The Duty of Fair Representation ("DFR") and Difficult Members

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INTRODUCTION

The reality is that a small percentage of Union members often take up ninety percent of a Union official's time. Every seasoned Union representative has encountered at least one difficult member — the member who eats up the Union's time and resources, who does not listen, who knows better than the representative, who threatens or complains, who will not agree to medical appointments, or who refuses to meet with the employer or the Union, and never seems to be satisfied with the outcome.[1]

Every Union representative also knows that the difficult member will not hesitate to file a duty of fair representation complaint ("DFR") against the Union when things do not go his or her way. A DFR is an unfair labour practice complaint filed against the Union, by a member, at the Labour Board. DFRs themselves consume time and money, and no Union wants to be found to have breached its duty to its members.

The threat of a likely DFR will compel most Union representatives to deal with even the most difficult member fairly and carefully. But the difficult member should also be heard out of an obligation of fair dealing, as they may well have a case or be grappling with challenging personal circumstances that require special attention.

This paper will outline some of the basic legal responsibilities of Unions and members and discuss strategies to minimize the Union's liability and to maximize service to members by managing difficult members and ensuring that proper evidence is in place to defend against the DFR when it comes.

Union Duties and Responsibilities

The duty of fair representation arises out of Unions' exclusive right to represent their members. Unions have significant control over the working lives of their members. Unions control bargaining, control the grievance process, and in some workplaces even control access to work. In return, Unions have legal obligations to their members. The Union's basic legal responsibility to its members, set out at section 20 of *Manitoba's Labour Relations Act*, is this:

> ***Duty of fair representation***
> *20 Every bargaining agent which is a party to a collective agreement, and every person acting on behalf of the bargaining agent, which or who, in representing the rights of any employee under the collective agreement,*

(a) in the case of the dismissal of the employee,

(i) acts in a manner which is arbitrary, discriminatory or in bad faith, or

(ii) fails to take reasonable care to represent the interests of the employee; or

(b) in any other case, acts in a manner which is arbitrary, discriminatory or in bad faith;

commits an unfair labour practice.

A violation of this duty exposes the Union to a successful duty of fair representation complaint at the Labour Board.

It is important to remember that the duty above is restricted to member rights that arise under the collective agreement (wages, vacation, seniority etc.). The Labour Board will not hear complaints about the Union's handling of non-negotiated items (depending on the collective agreement, pension or benefit rights or WCB matters) and will not hear complaints about internal Union matters like member discipline.

Where members have rights not arising under the collective agreement (for example, non-negotiated pension, benefit, or insurance rights, Workers Compensation Claims) the Union does not generally have the obligation to represent the interests of the member. In circumstances where the Union does not provide such representation, the difficult grievor may nevertheless file a DFR or even attempt to sue the Union. The difficult member may also use internal Union procedures (such as membership meetings or disciplinary hearings) to attack other members or Union officials. Finally, members can file a human rights complaint against the Union and often include the Union as a respondent when filing a human rights complaint against the employer.

A review of case law arising out of duty of fair representation complaints reveals the following basic Union duties.

<u>The Union Must</u>

1. Not act in bad faith.

The bad faith requirement ensures that the Union will act honestly and free of any personal animosity toward members of the bargaining unit. A Union acts in bad faith

when its conduct is motivated by ill-will, hostility, or for some reason which has nothing to do with the matter at hand.[1]

In ***Winnipeg (City)*, [2009] M.L.B.D. No. 23**, the Board stated that "bad faith" "has been described as acting on the basis of hostility or ill-will, dealing dishonestly with an employee in an attempt to deceive, or refusing to process a grievance for sinister purposes. A knowing misrepresentation may constitute bad faith, as may concealing matters from the employee" (para. 7).

Examples of bad faith conduct include:

- the personal feelings of Union officers influencing whether or not a grievance should be pursued;
- conspiring with the employer to have an employee disciplined or terminated; or
- putting the ambitions of a group of employees who support a Union official ahead of the interests of an individual employee.

