed the limits of that immunity.

<sup>1</sup> Bell Canada, 57 L.A.C. (4th) 289 (Dissanayake, 1996).

<sup>2</sup> Burns Meats, 26 L.A.C. (2d) 379 (Picher, 1980).

<sup>3</sup> St. Lawrence Seaway Authority, 20 L.A.C. (2d) 24 (Brown, 1978).

<sup>4</sup> Hella Prante, PSSRB File 161-2-388 to 393 (Kwavnick, 1987)