Unfair Labour Practices

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Unfair labour practices interfere with workers' rights to join and participate in the union, or in the union's right to represent its members. Unfair labour practices target union representatives or union members for discriminatory treatment because they exercise their union rights. Federal, provincial and territorial labour laws describe unfair labour practices as prohibited conduct, and provide a complaint mechanism to have the matter reviewed. If the labour board agrees that the conduct has violated the law, it can intervene and order that the practice stop.

Before the first labour laws were enacted in Canada, workers had exercised their rights to strike, form unions and bargain collectively before it became "legal" to do so. When these fundamental rights found their place in the early labour laws, they came with protections. Legislators early on decided that legislative provisions were needed to prohibit an employer from abusing its power to circumvent or undermine these rights. Without the protections, it was thought that employers could basically buy the type of union or union representative that served their needs, or use coercion and intimidation to prevent workers from joining or participating in the union or otherwise exercising their rights. These first "unfair labour practice" provisions were the precursors of our modern versions. Today, in every jurisdiction, each labour code outlines in detail those "unfair labour practices" prohibited under the statute.

The law provides a framework to protect union representatives and the members they represent from these illegal practices. Over time, there have been many labour board decisions that have sent a strong message to employers that these rights must be observed and taken seriously. By the same token, an equally strong message has been conveyed to unions that only serious allegations should be brought as unfair labour practice complaints.

Therefore, to protect and promote the effectiveness of the union at the workplace, we need to consider the unfair labour practice complaint as but one option among a variety of tools and strategies.

PROHIBITIONS

Unfair labour practices vary from statute to statute. Generally speaking, unfair labour practices are those employer actions or conduct that interfere with union rights. In addition, the union's failure to fairly represent its members can be considered such a practice. Prohibited employer practices, in general terms, mean that:

- management can't interfere in the formation or administration of a union;
- management can't interfere with a union's representation of its members;
- management can't prevent an employee from joining the union;
- management can't stop an employee from participating in a union's lawful activities;
- an employee cannot be discriminated against, threatened, intimidated or restrained from exercising union rights.

In practical terms, here is a brief description of some actual examples of employer conduct that has been found to constitute unfair labour practices.

- belittling and intimidating an employee who files a grievance [1];
- making intimidating and threatening comments with respect to the lost career advancement prospects of an employee because he files grievances [2];
- threatening to remove certain benefits from employees unless grievances are withdrawn [3];
- threatening to document the activities and performance of a union representative, who files and provides representation on grievances, for

the purpose of taking appropriate action to curb the number of "unwarranted grievances" [4];

- withdrawing an offer of assignment because an employee indicated she would file a grievance with respect to one of the conditions regarding the assignment [5];
- withdrawing an acting appointment because an employee had submitted a grievance [6];
- retaliating against an employee for testifying at an arbitration hearing [7];
- making critical comments on the performance appraisal of an employee that referred to her conduct while interacting with the employer in her capacity as a union representative [8];
- disciplining an employee for using an alleged commanding and disrespectful tone of voice to a manager while she was acting in the capacity of a union representative [9];
- threatening disciplinary action against a union representative if he provided representation on an Employment Insurance (EI) appeal of one of his members because it contravened his employer's policy stating that employees (of that particular government department) could not act in an advocacy role on behalf of a client of that department [10];
- threatening to discipline an employee if he didn't withdraw as the union nominee on a community board because it allegedly placed him in a conflict of interest situation given his particular job for the employer [11];
- taking disciplinary action against a federal public service employee for having publicly criticized the proposed federal free trade agreement in his capacity as a union representative [12];
- chastising a union representative and reminding her that her rights to publicly criticize her employer, to whom she owed loyalty and fidelity, did not extend to condemning job cuts in a meeting with MPs [13];
- conducting focus group meetings of employees where bargaining issues were sometimes discussed [14];

- paying the legal fees of a suspended member who brought damages for libel and defamation against union representatives [15].

LIMITATIONS OF UNFAIR LABOUR PRACTICE COMPLAINTS

As can be seen from the above references, unfair labour practice complaints have resulted in many important decisions that have helped us protect and further define our union rights. These in turn have been used successfully by other union representatives and members to demand fair treatment and practices. This is how it is with "good case law". It becomes a template for defining how the law must be applied. It has meaning when it is used through individual and collective action to preserve and enhance these rights.