(***Virginia McRaeJackson v. CAW,* 2004 CIRB 290 (CanLII)**)

2. Not act in a manner that is…discriminatory.

The duty not to act in a discriminatory manner protects against the making of distinctions between employees and groups of employees for reasons that have no relevance to legitimate collective bargaining concerns. A Union is only entitled to treat members of a bargaining unit differently where it has valid reasons for doing so.[2]

In ***Moreau (Re)*, [2004] M.L.B.D. No. 12**, the Board adopted the following statements regarding the duty of fair representation provided in *Ontario Labour Relations Board Law and Practice* (3rd ed.), Sack, Mitchell and Price, wherein the authors review what conduct may be said to be discriminatory (para. 13):

> *8.393 The Board has held that the term "discriminatory" is to be given a broad interpretation that encompasses all cases where the Union distinguishes among its members without cogent reasons...*

[1] *Guide to the Labour Relations Act - Province of Manitoba*, p. 13.

[4] *Guide to the Labour Relations Act - Province of Manitoba*, p. 13.

> *8.394 The Board has stated that a Union may be found to have acted in a discriminatory fashion even where it is not motivated by bad faith or dishonesty. However, not every difference in treatment among employees amounts to discriminatory conduct contrary to s. 74. Rather, discriminatory conduct is conduct which "will result in a difference in treatment that has no labour relations rationale."*

3. Not act in a manner that is arbitrary.

Arbitrary refers to the absence in decision making of those factors which should be present. Unions have been found to act arbitrarily when they completely ignore a grievance or where they treat a matter in an indifferent fashion. However, it is not arbitrary for a Union to put its mind to a complaint or grievance and honestly decide not to take the complaint or grievance further.[3]

In ***Winnipeg (City)*****, [2009] M.L.B.D. No. 23**, the Board described acting in an arbitrary manner as follows (para. 7):

> *"Arbitrary" conduct has been described as a failure to direct one's mind to the merits of the matter, or to inquire into or to act on available evidence, or to conduct any meaningful investigation to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles, or displaying an attitude which is indifferent, summary, capricious, non-caring or perfunctory. Flagrant errors consistent with a non-caring attitude may also be arbitrary, but not honest mistakes, errors of judgment, or even negligence.*

4. Direct its resources to achieve maximum effect.

Through the control of its resources, a Union can leverage them to achieve maximum results for minimum expenditure. An employer knows that the Union could take any given case to arbitration if it wished. It also knows that the resources of most Unions do not permit taking every single case to a lengthy and costly arbitration and that the Union is likely to accept a reasonable settlement if one is offered. The employer deals with analogous considerations when determining its position on a grievance. With that type of relationship, the employer may be motivated to make reasonable offers to settle some matters by agreement, without litigating every issue and the Union will be entitled to accept them. (***Judd and CEP Local 2000*** **(2003), 91 CLRBR (2d) 33**)

[5] *Guide to the Labour Relations Act - Province of Manitoba*, p. 13.

5. Weigh conflicts between the interests of the individual and the interests of the bargaining unit in assessing the appropriate course of action.

A Union can consider legitimate factors other than the employee's interests. For example, the Union and the employer may have agreed to a particular interpretation of the collective agreement during the course of collective bargaining or the Union may have been unsuccessful at arbitration in a similar case. The Union may be concerned that a victory would have an adverse effect on other employees of the unit. The Union may decide that the cost of resolving the grievance is too high given the issue at hand. The Union must weigh these factors fairly against the wishes of the employee. (***Virginia McRaeJackson***, above)

6. Investigate and put its mind to the merits of a grievance, in light of all the circumstances, and make a reasoned judgment as to a possible outcome.

A Union can fulfill its duty to fairly represent an employee by taking a reasonable view of the grievance, considering all of the facts surrounding the grievance, investigating it, weighing the conflicting interest of the Union and the employee and then making a thoughtful judgment about whether or not to pursue the grievance. (***Virginia McRaeJackson***, above)

7 File a grievance to protect the opportunity while investigating.

8 Follow collective agreement procedures (e.g. timelines) and comply with substantive obligations (e.g. think, investigate, act, and react).

9. Follow a reasonable course of action in processing grievances, even if this course does not accord with the Union's own its own internal policy.

