The Ability, Obligations and Role of a Trade Union to Represent Its Members in Employer Investigations

Allan E. Black, Q.C.
Partner
Black, Gropper & Company
(Vancouver)

and

Pamela Costanzo
Black, Gropper & Company
(Vancouver)

***in*SIGHT INFORMATION**

Western Canada
LABOUR RELATIONS
January 30-31, 2007
Four Seasons Hotel
Vancouver

These materials were prepared by Allan E. Black, Q.C. and Pamela Costanzo of the law firm of Black, Gropper & Company for the Insight Western Canada Labour Relations Conference January 2007.

Representational Rights: Why Bother?

Representational rights are fundamental among those enjoyed by union members; in the words of Brown and Beatty, "the expectation is that, with their experience, union representatives can improve the disciplinary process and make it more balanced by giving employees counsel and advice, and by directing the employer's attention to matters that it might otherwise fail to consider".

The 'balance' referred to in this quote can have several aspects. The most obvious is the need to correct the readily apparent power imbalance between employer and employee. Employees who are under investigation are clearly vulnerable. They are often afraid of facing discipline or even dismissal; they are usually unfamiliar with human resource procedures; and they may be totally unaware of their rights. When they meet with a manager or human resources professional, they face an individual who represents the interests of the employer and who may have a great deal more knowledge of workplace law and policies. A union representative places an employee on a more equal footing with that manager. A more level playing field is created, wherein the union rep can advocate forcefully for the interests of the employee, while the manager advocates for the interests of the employer. In addition, a union representative can ensure that due process, set out in law or in the collective agreement, is followed. Emotions may well be running high following an allegation of wrongdoing, and a union representative may well be able to defuse the tension in the meeting by providing the employee with the sense that someone in the room is 'on his/her side'. A union rep may be able to provide balance in terms of the 'evidence' given to the employer; a nervous and perhaps inarticulate employee may put things badly or blurt things out. A union representative can possibly prevent an employee from incriminating himself or from answering improper questions. She can also provide balance by keeping the employer and the employee focused on issues and facts relevant to the investigation. While a defensive employee may say things he doesn't really mean, or didn't mean to say, a union rep can ensure that fair questions are answered thoughtfully. She can also help prevent investigations from escalating into confrontations.

In summary the employee gains some clear and real advantages through the presence of a union representative at investigation and disciplinary meetings.

In addition, the employer may gain something from the presence of a union representative. First and most importantly, the employer may be required to have the union rep present. Since the Labour Board's decision in *Government of B.C.* in 1995, the law in B.C. has been clear: a breach of representational rights **may** result in the employer's decision to impose discipline being reversed, or modified by an arbitrator. This challenge to an employer's jurisdiction or authority arises from the inability of an employer to establish just and reasonable cause for the imposition of discipline, because that breach precludes the employer from making a proper inquiry. If issues arise later on with respect to any discipline that was imposed, the employer may point to the steward's presence as some assurance that due process was provided, and just cause could be found. In addition, the presence of a union rep may expedite the investigation process, by encouraging focus on the relevant issues. It may lead to quicker settlement, since all parties will be present in the room. Before a manager commits to a particular position, the union rep will have a chance to bring up concerns that may affect that position. As mentioned above, a representative may calm the employee and make him feel that he has been heard. In *Canada Packers and UFCW, Local 208* (1987), an employer met with an employee and presented him with a letter of suspension. No steward was present. The employee swore at the employer; he was then further disciplined for insubordination. The arbitrator rescinded the second suspension because of the absence of the steward. He found that, "had a union representative been present, as required by the collective agreement, this entire exchange would likely not have occurred".

It is clear, from this review of the advantages of representation, that calling in a union rep is not just a matter of following procedure. In *Budd Automotive and UAW* (1982), Arbitrator Brown put it thus: "In my view the parties have balanced the basic rights of the company and the employee for the purpose of discipline by which the exercise of the company's right to discipline must be met with the employee's right [to representation]."

Are There Representational Rights for Investigations?