It is therefore in our collective interests to have supportive case law. That is why the Alliance carefully reviews each and every request to support an unfair labour practice complaint. The costs of unfavourable decisions and "bad case law" are too high for individual complainants, their union locals and the membership as a whole. Even a "neutral" denial of an unfair labour practice complaint can have negative consequences, as it very often puts the stamp of approval on employer actions that were the subject of the complaint. The outcome is that the employer's conduct is judged "lawful". Some union representatives in very difficult situations feel they have nothing to lose by filing an unfair labour practice complaint when indeed, they (and all of us) have something to lose. Therefore, we must proceed with caution.

From an examination of the case law, we can draw certain conclusions about how some labour boards view unfair labour practice complaints.

1. Serious matters

As expressed by one Board member,

I wish to comment that the accusations ... are most serious. Allegations should not be made lightly and complainants have the duty and obligation to submit appropriate evidence to support their allegations. Respondents have a right to defend themselves. [16]
As it has already been decided in other Board decisions, complaints... are serious procedures which should not be raised in an uncaring and flippant manner. In all legal procedures and, in particular, in matters subject to a complaint..., the parties should proceed carefully and with regard to the consequences of their actions. [17]

Both the *Canada Labour Code* and the *Public Service Labour Relations Act* provide for fines to be imposed upon summary conviction of an offence with respect to an unfair labour practice.

2. Clear proof

Because unfair labour practice allegations are regarded as very serious matters, they generally demand a higher standard of proof than in other kinds of cases. For example, in the case of the Public Service Labour Relations Board (PSLRB), we must establish a *prima facie** case of a violation of the Act and present clear and compelling evidence in support of the allegations. Mere suspicions and loose, circumstantial evidence will not suffice. The burden of proof is akin to a "quasi-criminal" proceeding. Otherwise, the Board is likely to interpret the prohibitions very narrowly in favour of the respondent. For example, a general conversation between a supervisor and an employee suggesting the employee curb his involvement with the union did not amount to a violation because it did not involve direct threats or clear intimidating statements. [16]

3. Serious Transgressions

Frivolous submissions can be harshly dealt with by a Board. Only serious issues or breaches should be the subject of an unfair labour practice complaint, and be those that are clearly prohibited by the legislation. In other words, the conduct must be more than simply "unfair" in a general sense; it must fit within the specific legal framework. Only clear and blatant violations generally succeed.

4. Complainant must have "clean hands"**

It is not unknown for complainants to be harshly treated by a Board. When the evidence is mixed, that is, where the complainant's own conduct is open to criticism, a Board may well cast the facts in the worst possible light for the complainant. [18]

* *prima facie* is a Latin term meaning "on the face of it" or "at first appearance".

** "clean hands" is a legal term meaning that someone initiating a proceeding must be in a position free of unfair or questionable conduct.

TIPS FOR UNION REPRESENTATIVES

Therefore, we must be strategic in how we use the unfair labour practice complaint, and be exploring as many options as possible to preserve and enhance our union rights. We offer the following suggestions from our experience with unfair labour practice complaints.

1. **Your work habits and communication style should be a model.** Always try to conduct yourself in a manner that does not invite warranted criticism, or a reaction from the employer that can be explained on sufficient or reasonable grounds. This doesn't mean to say that you can't make mistakes, but if your work habits are being questioned or your communication style with management is being challenged, it lessens your effectiveness as a union representative. It leaves you open to criticism or an employer action that might be successfully argued as unrelated to your union activities.

2. **You have obligations to the employer as well as to the union.** Finding just the right balance between discharging your responsibilities as both an employee and a union representative will be a constant challenge. Labour boards consistently refer to the fact that an employee has obligations to the employer whether or not s/he is a union representative. [19] Try to establish a good working relationship with your supervisor. Recognize the employer's rights and responsibilities to set and expect reasonable work standards. Acknowledge the right of the employer to grant or not grant leave or permission to leave work for union activity, subject of course to the requirements set out in the collective agreement. Respect the need of your supervisor to know such things as when s/he can expect you back from a meeting with management or with a member.

3. **Be proactive in identifying possible "pressure points" that might contribute to strained union/management relationships.** Notwithstanding the previous comments, if the price of good working relationships is at the expense of our union rights, then it's not a cost we should be willing to pay. We have a right to expect knowledgeable and

well-trained managers and supervisors who recognize the value of the union and know better than to waste their time interfering with union representatives' pursuing the legitimate rights and responsibilities of the union, or members' exercising their legal rights. However, working relationships sometimes deteriorate, not because of anti-union animus or conscious attempts to restrain or discriminate against union representatives, but because supervisors and managers are also trying to balance their responsibilities of "getting the work done" and respecting union rights. We have learned a lot from past experience with the result that union and management in many workplaces have negotiated tangible supports for the exercising of union rights. Management, in many cases, recognize the value of well trained and accessible union representatives and is providing material support in the form or paid leave for union representatives to work full-time on union activity, office space and equipment, union training at the workplace and union meetings during working hours. Be proactive in identifying possible "pressure points" that might contribute to placing a strain on relationships within your workplace or work unit. Work with others in the local to identify preventative measures and strategies.

