



THE Steward

NEWS AND INFORMATION FOR BCGEU STEWARDS



MESSAGE FROM THE PRESIDENT:

Many of you will have received email updates throughout the year, calling your attention to new materials posted on the Stewards section of our website. In addition to this web-based information, I want to make sure we mail out a copy of some of the materials available on the website, since I know that there are still some stewards we don't have emails for.

Enclosed in this package you will find both interpretive articles prepared by the BCGEU staff in our Advocacy department, and several summaries of significant arbitration awards.

We have emails for an average of 36% of the membership. But if you have a work or personal email, and have never received any email notices from the BCGEU, it means we do not have your email address on file. Please take a

moment and visit the website at www.bcgeu.ca. At the bottom of the page there is a link to a change of address form that allows you to send us your email note.

I hope that you find the enclosed information helpful and I want to thank you for the hours that you spend on behalf of BCGEU members, clarifying the collective agreement, solving workplace problems and providing leadership in your workplace.

Darryl Walker
BCGEU President

STEWARD UPDATES:

TECHNOLOGY

Using the internet and e-mail at work

BY KATE CAMPBELL

Some union members may have questions about e-mail and internet use at work. It is important for members to be aware and mindful of their employer's internet use policies, as they can face discipline or, in some circumstances, even dismissal for breaching these rules.

Privacy rights

The first thing to be aware of regarding computer use is that the computers and the computer network at work are the employer's property. This means that an employee has almost no privacy rights in regard to what is sent, viewed and stored on a work computer. This includes devices like laptops and Blackberries which are provided by the employer and used away from work.

Unless the collective agreement specifies otherwise, an employer has the right to record, monitor and investigate most computer use on employer-owned equipment.

The only area where employees may have some internet privacy rights is in regard to personal e-mail accounts. However, most of the printed internet use agreements employees are asked to sign include a waiver of privacy rights for personal e-mail, or prohibit personal e-mail altogether. For example, many employees working under the BCGEU Master Agreement over the past 10 years have signed an 'internet use agreement' which prohibits accessing web-based personal e-mail accounts, such as Hotmail, Yahoo mail or G-mail, from work.



steward updates

Although in the 1990s it was expensive and onerous for employers to investigate computer use, due to increased technology and expertise these investigations are now much easier, and the records produced are admissible as evidence at arbitration hearings.

These records include the website addresses of any websites visited, the time visited, and the length of time the webpage was on screen. This information allows an employer (or a forensic computer expert hired by an employer) to recreate an employee's internet and e-mail use over any given period, and conclusively prove what content was looked at or downloaded and for how long.

In general, there are three things which can lead to discipline for internet/e-mail use:

- inappropriate content (sexual, violent, racist, etc.)
- “theft of time”
- accessing client information for inappropriate reasons.

Inappropriate content

Some employers have guidelines regarding what internet content is unacceptable, but even if there is no specific policy, accessing pornography in the workplace is considered by arbitrators to be a form of sexual harassment – *Citation A: Province of British Columbia and BCGEU (1990), 23 C.L.A.S. 157 (Ladner)*.

Employers have a duty under the *Human Rights Code* to provide a workplace that is harassment-free and, therefore, they will almost always discipline or even dismiss employees who access pornographic, racist or otherwise discriminatory content at work.

Some employees may be unclear about what constitutes pornography or inappropriate content. Simple answer: if you are unsure, wait until you are at home. An employer does not have to prove that the content was hard core pornography in order to uphold dismissal.

Although there has been some discussion by labour advocates that some individuals may have an addiction to pornography, thus triggering an employer's duty to accommodate and preventing dismissal for viewing

pornography at work, this has not yet been successfully applied in Canada.

In one Ontario case – *Citation B: London (City) and CUPE Local 101 (2001), L.A.C. (4th) 411 (Marcotte)* – an arbitrator accepted evidence that the grievor had an obsessive compulsive disorder and a psychotic disorder, and found the conditions to be a mitigating factor in reducing dismissal to a five day suspension. However, the arbitrator rejected the union's argument that the grievor was addicted to pornography.

In the remaining few cases in which employees were reinstated after dismissal for viewing pornography at work, the success was achieved either because the employer did not have a clear policy on internet use, or because the policy had not been properly communicated to the employee. This is one reason many employers now require employees to sign written internet use policies.

Theft of time

One of the main factors an arbitrator will consider in assessing discipline for e-mailing or viewing pornographic, racist or offensive content at work is the frequency of the conduct and the amount of time spent engaging in the conduct.

While an arbitrator will not generally uphold dismissal for a one-time incident, such as sending an e-mail or looking at one website, frequent conduct may constitute just cause for dismissal. This is in part because of the “theft of time” issue. Because the employer is paying employees to be at work, they have a justifiable expectation that employees will be working, except during breaks.

If the computer records show that an employee has spent a large amount of time accessing websites, an employee can be disciplined or dismissed for collecting wages while failing to work. This can include employees who spend significant time accessing websites such as Facebook (statistics indicate the average Facebook user accesses it every 20 minutes) which may be uncontroversial.



steward updates

Confidential information

Employees have also been disciplined or dismissed for accessing client records for personal reasons, or for disclosing the content to others.

Some internet use agreements specifically include rules on this area, but in general an employee can be disciplined for sharing passwords with others, for negligently leaking passwords or confidential information, for inappropriately altering computer records, and for looking up client records for any reason other than your own work assignment.

One issue that occasionally arises is when an employee is tempted to review information about their own records on the employer's computer system (medical or criminal records) or the records of a friend. Although this seems harmless, it can lead to discipline in some cases.

Employers have an increasingly stringent duty to protect the privacy of all the individuals about whom they have records, and will discipline employees who expose them to liability for privacy breaches.