When management initiates an investigation of an employee in a unionized workplace, the first question it should ask is whether the employee is entitled to be represented by his or her union. Although representational rights are related to the statutory concept of just cause, *Government of B.C.* stated that they must be bargained for, and must be found in the language of the collective agreement. Vice-Chair Hall, who chaired the Labour Board decision in *Government of B.C.*, recently affirmed this approach in his decision as an arbitrator in *Surrey School District* (2005). However, when representational rights are found in the collective agreement with respect to a meeting to impose discipline, there is often disagreement about whether such rights extend to investigation meetings. Collective agreements do not always explicitly address representational rights in the context of an investigation, although some do – for example, the BCTF and BCPSEA agreement includes the following article:

> Where an employee covered by this Agreement is under investigation by the Employer for any cause, the employee and the Association shall be advised in writing of that fact unless such notification would prejudice the investigation, and in any event shall be notified at the earliest opportunity and before any action is taken by the Employer. The employee shall be advised of the right to be accompanied by a representative of the Association at any meeting with the employee in connection with such investigation.

But where the collective agreement is silent as to representational rights during investigation meetings, how do employers know where to draw the line? If the meeting is clearly aimed at imposing future discipline, would the union have to be included? What if the meeting is pure fact gathering?

There is no obvious reason to treat investigation meetings differently from meetings that are called for the purpose of imposing discipline. An investigation meeting may result in the employee making admissions against interest. It may lead immediately to discipline. Employees facing this circumstance should have access to advice and assistance. On the other hand, as in the example used by Arbitrator Joseph Weiler in *Canex Placer* (1978), it may merely be a discussion of why an employee was late for work. Putting it from the employer's perspective: it will not want to call a shop steward every time an employer asks a simple question.

The question, then, is where that line sits. In *Canex*, the collective agreement referred to the right to representation when a 'dispute' arose. The arbitration board concluded that, once the employer and employee had taken "opposing positions", the right to representation applied. That dispute could arise prior to any investigation taking place; the arbitration board cited an earlier case, where a worker who refused to do an assigned task was pulled off the line with the words "you're no use, go to the office". No discipline had yet been imposed, but the arbitration board found that those words invoked the right to representation, because a "dispute" had clearly crystallized. The Employer's action and comments clearly contemplated possible discipline. Where an employer has judged an employee as potentially culpable and subject to discipline, representational rights should apply.

This is a principled approach that shows the dangers of drawing an arbitrary line between investigations and discipline. In Ontario, recent case law has recommended abandoning the distinction altogether. In *Riverdale Hospital* (2000), Arbitrator Surdykowski stated that recent case law:

> ...demonstrates that this distinction is result driven, and is a dangerous one to draw. Even in hindsight, in the relative calm of a hearing room or in an arbitrator's peaceful contemplation, it can be difficult to discern where an investigatory process ends and a disciplinary process begins. Indeed, I suggest that it is neither possible nor useful to try to draw such a

> distinction, even in hindsight. Investigations are conducted because an employer is concerned that something is amiss. An investigation may satisfy the employer that there is nothing to be concerned about, or it may indicate the contrary. Paranoid employers are the exception, and experience suggests that more often than not an investigation confirms an employer's suspicion that there is cause for concern, which in the real world generally translates into negative consequences for the employee who is the subject of the sort of investigation under consideration. Who possesses a crystal ball that accurately predicts the result of an investigation (which crystal ball would make the investigation unnecessary)? To ask that question is to answer it. **The fact is that an investigatory process is inherently part of a disciplinary continuum.**
>
> (emphasis added)

That approach is a sensible one. It is not, however, always followed by B.C. arbitrators. Where a collective agreement only refers to representational rights following the filing of a grievance, unions may have trouble establishing representational rights earlier on. Two decisions dealing with such language, *Gorge Road Hospital* (2001) (Arbitrator McEwen) and *Marie Esther Soci*ety (1999) (Arbitrator Dorsey), found that investigation meetings, even where they clearly lead to discipline, did not require union representation. Both those decisions were based on collective agreement language that allowed for union representation, at the employee's option, at step 1 of the grievance procedure. Arbitrator Dorsey had considered the collective agreement in a previous decision, and found that no right to representation arose before step 1. This was true even in circumstances where the investigation is hurried and results in dismissal. In *Marie Esther Society*, a nurse's aide was accused of abusing a patient. The investigation was performed in less than an hour, with the shop steward called in at the end to witness the dismissal and walk the employee out the door. Arbitrator Dorsey found no violation of representational rights. "The union representational rights afforded by Article 9 of the collective agreement do not extend to every meeting with management from which some adverse consequences may result for the employee". But if those rights do not extend to a meeting that clearly had the

potential to lead to a quick firing, it is difficult to imagine what sort of meeting those rights would apply to.