> *We can say it is our view that internal procedures of the Union will only be scrutinized under section 136.1 [i.e. the DFR section of the Canada Labour Code] to the extent they relate directly to and form part of the bargained relationship between the Union and employer and if they are accessible to all employees in the bargaining unit (including probationary employees, members in arrears of dues, and employees denied, suspended or expelled from Union membership). In our experience we know of no Union procedures that meet these criteria. (**George Lochner and CBRGT, [1980] 1 Can. LRBR 149**)*

10. Communicate with the grievor.

> *...it is when the lack of communication results in a situation that prejudices the position of the grievor that the omission can result in a violation of [the DFR provisions of the Act]. (**Barbara Pepper, [2009] CIRB 453**)*

In ***Charbonneau et Unifor***, 2018 QCTAT 855, the Tribunal held that the Union's failure to give adequate reasons for withdrawing a grievance amounted to arbitrary conduct. The grievance concerned a member who was seeking to be paid the standard minimum wage (rather than the lower minimum wage rate that can be paid to employees in Quebec who receive tips). The Union failed to provide any meaningful explanation for why the grievance was withdrawn, telling the grievor only that the law in the area "was not sufficiently clear and left too much room for interpretation". The Union should have given more fulsome reasons that permitted the grievor to understand why the Union had decided to withdraw the grievance.

11. Assist the grievor in a return to work.

12. Deal with member versus member conflict and grievances.

13. Work to enforce the accrued rights of former members.

<u>The Union May</u>

1. Ask the grievor to attend an IME.

In ***Gariano*, [2003] A.L.R.B.D. No. 2**, the Union decided not to proceed with a grievance on behalf of the complainant, who refused to provide consent for the Union to obtain additional medical information it felt it needed or to obtain access to medical information from a doctor the complainant had seen who had reached conclusions about the complainant's fitness to perform modified duties that differed from the complainant's own opinion. The Alberta Labour Relations Board stated (para. 28):

> *…Finally, the Union clearly indicated to the Complainant that it felt access to additional medical information was necessary. The Complainant refused to provide such access. The Complainant cannot now complain about the Union's failure to act, when he refused to provide information which the Union had come to the conclusion was necessary (a conclusion which in the circumstances of this case we find to be reasonable).*

2. Communicate in a "terse" manner, so long as the communication is clear and direct.

In ***Winnipeg Fire Paramedic Service (Re)*, [2007] M.L.B.D. No. 19**, the Board stated (para. 10):

> *…the Union did not display an attitude which can be characterized as "... indifferent in summary, or capricious and non-caring or perfunctory" [see Re Moreau, supra, at p. 268]. While the Union's communication of September 13, 2004, to the Applicant was "terse", it was nevertheless clear and direct, as the Applicant himself acknowledged.*

How Far Must the Union Go?

Grievors often demand that the Union proceed with their grievance, or insist that the Union proceed to arbitration, or insist that the Union take an unfavourable arbitration decision to judicial review. Yet the grievor has no such right. The decision to proceed with a grievance is a decision of the Union, not the grievor, and when a DFR is filed over the Union's decision not to proceed, labour boards are more interested in how a Union arrived at the decision not to proceed than whether a grievance or a review has merit.

Given the responsibilities outlined above, when a Union refuses to proceed with a grievance and the grievor files a DFR, the Board will look for evidence that the Union:

- Investigated the grievance;
- Obtained full details of the case, including the employee's side of the story;
- Put its mind to the merits of the claim;
- Made a reasoned judgment about the outcome of the grievance; and
- Advised the employee of the reasons for its decision not to pursue the grievance or refer it to arbitration.

Union officials may make honest mistakes or exercise poor judgement but these occurrences may not in themselves be a violation of *The Labour Relations Act*. The standard of care required will vary according to the seriousness of the consequences and the nature of the job interest at stake.[4] Unions are reminded that s. 20 of the LRA creates a higher level of obligations when the issue is termination of employment: failure to take reasonable care.

[4] At p. 14.

In ***Laing (Re)*****, [2005] M.L.B.D. No. 10**, the Union executive's decision not to proceed to arbitration was made after considering a legal opinion and listening to the complainant's presentation relating to the legal opinion regarding his grievance. In these circumstances, the Board found that the DFR application did not provide allegations to support even a *prima facie* case that Union acted in a manner that was discriminatory, arbitrary or in bad faith and dismissed the application.

In ***Vogel (Re)*****, [2006] M.L.B.D. No. 12**, the complainant claimed that the Union failed to fairly represent him with respect to certain issues he had with his employer, Manitoba Hydro. In particular, he alleged that the Union failed to properly support him and advocate on his behalf. He claimed that the employer had harassed and threatened him. The application alleged that the Union had failed to fully consider the issues and the facts (including certain medical information) related to the employer's actions.