4. **You have equal status.** As a union representative, always conduct yourself with the knowledge and confidence that you have a right to be treated by the employer as an equal when you are acting in the capacity of a union representative. You should not be treated as an "employee" in those situations or be expected to conform to the normal rules governing the employer-employee relationship. Your responsibilities at that time are to the union membership. The law recognizes the adversarial nature inherent in the union management relationship and that as such, union representatives enjoy substantial immunity vis-à-vis the employer. If union and management could meet as unequals, then the role of the union representative would be severely compromised. Management could dictate how a union representative could behave. Management could muzzle a union representative into quiet complacency. In effect, there would be no union at the workplace.

5. **Be a strategic problem solver.** As a general practice, try to resolve problems at source. In other words, try to resolve them "at the lowest possible level" and as early as possible. Get to know the respective managers and supervisors and generally try to provide them with the opportunity to resolve problems within their area of jurisdiction. The same holds true for various workplace committees with problem solving mandates. Get to know the various committees and whether or not a particular problem rightfully belongs with a particular committee.

6. **Avoid divisions within the membership.** Try to avoid any situation that could pit a union member against a union representative in relationship to the employer. When representing a member's concerns or interests, be clear about the objective and the process, and that you have the member's support. Plan the approach together, and report back to the member as soon as possible if s/he was not present when the matter was being discussed with the employer. As a general rule, do not use the Union Management Consultation Committee table to discuss matters affecting an individual employee. Find out all you can about the "organizing model" way of working and look for ways to involve members in solving workplace problems.

   The same holds true for collective action or on issues where the local takes a stand with the employer. Lay the necessary groundwork to mobilize membership support or otherwise ensure that members are supporting union representatives. Division within the membership has the potential to lead to some kind of employer reaction or intervention that may or may not constitute an unfair labour practice.

7. **Don't tolerate anti-union behaviour.** As early as possible, deal with anti-union statements or conduct on the part of employer representatives. Separate those that are motivated by anti-union animus or malice from those that are not. Distinguish those that are intimidating or threatening from those that aren't. Differentiate between those made by supervisors who are members of the union from those made by managers who are not. This isn't to say that they all shouldn't be dealt with, but statements

based on honest mistakes, "fair comment" or the right of union members to criticize union practices need to be treated differently from direct threats. However, be strategic in how you go about it.

8. **Keep a written record.** Always record the exact statements and a full description of the circumstances. Include how you felt and its impact on you, especially if you felt threatened or intimidated. Ask yourself if a "reasonable person" would feel threatened or intimidated if faced with the same situation. Sign it and date it. Identify any witnesses and get them to write down what they observed. Or, write down what they told you and then ask them if it is correct. Ask them to sign it and date it. Any statements should be written legibly, signed and dated. These statements will be used by grievance Adjudication Officers to help members remember what happened. The more detail the better.

DOCUMENT! DOCUMENT! DOCUMENT!

Contact another union representative without delay and talk about what happened. Discuss possible strategies to effectively deal with the problem.

9. **Plan your approach.** Don't confront the person alone, unless you've made a conscious decision that this is likely the best approach under the circumstances. Consider involving another union representative, or it may be that the situation warrants a meeting between the entire executive and one or more appropriate management representatives. Stick together. Be clear about your objectives. Plan who will say what and what your options are if you cannot secure the desired commitment. Keep a record of what happened at the meeting.

10. **Work on your communication style... especially in difficult circumstances.** Do your utmost to engage in respectful communications at all times. There are times when this will be extremely difficult. Try not to be easily provoked, react with anger or respond with a personal attack. Try to remain cool, objective and focussed on the issue at hand.

11. **Develop a working knowledge of unfair labour practices.** Get to know the legislation that applies to the bargaining units you represent and keep abreast of amendments that are made from time to time. Become familiar with the section on unfair labour practices. It usually specifies what constitutes prohibited conduct. It often specifies what is not an unfair practice. For example, the *Public Service Labour Relations Act* has an employer "free speech" provision saying that an employer doesn't commit an unfair labour practice where it expresses its opinion, as long as there is no coercion, intimidation, threats, promises or undue influence. Find the section that describes the complaint mechanism, especially whether or not there are time limits for filing a complaint. All labour boards now have a website and many have information bulletins, forms and decisions on-line. Consider organizing a workshop for all local representatives on these rights and protections and what they mean in practical terms.