Marie Esther did not consider the principles behind the right to representation. The employee in question was fired and sent out the door without any advice from her union. This will not, generally, be acceptable in a unionized workplace; nor should it be. Unions, as stated, are there to redress a power imbalance, and their presence is especially relevant where an employee faces punishment by an employer. Where an investigation is aimed at uncovering wrongdoing, punishment is a likely outcome, and the union will have to be called in at some point. In general, then, the employee and the employer should consider at the outset whether they are in a meeting that may end in discipline, so that the question of representation may be addressed before things have progressed to the point that representation may be too late.

But how does an employee know whether discipline may result from an investigation? Well, he or she could ask the employer at the outset. They may not get an answer, because in fact, the employer may not know the answer. What factors should the parties consider? In *North Vancouver School District and North Vancouver Teachers Association* (1993), Arbitrator Glass was asked to determine whether a lateral transfer was disciplinary. He turned to the collective agreement, which required just and reasonable cause for an involuntary transfer. He found that, where the action "is the subject of carefully drawn procedural and representational safeguards for the employee, it is readily apparent from the words of the collective agreement itself, that the parties recognize the importance or significance of the action in terms of its impact on the employee". The impact on the employee is the key. Because the transfer had a negative impact on the employee, it was regarded as disciplinary, and representational rights applied to the meetings where the transfer was discussed. To avoid the characterization of discipline, the employer should have considered alternative actions that would not have negatively affected the employee. The transfer was revoked. Employers need to think carefully about what the outcome of an investigation meeting may be, and whether it is likely to stray into territory that will trigger representative rights.

The logic behind representational rights was recently outlined by Arbitrator Steeves in *Open Learning Agency* (2005). That case dealt with non-disciplinary discharge, not an investigation. He said:

> The value of a meeting and union representation in a disciplinary context is the ability to discuss the allegations with the employee, to ensure that the employer has the correct information and to ensure the employee has an advocate. In the event that discipline is given at the meeting the union representative can try to get the employer to reduce it in some way. In the non-disciplinary setting the function of union representation is similar. I do not think it can be said that an employee who is suffering from a serious illness requires less protection when she is told her employment is terminated because of the illness.

The function of union representation in an investigation is similar: to provide the employee with advice and protection and to ensure that the employer has the correct and relevant information. Representatives are there to redress the imbalance in power between an employee and his managers; that imbalance is as significant in an investigation, where discipline could result, as it is in disciplinary meetings.

Note that none of these decisions preclude extending representational rights to unions for investigations. Many acknowledge that these rights could or even should exist. Perhaps what is needed, for now, is for this issue to be addressed at the bargaining table. If arbitrators insist on explicit language giving representational rights at investigations, then unions will have little choice but to bargain for that language.

<u>Once Unions Are Involved....What To Do, What Not To Do</u>

The next question that arises is: what are the parameters that govern union involvement in investigations? One obvious limit is set by section 12 of the Code: unions owe a duty of

fair representation to their members, and must not act in a manner that is arbitrary, discriminatory, or in bad faith. Generally, unions do a good job of representing their members, and while complaints may arise over outcomes, it is rare for an arbitrator or the Labour Board to levy sanctions as a result of union actions in an investigation. There are, however, a few cases worth considering, where union members acted inappropriately.

First, it is worth considering the expectation of a union representative. A union's duty under section 12, and also under section 2 of the Code (to participate in resolving workplace issues), requires that union representatives do more than just act as observers. According to Chair Weiler in *Rayonier Canada and IWA* (1975), a union "must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations". The duty, then, can only be satisfied if representation is active; unions must investigate, analyze, and then advise their members. A representative who fails to inform herself and consider all relevant factors is open to a charge of arbitrary conduct.

Union representatives are in a position analogous to that of defense counsel: they are advising someone who is being investigated and may well have a lot to lose. However, members should remember that union reps are not lawyers, and are not expected to meet that standard. In an early but still cited decision, *Charles Morgan* (1979), the Board considered a claim by a psychiatric nurse that his union failed to represent him fairly in an investigation of a patient death. The union rep had observed the investigation, without any objection or request for adjournment, and without vigorously defending the nurse. He then privately recommended Mr. Morgan resign, to avoid a termination. He even suggested Mr. Morgan leave the country to avoid criminal charges. While the recommendations may not have been sound, they were made in good faith. The Board found that the duty of fair representation does not require union reps "to meet a standard expected of lawyers". The union representative felt that the investigation process was fair and open. He formed an opinion as to the merits of the situation and advised Mr. Morgan accordingly. This was all that was required of him. As stated again by the Board in *Judd and CEP* (2003), "unions are not law firms".