The Board found that the Union investigated the complainant's issues and obtained legal advice before deciding not to file grievance. It dismissed the application and concluded, "a Union does not have to grieve every employee concern…The fact that the Applicant does not agree with the approach taken by the Union or, presumably, the legal opinion which it secured, does not amount to an unfair labour practice" (para. 9).

Grievors' Duties

There are also duties placed on grievors. Among other things:

> *15 The Union's duty of fair representation is predicated on the requirement that employees take the necessary steps to protect their own interests. Employees must make the Union aware of potential grievances and ask the Union to act on their behalf within the time limits provided in the collective agreement. They must cooperate with their Union throughout the grievance procedure, for example by providing the Union with the information necessary to investigate a grievance, by attending any medical examinations or other assessments.*
>
> *16 Employees must follow the Union's advice as to how to conduct themselves while the grievance process is underway. Employees must attempt to minimize their losses, for example by seeking new employment if they have been dismissed, or attending retraining if this will increase their chances of re-employment.*

*17 If an employee is neglectful in any of these regards, a claim before the Board will likely be unsuccessful (see **Jacques Lecavalier** (1983), 54 di 100 (CLRB no. 443)).*

(***Virginia McRaeJackson***, above)

Members Must

1. Protect their own interests, and co-operate with the Union in processing grievances.

9 This is not to say the responsibility for the conduct of a grievance, or the investigation leading up to it or its ultimate resolution, lies solely at the feet of the Union. Employees owe a responsibility and duty to protect their own rights and interests. They must ensure the Union is aware of their claim and they must do so in a timely fashion; they must cooperate fully with the Union; and they must be honest, forthright, and timely at all times. They cannot sit on their hands expecting full indemnification for losses when they could have mitigated or otherwise cut their losses.

(***Hussein v. Unite Here*, [2008] ALRBD No. 51**)

2. Mitigate losses by seeking employment elsewhere following termination.

3. Advise the Union that he or she wants to file a grievance.

20 Failure to cooperate with the Union may result in the Union being unable to properly represent the employee. At a minimum, it was incumbent upon SWK to advise the Union that he had been terminated, file a grievance and assist the Union in the presentation of the grievance. None of this occurred in SWK's case. Moreover, it appears that SWK did not pursue internal appeals that were available to him without providing a reasonable explanation for failing to do so. For these reasons alone, I would dismiss SWK's complaint: See Judd, para. 96-97.

(***SWK v. CAW*, [2005] BCLRBD No. 310**)

4. Attend meetings.

In ***Winnipeg (City)*, [2009] M.L.B.D. No. 23**, the complainant alleged the Union failed to fairly represent him in relation to a grievance concerning net pay top up, which he alleged the employer had calculated incorrectly.

The Board noted that the complainant had declined to attend meetings as repeatedly offered by the Union (para. 7):

> *…The Union met with the Applicant, investigated his concerns, received verbal and written accounts from the Employer which it accepted, reviewed the applicable provisions of the collective agreement and considered the issues prior to determining that it would not proceed further with the Applicant's concerns. The Union offered to meet with the Applicant and the Employer to review the calculation; however he refused to attend and ultimately advised the Union to meet with the Employer in his absence. The Union did meet with the Employer and received a detailed explanation of its calculation verbally and in writing. The Applicant was given the opportunity to contest the decision not to proceed to arbitration and to make submissions to the Union's Executive Committee, however he chose not to do so.*

5. File a DFR in a timely manner (usually within six months).

In ***James Kepron - and - Brandon University Faculty Association - and – Brandon University,*** **[2004] M.L.B.D. No. 16**, the Board summarized what constitutes undue delay in filing a DFR as follows:

