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Section 12: The Union's Duty of Fair Representation

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Introduction

The labour boards and courts have recognized the tension that unions face between the pursuit of collective interests and the protection of individual employee rights. This tension requires a delicate balance from the union that is reflected in the duty of fair representation.

The BC Labour Relations Board (the "Board") recognizes the difficult challenge facing the union in its attempts to fairly represent its employees, collectively and individually. The Board has taken a restrictive interpretation of the duty of fair representation, stating that the rights and protections afforded by Section 12 of the BC *Labour Relations Code* (the "*Code*") are narrow. The Board has continued to apply a limited scope of the duty in recent decisions.

This article will present a discussion on the latest decisions in labour law, mainly from the BC Board. Before delving into the latest cases, we will generally review the leading decision from the Board on a union's duty of fair representation: *Judd (Re)*, BCLRB Letter Decision No. B63/2003 ("*Judd"*). The principles espoused in *Judd* continue to frame and inform labour board decisions on a union's duty towards employees. Following a discussion on the general principles, we will discuss recent BC Board decisions and will provide a discussion of a recent decision from the Canada Industrial Relations Board. We will then briefly discuss the standard for the duty of fair representation where there are allegations of discrimination. In conclusion, we will provide general suggestions proposed by the law that unions can keep in mind when representing their bargaining units and individual employees.

BC's approach: *Judd*

Judd provides the leading BC interpretation of the duty and has set out principles that are continually relied upon and applied by the Board.

Judd, the complainant, was employed as an editor with the Employer. He had been dismissed from his employment twice. First, the union declined to pursue the grievance. However, it advised Judd that his internal union appeal of that decision had been successful and it would arbitrate the grievance. At arbitration, Judd's dismissal was dismissed and he was reinstated with back pay.

Soon after his return to work, Judd was dismissed again. By letter, the union advised that after seeking legal advice, it would not proceed with arbitration. This time, Judd's appeal of the union's decision was unsuccessful and he filed a Section 12 complaint.

In determining whether the union breached its duty to Judd, the Board reiterated the principles established in *Rayonier Canada (BC) Ltd*., BCLRB No. 40/75 and interpreted the duty within the overall context of the union's obligations to represent all employees in the bargaining unit under Section 27 of the *Code*. The union's duty of fair representation must be interpreted and applied while keeping the union's obligations to the rest of the bargaining unit in mind (para. 24).

The Board first notes that the carriage of a grievance lies with the union who decides whether and how to proceed with the grievance (para. 34). The Board states that the *Code* gives unions this exclusive control in order to allow a union to be effective in representing employees as a single entity and to effectively manage its limited resources (para. 35).

The Board states:

> 42 … When a union acts based on considerations that are relevant to the workplace, or to its job of representing employees, it is free to decide what is the best course of action and such a decision will not amount to a violation of Section 12.

However, the union does not have free range to make its decisions, though it does have considerable leeway. The Board states:

> 43 The situation is different if a union's decision is not based on these kinds of relevant considerations. A union would breach Section 12 if it misused its exclusive bargaining agency by making decisions based on improper factors, or by making random or unreasoned decisions…

The Board clarifies that a complaint under Section 12 requires sufficient evidence that the union has breached is statutory duty in a manner that is in bad faith, discriminatory, or arbitrary.

<u>Bad Faith</u>

The Board in *Judd* describes two manners in which a union could be found to be in bad faith (para. 48):

- Representation with an improper purpose.
- Representation with an intention to deceive the employee.

Examples of representation with an improper purpose include: the refusal to proceed with a grievance because of a union official's personal hostility toward the grievor; a president of a union local making decisions in collective bargaining or grievance to harm his or her rival; or the union conspiring with the employer to have an employee terminated. With respect to the third

example, the union's agreement with the employer after assessing a situation does not necessarily make it a conspiracy against the employee (para. 52).

An intention to deceive the employee pertains to dishonesty where it directly affects the quality of the union's representation of an employee's interests (para. 53).

Discrimination

Discriminatory representation involves unequal treatment on the basis of race, sex, or other prohibited grounds set out in the *Human Rights Code*. It also includes discrimination on the basis of personal favouritism. However, the Board acknowledges that treating people differently does not necessarily amount to discrimination. For instance, one employee's case may be weaker than the other, which is a relevant consideration supporting differential treatment (para. 56). The Board also considers the potential for differential treatment when a union reaches an agreement with the employer that leaves some employees in a better position than others. The Board's position in such a situation is to not substitute its judgment for the union's (para. 57).

