Discipline - Rights to Union Representation

Verified 2013

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.

In December 2013, the Conservative government introduced major changes to the Public Service Labour Relations Act (PSLRA) through its Budget Implementation Act (C-4). Once these representation related changes are in effect, all employees in a bargaining unit will have to obtain the approval and the representation of the union before filing an individual grievance, including discipline and termination grievances.

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 Chertkow [3]:

> *"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*.

References:

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)
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)
10. *Schneidman v. Canada Customs and Revenue Agency*, File 166-3432591 (Henry), citation 2004 PSSRB 133