> *57 …in its previous decisions, this Board has stated that its normal rule or practice is not to entertain a section 20 complaint if it is filed some six to eight months beyond the event(s) referred to in the complaint…A brief reference to some of the Board's decisions is warranted. In* ***K. Scheurfeld - and - Canadian Paperworkers Union, Local*** *830 - and -* ***I.W.A. Local 830 - and - Domtar Inc.*** *[1995] M.L.B.D. No. 4 (Quicklaw), ("**Scheurfeld**"), an employee filed a section 20 complaint some 28 months after his employment had been terminated, claiming that the Union(s) had not taken reasonable care to represent him when they did not take his dismissal to arbitration. The Unions submitted that a lapse of 28 months constituted undue delay. On the facts prevailing, the Board found that there had been undue delay and the application was dismissed. In Scheurfeld, the Board stated:*
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> > *This Board must give reasonable meaning to the statute which creates it. The Legislature has said, under subsection 30(2), that matters are not to be "unduly delayed." The term "undue delay" has been interpreted by this Board to mean periods of up to approximately six or eight months. In the case of* ***Raoul McKay - and - University of Manitoba Faculty Association - and - University of Manitoba****, M.L.B. Case No. 186/94/LRA, Sept. 29, 1994, a delay of eight months was held to be undue delay. Similarly, in the case of* ***J.E. Labra -***

> ***and - Sheet Metal Workers' International Association, Local 551 - and - E.H. Price****, [1992] M.L.B.D. No. 6, M.L.B. Case No. 217/92/LRA, a delay of eleven months was held to be undue delay. In this case, the delay is well over two years.*
>
> *The Legislature has used the term "undue delay." We are of the view that the lengthy period taken by the Applicant to file his application is an extreme example of such delay. One of the primary functions of any adjudicative body, especially in matters of labour relations, is to deal with matters in a prompt and expeditious fashion. It is not really necessary for this Board to recite the detrimental effects that can occur because of delay. Memories may fade; witnesses may not be available; documentary material may be lost; and of equal importance is the fact that, if no proceedings have been taken in any reasonable period of time, the parties may well assume that the matter has been finalized or, at least, will not be proceeded with. It must also be noted, in this case, that the Applicant was attempting to establish some form of claim during this period. He attended at the Employment Standards branch; he obviously communicated with the Union; he communicated with the Employer; and we are not sure if he communicated with anyone else. Perhaps he did not obtain the proper advice, or perhaps he did not seek advice from well-informed individuals. It is perhaps trite to state that ignorance of the law is no excuse, especially after such a lengthy period. (Our emphasis.)*

58 ***In Andrzej Bal - and - United Food and Commercial Workers' Union, Local No. 832 - and - Burns Meats Ltd****., [1997] M.L.B.D. No. 6 (Quicklaw), ("Bal"), an employee filed a claim under section 20, some twelve months after the Union advised him of its decision not to proceed with his grievance. The Chairperson of the Board found that the delay of twelve months was excessive in the circumstances, and the application was, therefore, ruled to be untimely.*

59 In ***Wayne Smith - and - International Association of Machinists and Aerospace Workers - and - Motor Coach Industries****, [1998] M.L.B.D. No. 4, (Quicklaw), ("Smith"), the Board found that the applicant had failed to disclose a prima facie case in a dismissal situation and that no complaint was filed until almost a year after a "last chance agreement" was signed. The Board (Ms. D.E. Jones, Q.C. Vice-Chairperson) observed that,*

> *... Normally the Board's practice is not to entertain unfair labour practice complaints which are filed more than 6 months beyond the facts complained of.*

> *60 In **Juan Enrique Labra - and - Sheet Metal Workers' International Association, Local Union No. 511 - and - E.H. Price,** [1992] M.L.B.D. No. 6, (Quicklaw), ("Labra"), a delay of one year was fatal. The employee was aware of the Union's intention not to proceed with his grievance for one year and, during most of that period, he had access to legal representation. The application was dismissed on the basis of "undue delay" under section 30(2).*

The Intersection of these Duties

A Union will want to keep its duties and its members' duties top of mind. Often, one case will require consideration of many of the above-discussed duties, such as the recent case of ***Complainant v Canadian Union of Public Employees, Local No. 37***, 2018 CanLII 83546. The complainant had been fired after a driving-related incident. The Union speculated that the complainant was suffering from mental health issues, and the Union's legal counsel recommended that the complainant undergo an Independent Medical Evaluation ("IME") to determine whether a disability had contributed to the misconduct that led to the discipline. The complainant repeatedly refused to undergo an IME, stating that he did not want to "hide behind" his medical conditions and wanted the Union to proceed to arbitration on the basis that he had not committed the misconduct.

The Union provided the complainant with a detailed, written legal opinion, stating that if he could obtain supportive medical evidence, the Union might have a claim that the discipline was discriminatory. The opinion stated that in the absence of such medical evidence, the grievance was not viable. The complainant again refused an IME, the Union withdrew its grievance, and the complainant filed his DFR complaint.