Arbitrariness

With respect to arbitrary representation, the Board will more closely review the union's conduct if the matter is more serious for the employee, such as termination or loss of seniority (para. 59). The Board set out three requirements underlying arbitrariness. The union must: (i) ensure it is aware of the relevant information; (ii) make a reasoned decision; and (iii) not carry out representation with blatant or reckless disregard (para. 52).

Guidelines

The Board has set out specific guidelines regarding the general requirements under Section 12. The union is required to:

1. talk to the grievor and learn what the grievor is complaining of.

2. investigate, for example:

    * obtain information from those involved;

    * construct a sequence of events from the information obtained; and

    * offer the grievor a chance to respond.

3. make a reasoned decision, for example:

    * consider the collective agreement language (and potentially the practice in the industry or the workplace);

* take into account how similar grievances have been handled in the past; and

* provide to the grievor the reasons for the union's decision.

4. proceed with the grievance (if a decision is made to do so) in a manner which is not in blatant or reckless disregard of the grievor's interests (all the while remembering that the union must represent the bargaining unit as a whole, not simply the interests of the grievor).

While these are the most usual requirements, the actual requirements in a particular matter will depend on the facts in that case.

As the leading decision, the principles in *Judd* should frame union considerations and conduct when representing the bargaining unit or individual employees.

Recent BC Board Decisions

The BC Supreme Court's decision in *United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, Local 2009 v. Auyeung,* 2011 BCSC 220 upholding the Board's finding of a breach of Section 12 was recently upheld by the Court of Appeal (2011 BCCA 527). The Board's decision in BCLRB No. B126/2009 ("*Auyeng*") (reconsideration dismissed: BCLRB No. B49/2010) can be unsettling and a cautionary reminder for unions about the scope of their duty. The union in this case was found to have been in reckless disregard with respect to employee's claims under the *Employment Standards Act* (the "*Act*").

The union entered into a settlement of all of the outstanding issues concerning the closure of a sawmill. The agreement included a standard release of all claims between the parties. The union erred by not considering the *Act* when including the release. The provision of the *Act* at issue was Section 64 which provides notice periods for large-scale group terminations. The union attempted to enforce its members' Section 64 rights at the Employment Standards Branch, but as the workplace was unionized, the Branch ruled that it had no jurisdiction. At arbitration the release of all claims was held to be broad enough to include claims under Section 64. Therefore, a group of 84 employees filed a Section 12 complaint, claiming that the union had "signed away" their rights under Section 64.

One of the central issues of the case was whether the union was exercising its exclusive bargaining agency for its conduct to fall within the duty of fair representation. Following the decision of *Tom Smith v. United Food and Commercial Workers' International Union, Local 1518*, BCLRB No. B15/2004, the Board emphasized the distinction between grievance arbitration where the union has "absolute control" of the process and circumstances falling outside the scope of the union's exclusive bargaining agency (para. 65). In circumstances outside of the scope, the employee has control and can decide if, and how, to relinquish control and be represented by the union.

With respect to the Section 64 claims in this case, it was not clear that the employees had any control over the claims. All parties had acted as if they were within the union's control and the union had never asked the employees whether they would like it to represent them with respect to the claims. Furthermore, the union did not consult with the employees nor keep them apprised of the progress of the claims.

Finding that claims under Section 64 of the *Act* were those requiring a higher standard from the union as suggested by *Judd*, the Board held that the union breached Section 12, even though its oversight was an unintentional mistake. The union cannot be said to have ensured that it was aware of relevant information nor to have made a reasoned decision regarding the effect of signing the Settlement Agreement.

A union's representation of employees involving settlement negotiations with the employer was reviewed by the Board in *Janet C. Handson and Teamsters Local Union No. 213, -and- Gateway Casinos*, BCLRB B51/2009. The union and employer negotiated a settlement whereby employees enjoyed a right of recall in their last job classifications without loss of seniority. The employer intended to close another property but also intended to open a new casino in Langley. The employer had given assurances that the union's bargaining rights and members would be transferred to the new location. However, when the new location opened, the prior location continued to operate and non-union employees were given jobs at the new casino.

Five employees filed a complaint with the Board alleging a breach of Section 12 stemming from the settlement. Along with various allegations, the complainants argued that the union gave up too much at the mediation session that resulted in the agreement.