The Union does, however, have a positive duty to inquire into the relevant facts. In *Charles Morgan*, the Union did that. In *Fritz Steisslinger* (1991), the Board found that the Union had failed in its duty with respect to an accident investigation. In that case, a worker was injured on a construction site. The Employer's investigation blamed the injured worker, but Mr. Steisslinger was widely blamed for the accident by the other employees. The Union conducted its own investigation, but despite several meetings on site, it failed to ask Mr. Steisslinger for his version of events. The Board found the failure to inquire was arbitrary conduct. Thus, when a union does get involved in an investigation, it must "take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the relevant and conflicting considerations". Since Mr. Steisslinger had relevant information to provide, the Union was required to meet with him.

While a failure to represent a member may lead to liability for the union, overzealous representation can also lead to problems. Union officials may investigate, but they are not allowed to thwart or interfere with employer investigations. In *917921 Ontario* (1993), a union member was investigated for theft. The Employer interviewed the accused with the chief steward present; while waiting for the police to arrive, the accused employee passed the stolen money to the steward to hold. The steward accepted it and said nothing about it to the Employer or to the police. The employee then confessed the theft to the police and told them the steward had the money. The arbitrator accepted that the steward had not intended to keep the money, but rather misperceived his duties as a steward. However, it was not legitimate for the steward to thwart the investigation process in this way. He was suspended for 20 days.

Another investigation gone wrong was outlined in *Tudor House* (1993). In that case, a nurse was accused of patient abuse by other nurses, who reported her to the employer. The accused nurse called the chair of her bargaining unit and asked her to find out what was going on. The union official telephoned the two nurses who had made the report. She told them they should stick together, and that other nurses would give them a hard

time at work. The arbitrator found that these statements went beyond investigation and was tantamount to intimidation. While the official was certainly entitled to telephone the two nurses and investigate, she should have taken care not to say anything that could amount to interference with the employer's investigation. She was suspended for seven days.

Harassment: When Members Have Competing Interests

More complex considerations arise when an investigation of one member results from a complaint by another member. The union then has to deal with conflicting interests within the bargaining unit. This likely occurs most frequently in the context of harassment complaints. The Board has made some decisions that can provide guidance to unions on how to navigate these situations.

In *Re Woodson and Howell* (1995), two professors were the subject of a sexual harassment complaint by another faculty member. The Union asked its ombudsman to work with the employer on the investigation and ensure the process was fair. However, the professors asked that the Union provide them with independent legal counsel. When the Union refused, they hired their own lawyer and asked the Union to reimburse them. The Union again refused. No discipline resulted from the investigation, but the professors argued that the Union had dealt with their matter in an arbitrary manner.

The Board disagreed. It found that the Union responded to the members' complaints, participated in the mediation process they proposed, and acted on their concerns regarding delay by asking the Employer to complete its investigation. There was no requirement that they provide legal representation. The Board found that "unions need some latitude and flexibility to allocate their resources in an effective manner and to exercise discretion in deciding priorities... There are many occasions where a union may deal with matters arising between two bargaining unit members, but in which it is not required to supply independent legal counsel. In promotion competitions, for

example..." Since the Union was not in an adversarial position to the complainants, and no discipline was contemplated, there was no requirement that they provide legal counsel.

Conversely, in *Re Harrop* (1997), the Union was ordered to reimburse a professor for legal costs incurred as a result of a sexual harassment complaint made by a student. The difference between these two cases lies in the Union's inaction in *Harrop*. Once the professor hired independent legal counsel, the Union completely stepped away from the process. It had not thought out any response to the Employer's new harassment policy, and made the sole recommendation that members not participate unless discipline had been issued. The steward never interviewed the professor for his version of events. This failure to investigate, as in *Steisslinger*, was a breach of section 12.

The Board did not, however, find that a failure to grieve the Employer's poorly drafted harassment policy was a breach of section 12. The Union was split between those who favored a strong policy against harassment in the workplace, and those who favoured protecting members against complaints. This conflict was found to be a legitimate reason to choose consultation with the Employer over a grievance. As in *Woodson*, the Board found that the union has the ability to decide how to balance competing interests in the bargaining unit without exposing itself to liability, so long as it does not do so in an arbitrary or discriminatory manner, or in bad faith.