The Board found that the Union had fulfilled its duty to the complainant, and in so finding made the following comments:

- It was not the role of the Board to determine whether a grievance would have been successful. Rather, its role was to consider whether the Union represented the complainant "without discrimination, arbitrariness, bad faith or serious negligence."

- The Union was not required to take the grievance to arbitration because the grievor asked, but is entitled to "assess the merits of the grievance, the chances of success at arbitration, the costs of the arbitration process and other factors when deciding whether or not to advance a grievance to arbitration."

- The Union was also not obliged to pursue the grievance with the argument the grievor wanted to make. It could consider how to best present the grievance, and whether it should be advanced to arbitration at all.

- The Board noted that the complainant had a duty to cooperate with the Union and "to take all reasonable steps to protect their rights and interests." The complainant failed to fulfill this duty when he refused the IME. Further, the Union had been properly cautious in its approach, as it had explained the need for supportive medical evidence, given the complainant ample time to change his mind, arranged for the complainant to meet with the Union's lawyer, and gave him an opportunity to provide input and present his view to the Union.

The Board summarily dismissed the complaint.

The Duty of Fair Representation and Vaccination Policies

During the COVID-19 pandemic, vaccination policies have become a particularly contentious issue. Many workplaces (including health care, education and government services provided to vulnerable persons) were covered by the *Orders for Vaccination or Testing for Designated Persons* issued under *The Public Health Act*, which required that employees either be vaccinated or engage in rapid antigen testing up to 3 times per week. In many other workplaces, including several universities and the City of Winnipeg, employers passed policies requiring workers to be vaccinated, with or without a rapid testing alternative.

Vaccination policies have given rise to a variety of demands by some workers that their union file grievances. This includes demands that the union grieve a vaccination requirement and/or a rapid testing requirement as unreasonable and/or a violation of personal medical privacy; that the union grieve for a vaccination policy to provide rapid testing as a lesser intrusive alternative to vaccination; that the union grieve an employer's actions in either placing non-compliant employees on a leave of absence, or grieving the application of progressive discipline; that the union grieve to compel an employer to grant an exemption to vaccination policies on human rights grounds, etc..

Manitoba's labour board, and labour boards across the country, have been inundated with DFR complaints about union representation in the context of vaccination policies and their impact on workers who opposed them, where unions have not grieved based on a member's demand. The vast majority of these complaints have been dismissed on a *prima facie* basis, without a hearing.

Sample dismissal decisions include the following:

- *River East Transcona Educational Assistants*, Dismissal No. 2428 (MLB);
- *Winnipeg Police Association*, Dismissal No. 2447 (MLB);
- *University of Winnipeg Faculty Association*, Dismissal No. 2469 (MLB);
- *Manitoba Nurses Union*, Dismissal No. 2465 (MLB);
- *Di Tommaso v. Ontario Secondary School Teachers' Federation*, 2021 CanLII 132009 (OLRB);
- *Bloomfield v. Service Employees International Union*, 2022 CanLII 2453 (OLRB);
- *Mustari v. CUPE Local 79*, 2022 CanLII 2433 (OLRB);
- *Watson v. CUPE*, 2022 CIRB 1022 (CIRB – application for judicial review filed).

Several recurring themes arise from these decisions, including the following:

- Unions obtaining and relying on a legal opinion about whether a grievance has a reasonable chance of success will be a "potent" defence to a DFR complaint.
- The labour board's role in a DFR complaint is limited to assessing the union's representation. A DFR complaint is not the forum for employees to launch their own challenges to employer vaccination policies, and the board's role is not to act as a surrogate arbitrator over vaccination policy issues.
- As bargaining agents, unions have discretion as to whether to grieve vaccination policies issues, and are entitled to consider whether a grievance challenging a vaccination policy has a reasonable chance of success. Unions are also entitled to consider the broader interests of its membership in a vaccination policy in deciding whether to grieve.
- Unions do not have to promote unity within the bargaining unit or "remain neutral" on the issue of vaccination, and it is not a violation of the duty of fair representation for unions to promote and encourage an employer's vaccination policy or members' compliance with it.
- Unions are not expected to debate the virtues or risks of vaccination with members who are opposed to it, and are not required to engage in endless debate after a decision has been made and communicated about a grievance.
- Unions do not act in an arbitrary, discriminatory or bad faith manner by reason of supporting vaccination based on public health recommendations and advice about the benefits of vaccination for workplace safety.