With respect to representation at mediation and settlement meetings, the Board held that the union was entitled to engage in mediation and negotiate a settlement as the bargaining agent of the employees. The fact that it settled its complaint in mediation is not evidence of bad faith, but is consistent with the conduct encouraged under the *Code*, in Section 2. Overall, the Board dismissed the Section 12 complaint.

In *Pardo (Re)*, BCLRB Decision No. 317/2007 (Leave for Reconsideration of BCLRB No. 284/2005), the Board explored the union's conduct in entering into a Last Chance Agreement on behalf of the employee. The complainant argued that the union should not have entered into the agreement and had acted in bad faith by doing so. He alleged that he signed it under duress because of timeline pressures.

The Board held that the union had the authority to negotiate a Last Chance Agreement with the employer who was going to decide to terminate the employee. There was no evidence to indicate that the union misled the employee. Any pressure came from the employer who insisted that the agreement be signed within timelines. The Board also noted that the agreement conformed to the principles in *Re Steele*. After reviewing the circumstances of the case, the Board found that the grievor had not been truthful to the union or the Employer regarding a medical defense for his conduct. Therefore, the Board dismissed the Section 12 complaint.

In *Surgit Singh and National Automobile, Aerospace,* BCLRB No. 133/2010 the Board explored the employee's obligations with respect to the union's efforts to represent him/her. The complaint alleged that the union failed to process a large number of seniority grievances to arbitration, failed to keep him apprised of settlement discussions with the Employer, and negotiated an unfair settlement. It also included the union's withdrawal of an unfair labour practice complaint.

The union argued that it withdrew the unfair labour practice complaint and associated grievances because the employee failed to produce any evidence to support the complaint. The Board held that the grievor failed in his duty to cooperate with the union in the prosecution of his grievances.

The Board's discussion of the nature of the standard in Section 12 is of note. Throughout his complaint, the employee argued that the standard to be met by the union when acting as the exclusive bargaining agent is fiduciary in nature. The Board rejected this argument and confined the standard to that provided under Section 12 where the union is to avoid conducting itself in an arbitrary or discriminatory manner and to avoid acting in bad faith (para. 68).

The Board is not willing to find that the union's refusal to proceed is in violation of Section 12, where proceeding with a grievance would be contrary to the union's interpretation of the collective agreement. In *Gateway Casinos & Entertainment Ltd. (Re)*, BCLRB No. B121/2011, the complainants argued that the union breached its duty of fair representation by failing to pursue a grievance regarding the elimination of a shift line in their department. There was a practice at the Casino of having a slot attendant on each of the three shifts choose to work a relief supervisor "line" for that shift. If required, that person would work as a relief supervisor and be paid a wage differential for performing supervisory duties. The complainants were negatively affected by the union's decision not to pursue the grievance as they had been laid off on the basis of seniority. They might have been able to continue working if the shift line practice was retained. The union refused to proceed with the grievance because of the position it took in bargaining that scheduling and shift assignment practices were to be based on seniority. The shift line practice had resulted in less senior employees being able to work a shift in place of other more senior employees in other departments.

The Board acknowledged and respected the union's position which was that the seniority-based practices were in the interests of the membership as a whole, even if they were unfavourable to in interests of individual members like the complainants. The Board held that the union was doing its job of representing the employees in the bargaining unit as a whole when it declined to pursue the complainants' grievance (para. 33).

Canada Industrial Relations Board

A recent decision from the Canada Industrial Relations Board ("CIRB") reviews the principles underlying the *Canada Labour Code*'s provision for the duty of fair representation, Section 37. In *Leveille v. Teamsters, Local 931,* 2011 CIRB 616, the complainant alleged that the union

acted in a manner that was arbitrary, in bad faith, and discriminatory in handling his grievance. The complaint filed a grievance challenging the requirement for English in a job posting for a hazardous materials specialist position in a depot in Quebec. The union proceeded with investigating the grievance to confirm the employer's explanations regarding the requirement. The union's investigation confirmed that past and current incumbents of the position had functional knowledge of English. The union further sought a legal opinion which provided that it would have no chance of succeeding at arbitration. The union notified the complainant that it was dropping the grievance.