Where a union does choose to actively assist both a complainant and the accused harassor, it must be careful to be even-handed in how that assistance is given. It is not a breach of section 12 to help a member through an investigation process when another member is being investigated. However, both members have a claim on the union's assistance. In *Re MacKenzie*, a painter accused her supervisor, also a bargaining unit member, of harassment. The Union provided each member with separate representation. Ms. Mackenzie complained that the Union assigned a very experienced representative to assist the accused harassor, while she was assigned a less experienced steward. The Board found that this was not a breach of section 12. The Union assisted her throughout the process, and thus failed to show any arbitrary conduct. It was legitimate for the

Union to assign the more experienced rep to the member that faced the more serious consequences.

Unions may even assign the same representative to work with both the harassor and the complainant, in some circumstances. In *Sophocleous and Pascucci* (1998), the union assigned a representative to guide the members through the process and attend the hearing. The union official did not represent either member at the hearing, since the employer did not permit representation. The accused harassor refused the union's help, claiming he perceived a conflict, and hired a lawyer. He then demanded the union pay him for his legal fees and alleged a breach of the duty of fair representation. The Board found no breach. Since the union official was not required to take a position on the merits, there was no conflict. She was there to protect the members from an abuse of process by the Employer. The Board quoted the Supreme Court of Canada in *Gendron v. PSAC*: "when a union finds itself in a position of conflict regarding the interests of certain of its employees, it satisfies its duty of fair representation so long as it acts honestly, treats all members equally, does not act in a perfunctory or hostile manner and does not engage in favouritism".

Perhaps one thing these harassment cases point out is the advantage to the employer of involving the union in investigations. While the union's role is to ensure fair treatment for its members, it may, ironically, also provide a protective function for employers. In harassment cases, where emotions are high and individuals are wont to suspect unfair treatment all around, union representatives can assure employees involved in investigations that their rights are being respected and their concerns are being heard and addressed. In this way, union involvement may assist in the investigation process and provide an advantage to both sides.

Citations

1. Brown and Beatty, Canadian Labour Arbitration, loose leaf, 4th Ed. (Aurora, ON: Canada Law Book, 2006 -)
2. *Government of B.C. and B.C.G.E.U.*, BCLRB No. B230/95 (Hall)
3. *Canada Packers and U.F.C.W., Local 208* (1987), 7 C.L.A.S. 46 (Springate)
4. *Budd Automotive and U.A.W., Local 1451* (May 15, 1982), unreported (Brown)
5. *Surrey School District and C.U.P.E., Local 728*, [2005] B.C.C.A.A.A. No. 112 (Hall)
6. *Canex Placer* (1978), 21 L.A.C. (2d) 127 (Weiler)
7. *Riverdale Hospital* (2000), 93 L.A.C. (4th) 195 (Surdykowski)
8. *Gorge Road Hospital and H.E.U.* (2001), 65 C.L.A.S. 276 (McEwen)
9. *Marie Esther Society and H.E.U.*, [1999] B.C.C.A.A.A. No. 266 (Dorsey)
10. *North Vancouver School District and North Vancouver Teachers Association*, [1999] B.C.C.A.A.A. No. 392 (Glass)
11. *Open Learning Agency and B.C.G.E.U.*, [2005] B.C.C.A.A.A. No. 31 (Steeves)
12. *Rayonier Canada and I.W.A.*, [1975] 2 C.L.R.B.R. 196 (Weiler)
13. *Charles Morgan and R.P.N.A.B.C.*, BCLRB No. 89/79 (van der Woerd)
14. *Judd and C.E.P., Local 2000*, BCLRB No. B63/2003 (Mullin)
15. *Fritz Steisslinger* (1991), BCIRC No. C68/91 (Paton)
16. *917921 Ontario and R.W.D.S.U., Local 414* (1993), 34 L.A.C. (4th) 129 (Carrier)
17. *Tudor House and S.E.I.U., Local 308* (1993), 35 L.A.C. (4th) 387 (Freedman)
18. *Re Woodson and Howell*, BCLRB No. 394/95 (Parkinson)
19. *Re Harrop*, BCLRB No. B430/97 (Pylypchuk)
20. *Re MacKenzie*, BCLRB Letter Decision No. B18/2003 (Parkinson)
21. *Sophocleous and Pascucci*, [1998] C.P.S.S.R.B. No. 94 (MacLean)
22. *Gendron v. PSAC*, [1990] 1 S.C.R. 1298