- The conduct of the applicant may also be considered in assessing the complaint – did the worker fail to take care of their own interests by refusing to follow the union's advice? Did the worker act unreasonably in refusing to cooperate with the union's requests for information necessary to assess their requests, because they disagreed with the union's assessment of their case or its views on vaccination policies?

Special Care for Grievors with Disabilities

Unions must take special care when dealing with grievors who have disabilities. In **Schwartzman**, [2010] M.L.B.D. No. 49, the Board concluded:

> *119 Unions must be particularly alert and sensitive to an employee's disability and the employment interests at stake in cases concerning the application of human rights principles, including the duty to accommodate. The obligations of the Union in such cases will vary depending upon the circumstances. However, generally speaking, in such cases Unions should:*
>
> *1) ensure that the disabled employee understands their rights and responsibilities in the context of their complaint against the employer;*
>
> *2) follow a process that recognizes the employee's disability;*
>
> *3) assist the employee with obtaining necessary medical reports in circumstances where it is not reasonable to expect that they will be able to secure such reports on their own;*
>
> *4) consider the relevant medical reports and the merits of the case; and*
>
> *5) if the employee's case concerns issues that are beyond the reasonable competence and experience of the lay Union official(s) handling the grievance, secure a legal opinion from counsel.*

The Board also referred to its previous determination in ***Buckboro v. Winnipeg Police Association*, [2000] M.L.B.D. No. 10**, that the "...a Union dealing with an individual in [a] fragile emotional state must do so with more sensitivity than would normally be necessary" (para. 116).

In the recent case of *Complainant v. Alberta Union of Provincial Employees*, 2015 CanLII 51529, the Board considered a Union's duties in relation to a member who

appears to be dealing with mental health issues. The Board held that in these cases, the Union must "carefully explain the necessity of any medical information it asks for, with as much assurance of confidentiality as is possible, and … carefully explain how the member's representation will be hampered without it."

The Saskatchewan Labour Relations Board has said that where a grievor suffers a mental disability, that may make it difficult for the grievor to "asses his own situation, to articulate his concerns, or to deal effectively with [the Union]...". In ***H. (K) v. C.E.P.*, [1997] Sask. L.R.B.R. 476**, the Board held that the Union had violated the duty of fair representation by not taking into account the "unique circumstances" of a grievor with a mental disability.

Nonetheless, in affirming the principles outlined above, the Manitoba Labour Board has confirmed that: “In all cases involving the duty of fair representation, notwithstanding that representation involves a disabled employee or human rights, the union has a wide latitude in dealing with the members’ representation.” (See *A.W. v Association of Commercial and Technical Employees’ Union*, 2022 CanLII 134492 (MB LB)

Legal Opinions

Many Unions obtain a legal opinion before or while processing a grievance. A legal opinion is a powerful defence when defending the subsequent DFR.

Reliance upon legal advice to justify a Union's refusal to proceed to arbitration with a grievance has consistently been found by this Board to constitute a "potent defence to a duty of fair representation complaint” (***Schwartzman***, above).

As long as the Union has otherwise conducted itself appropriately while processing the grievor's workplace complaints, and as long as the legal opinion was properly considered by the Union in light of its knowledge of the facts, even an incorrect legal opinion can help the Union meet its legal obligations before the Labour Board:

> *It is not for the Board to determine whether a legal opinion obtained in circumstances such as this is correct in terms of its conclusions, particularly where there is no dispute of substance concerning the facts underlying the opinion. In JULIE KERFOOT, [2004] O.L.R.D. No. 4272, the Board was faced with a somewhat similar fact situation. After filing a grievance on behalf of Ms. Kerfoot, the trade Union in that matter sought legal advice whether to proceed further with the matter. Legal counsel took into account all the relevant information,*

> *and advised that the trade Union would not likely prevail at arbitration. Ms. Kerfoot disagreed with the legal analysis, and contended it contained an obvious and flagrant error. In relying upon it, she asserted, the Union was grossly negligent. The Board refused to enter into a debate concerning the correctness of the legal opinion, and stated that, even if an error had been made, the Union was entitled to be wrong so long as its decision was not tainted by bad faith, discrimination or arbitrariness. The same principles apply here.*
>
> (***Bombardier Aerospace*, [2005] O.L.R.D. No. 3513**)