The CIRB followed the decision and analysis in *McRaeJackson,* 2004 CIRB 290 and provides that the purpose of Section 37 is to ensure that the Board analyzes the union's conduct and that it rules on the decision-making process and not the merits of the decision (para. 33). The CIRB's interpretation of arbitrary, discriminatory and bad faith conduct is very similar to that described by the BC Board in *Judd.*

Furthermore, it provides guidelines for the union's conduct that aligns with those in *Judd*. It states:

> 37 …[T]he Board will normally find that the union has fulfilled its duty of fair representation responsibility if: a) it investigated the grievance, obtained full details of the case, including the employee's side of the story; b) it put its mind to the merits of the claim; c) it made a reasoned judgment about the outcome of the grievance; and d) it advised the employee of the reasons for its decision not to pursue the grievance or refer it to arbitration.
>
> (citing *McRaeJackson* in para. 35)

There are two further factors that will inform the Board's review of the union's conduct. First, the existence of a legal opinion is a factor that the Board has taken into account regarding the union's decision-making process; however, the use of a lawyer does not serve as an absolute defence to a complaint (paras. 36-37). Second, the existence of a thorough method of handling grievances is a factor that the Board noted when determining whether the union's decision was reasoned and legally sound (para. 38 and 39). The Board held that the complainant failed to establish a breach of the duty.

Discrimination

Where a member is alleging discrimination in the sense of a breach of human rights legislation, the union may be held to a higher standard of fair representation. Labour boards in other jurisdictions have proposed this higher standard. The first case to do so was *K.H. v. C.E.P. Local 1-S,* [1997] S.L.R.B.C. No. 44 ("*K.H.*") of the Saskatchewan Labour Relations Board. It stated that in grievances involving discrimination, unions have a broader duty to take steps in taking a different approach in the grievance process in order to avoid discriminating against the employee (para. 92). For instance, the grievance procedure and the union's method of handling grievances may not be appropriate for an employee with a mental disability. The Saskatchewan Board

suggests that the union should be cognizant of this issue as the union's methods may have a discriminatory effect.

The CIRB in *Bingley v. Teamsters, Local 91,* [2004] CIRB No. 291 also proposes that unions will be held to a higher standard in representing grievors with disabilities. It also suggests that a different approach may be required in assessing and proceeding with grievances. The Board established the following guidelines in determining whether the union fulfilled its duty of fair representation with respect to grievances involving the duty to accommodate:

1) Whether the union's intervention was reasonable where the employer failed to implement appropriate accommodation measures;

2) Whether [the] quality of the process that allowed the union to come to its conclusion was reasonable;

3) Whether the union went beyond its "usual" procedures and applied an extra measure of care in representing the employee; and

4) Whether the union applied an extra measure of assertiveness in dealing with the employer.

(para. 84).

The BC Board in *Wong*, BCLRB No. B75/2004 held that a union has a duty under Section 12 to accommodate grievors when it is preparing for arbitration.

For a further detailed discussion on the issue of the union's duty to accommodate and its interaction with the duty of fair representation, the CLE Human Rights Conference 2008 Paper, "Accommodating the Mentally Disabled Employee: The Union Perspective," by Catherine Sullivan provides a useful analysis on the topic.

Conclusion

According to recent decisions on Section 12 and the duty of fair representation, as long as a union follows certain practices when deciding on how to act and represent its members, it will have fulfilled its duty. Such practices include investigating a grievance or determining its members' concerns, continually communicating with the grievor or members, abiding by its collective agreement, and having reasoned thought when making a decision. Circumstances in which unions have failed in their duty, include, but are not limited to, the following: they have either assumed authority to act where there wasn't one and placed the interests of a large number of employees at risk as in *Auyeung* recklessly disregarding the law*;* or they have not considered the need for a different approach when dealing with a disabled grievor.

It is important to note that the Board does not intrude on the merits of the union's decision, but rather the process it took to come to that decision. The Board in *Judd* has set out guidelines that unions should follow in order to ensure that they were fulfilling their duty. It would also be helpful if unions established a thorough method, if one is not in place, in assessing grievances.

The existence of a method is not a defence to a claim; however, if unions diligently follow the methods they have established, they will have formed a strong defence. However, as has been suggested in the discrimination decisions, unions should be aware and cognizant of a disabled employee's circumstances when tailoring an appropriate approach in assessing his/her grievances and his/her representation.

Although there have been many Section 12 complaints, very few succeed. This low success rate attests not only to meritless complaints, but also the level of deference given to unions and the restrictive approach that the Board has taken in interpreting the duty. In an effort to streamline Section 12 complaints, the BC Board posted guidelines on its website www.lrb.bc.ca. It may be useful to review the guidelines for further information on the Board's approach to complaints.

Although the specter of a Section 12 complaint can be daunting, it is important to keep in mind the amount of deference the Board has been willing to provide unions, in light of the challenges they face in fairly representing the collective and the individual.