12. **Get advice.** Get sound advice on whether or not particular comments or conduct are practices prohibited by the legislation, and the likelihood of a successful unfair labour practice complaint. Carefully weigh the consequences of filing a complaint and assess whether or not the desired outcome will likely be achieved. Consider what other options there are to achieve the desired outcome. Investigate whether or not the labour board has a requirement that other avenues must be pursued prior to filing a complaint. Never consider filing a complaint solely as a "tactic" - a complaint must be rooted in substance with sound evidence to back it up. Never "threaten" the employer with a complaint, especially if you don't yet have Alliance agreement to provide representation.

13. **Never file a complaint directly with the Board** without first asking for a review of the case by the Alliance. Filing without the endorsement of the union is very risky. The outcome may be that the Alliance will not agree to provide representation and possibly cause embarrassment and perhaps weaken your position. The quality of the review will depend on the quality of the evidence. Provide a complete file with clear details describing each and every incident and all supporting documentation.

The case will be analyzed and reasons provided on why the Alliance supports or does not support proceeding with a complaint. If a decision is made to not support a complaint, the consequences of proceeding alone need to be very carefully weighed.

14. **Find out about the relationship between the rights and protections in the legislation and those in the collective agreement.** Most PSAC collective agreements have a "no discrimination" provision listing "membership or activity in the Alliance" as a prohibited ground of discrimination. This could mean that in the case of *Canada Labour Code* (Part 1) units, the Canada Industrial Relations Board may refuse to hear a complaint if it can be the subject of a grievance. In the case of *Public Service Labour Relations Act* units, because the legislation specifies that an individual or group grievance cannot be filed when an administrative procedure for redress is provided under any Act of Parliament, the employer may refuse to accept a grievance because the matter can be the subject of a complaint elsewhere. If considering a grievance or complaint, get advice.

15. **Consider mediation.** If a dispute clearly exists and the union's ability to effectively represent members is compromised, consider mediation as a means to negotiate a settlement that addresses the underlying causes of the conflict. Using this process, union representatives have achieved outcomes that were unavailable through the formal complaint mechanism. Settlements have included practical workplace solutions that have laid the foundation for better working relationships.

16. **Local development is your best protection!** Invest time and energy in local development. It's key! Get help from the Regional Vice President and PSAC Regional Representative. A local development plan should result in all executive positions being filled, enough stewards and functioning joint and local committees. Build in a training plan for all local representatives. Identify tangible forms of employer support for union representatives' being able to perform their union duties, and a strategy to put them in place. Invite the employer to join the local in jointly

supported training sessions on topics such as the collective agreement and union management consultation.

17. A union local under the leadership of just one or two hard-working union representatives is not in the best interests of the union. Besides, it can set the stage for allegations of unfair labour practices if the employer tries to balance its obligations of respecting union rights with its legitimate interests of insisting on reasonable work standards for employees who are also union representatives. Our aim should be to involve more members, spread the union work around, and develop a strong union presence through a team of knowledgeable and effective representatives.

References:

[1] Joanne Hébert, PSSRB file 161- 2- 336
[2] Rock Lalancette, PSSRB file 161-2-251
[3] Roger Vaillancourt, PSSRB file 161- 2- 351
[4] Jacob DeGroot, PSSRB file 161-2-311
[5] Lorena Connick, PSSRB file 161-2-329
[6] Raymond Tremblay, PSSRB File 161-2-455
[7] Richard Marken, PSSRB file 161-2-605
[8] Hella Prante, PSSRB File: 161-2-388 to 393
[9] Brenda Scruby, PSSRB file 161-2-420
[10] Harvey Linetsky, PSSRB file 161-2-316; FCA file A-1482-84
[11] Rex Gilbert, PSSRB file 161-2-712
[12] Mike Clough, PSSRB file 161-2-511
[13] Donna Willan, PSSRB file 161-2- 834
[14] PIPSC and Treasury Board, PSSRB file 161-2-1104
[15] Gary Smith, PSSRB file 161-2-344
[16] Felix Hanzek, PSSRB file 161-2-334
[17] Gwen Jackson, PSSRB file 161-2-399
[18] Corina Tobin, PSSRB file 161-2-438; Nathan Godfrey, PSSRB file 161-2-518
[19] Lynn Fairall, PSSRB file 161-2-368