However, even where a Union obtains a legal opinion, it must still consider all the facts and arrive at a well-reasoned decision. For example, in ***S**apra v. Association of Postal Officials of Canada*, 2010 CIRB 533 (CanLII), the Board noted that a Union "cannot use [a] legal opinion as a blanket justification for not pursuing the grievance without considering the relevant facts involved". In *Toop v. Canadian Union of Public Employees, Local 1974*, 2010 CanLII 64761 (ON LRB), the Board found that the Union had breached its duty of fair representation when it did not attempt to reconcile conflicting legal opinions.

Categories of Difficult Members, and Suggestions for Dealing with Them

Unreasonable Demands

- Be clear that the Union will be in contact when something has happened but not when nothing has happened.
- Lay out realistic timelines for matters to proceed.
- Have time-limited contacts so that meetings do not stretch out; control the agenda that the union is prepared to discuss.
- Point out the pros and cons of proceeding with a grievance where necessary.
- Reinforce the weaknesses as well as the strengths of a particular matter.
- Take detailed notes and put key communications in writing.

Unrealistic Expectations

- Document communications setting out reasonable expectations throughout.

- Ask very detailed questions and make no assumptions.
- Provide context for the employer's probable concerns and explain that doing so helps in preparation for defending against the employer.
- Ask where the member has support in the workplace. If witnesses were called on his/her behalf who would they be?
- Try to identify solutions other than grieving.
- Dissuade member from contacting media where necessary.

Mental Health Issues

- As discussed above, members with mental disabilities require special care from Union representatives.
- They also often present particular challenges. For example, there may be issues with exercising judgment, difficulties controlling anger and emotions, and difficulty processing and retaining information provided to them.
- Suggest resources. Have written information as well as provide oral information.
- Encourage the member to bring someone with them to meetings who will be able to remember and reinforce what was discussed and what is needed from the member.
- Determine what medical support and other treatment is in place.
- Employers generally have the right under some circumstances to require a medical report. Be clear that the grievor should talk to the Union before signing any medical releases. Many employers want unrestricted access to and unrestricted information from medical providers.
- In some instances, the Union may want to facilitate a psychological or psychiatric assessment with the report coming to the Union.
- Members with addictions may present a unique set of issues as compared to other members with disabilities. For example, denial that there is a problem and provision of misinformation.
- A certain degree of skepticism is needed regarding positive reports on how well things are going, while still being supportive.

Members Threatening Complaints

- Never seek to dissuade a member from filing a DFR complaint; they have the right to do so under the LRA or Canada Labour Code, and it may be a union unfair labour practice to seek to dissuade them. In some cases, it may be appropriate to respond to a member's threat to file a complaint by noting that the union recognizes and respects their right to file a complaint.

- Document everything very carefully: take notes of phone calls, put key communications in an email.

- Limit responses in communication to specific question.

- Avoid permitting direct access to outside legal counsel.

- Have at least two Union representatives at each meeting and take careful notes.

- Make it clear that no meetings or phone calls are to be tape recorded.

- Consult with external legal counsel regularly as a protection against a DFR or other complaint.

Set and keep boundaries

- Where applicable, outline an expectation for courteous interactions, and establish parameters for representation in the context of communications that may be abusive to union staff.

- Restrict communications to business hours.

- Be formal in communications, and consider directing that communications occur over email (not text.)

- For members who send a high volume of emails, communicate parameters on the union's responses, i.e. because we have many members to represent, your emails will only be reviewed on Thursdays, and not every email will receive a response, etc..

Generally

- Listen. Allow the member to fully set out their concerns before interrupting and asking specific questions. Sometimes people just want to be heard.

- Always maintain your composure. Prepare yourself for the meeting and do not let your emotions get the better of you.
- Step out of the situation. Try to see it from the point of view of the member.
- Make it easy for them to say yes by pointing out mutual interests or common gain.
- Diffuse member anger; “tell me what is upsetting you and why”.
- Suggest alternatives to a grievance. Meeting with supervisor? mediation?
- If the answer is no, be firm, yet gentle and compassionate regardless of the attitude of the member.
- Correct unrealistic expectations. Be clear about what is or is not available under the collective agreement.