EMPLOYER INVESTIGATIONS

Is there a right to remain silent? Yes and no.

BY CATHERINE SULLIVAN

Members have a right to remain silent, but adverse employment consequences may flow from the exercise of the right. Members cannot be disciplined for exercising the right to remain silent. However, they can be disciplined if their silence impedes the employer's ability to conduct a full investigation.

An arbitrator may rely on the exercise of the right to conclude that the employment relationship is not capable of repair. Members who fail to provide an explanation or who fail to explain their alleged behaviour at the earliest opportunity may face obstacles at a subsequent arbitration hearing, especially in circumstances where they are hoping for reinstatement to their previous job.

Members facing criminal investigations must choose between two courses of action.

Generally, criminal lawyers will advise them to remain silent and not to participate in the employer's investigation. If they comply with the lawyer's advice, they potentially jeopardize their employment situation.

Generally, criminal lawyers will advise them to remain silent and not to participate in the employer's investigation. If they comply with the lawyer's ad-

vice, they potentially jeopardize their employment situation.

If they participate in the employer's investigation, they run the risk of their evidence being used against them at a subsequent criminal proceeding.

Members need to be fully informed about their options and the likely consequences of their choices.

Lastly, arbitrators will draw an adverse inference from a member's refusal to participate in an investigation regardless of the reason for their actions. Members who say "my lawyer advised me not to say anything" will not be insulated from the employment consequences of their actions.

Generally an employee is under no obligation to explain alleged conduct and an employer cannot rely on that silence to constitute just cause for discipline.



steward updates

Arbitrators say an employee does not have “an obligation” to explain alleged misconduct, but there is “an opportunity” to explain.

The latest caselaw decisions indicate that opportunities not taken can have negative consequences. A member who acts on the legal advice of their lawyer cannot rely on that explanation to escape the consequences that flow from them exercising their right to silence.

The right to remain silent arises in workplace misconduct instances and in situations where an employee has been or will be charged with a *Criminal Code* offence.

The decision to either remain silent or offer an explanation is most difficult where there is either a criminal charge or potentially one. Often, outside independent lawyers will advise a member to remain silent.

In a recent arbitration case, two ferry workers were terminated after they refused to testify (on the advice of their counsel) before a board of inquiry about events surrounding the sinking of the Queen of the North ferry.

The arbitrator found “the two employees put themselves in the position of violating one of the basic elements in an employer-employee relationship, that is, compliance of an employee with unequivocal directions/instructions from his/her employer”.

There are limits on the way that employers can conduct investigation interviews. An employer who subjects an employee to persistent questioning, even though an

employee has asserted the right to remain silent, may be guilty of a breach of procedural fairness. However, the remedy for this breach may only be the exclusion at arbitration of the evidence that was obtained from that process.

Arbitrators have found that an employer may be entitled to draw an adverse inference from the failure of an employee under investigation to offer an explanation for alleged misconduct. This is particularly important where the employee invokes the right to remain silent in a way that negatively affects the employer’s ability to fully investigate a matter.

The law is clear that evidentiary effects can flow from the exercise of the right to remain silent. In a situation where the employer proves its allegation, silence may lead an arbitrator to conclude the employer/employee relationship is irreparably damaged and cannot be restored.

An arbitrator may also uphold the discipline where a member fails to answer or explain or challenge the employer’s evidence of wrongful conduct.

If the employer proves that the alleged conduct has occurred, an arbitrator in assessing the penalty may rely on the member’s silence to conclude the employment relationship is not viable.

The Labour Board has stated that encouraging employees to provide a full and complete account for their actions at the earliest opportunity is consistent with the Code purpose of the expeditious settlement of disputes between employers and unions.



SETTLING GRIEVANCES

Labour code alternatives to arbitration

BY JAN O'BRIEN

Three provisions under the *Labour Relations Code* (the “Code”) provide alternatives to the grievance arbitration procedure in a Collective Agreement. The relevant parts of the Code are: Section 87: Settlement Officer, Section 104: Expedited Arbitration and Section 105: Consensual Mediation Arbitration.

They are administered by the director of the Collective Agreement Arbitration Bureau (CAAB) which is part of the Labour Relations Board.

To review the three provisions in detail and obtain application forms go to <http://www.lrb.bc.ca/caab/>

Section 87 and Section 104 have similar provisions.

Either party may apply to the CAAB director for a Section 87 settlement officer to help assist in settling a grievance or for expedited arbitration under Section 104.

However, there are two important conditions to remember:

- The grievance must not have been referred to arbitration under the Collective Agreement.

- The request to CAAB must be made before the timeframe for referral to arbitration under the collective agreement has expired.

These conditions are strictly enforced by CAAB.

Expedited arbitration under Section 104 is a way of moving quickly ahead with a hearing. However, unless the parties agree otherwise, the hearing will be conducted as a full, formal precedent-setting arbitration hearing.

Under Section 105, both parties must agree to proceed to consensual mediation-arbitration.

Under this process, a mediator/arbitrator will arbitrate outstanding items in an expedited manner if the parties fail to settle the grievance through mediation.



TECHNOLOGY

Implications of online social networking

BY LORI LEUNG, LAW CO-OP STUDENT

Canada is one of Facebook's fastest growing markets; approximately two million Canadians are subscribers of this popular social networking website. It has become a major online communication and networking tool for people of all ages and has begun to impact the workplace.

Undeniably, online social networks are an efficient and useful way for people to share information, to keep in touch and to disseminate knowledge. However, due to these sites' limitations on privacy, members should post information with care, after considering the implications to their current and future employment prospects.

There is currently no case law specifically addressing how employers should deal with issues created by social networking sites, such as Facebook, Friendster and MySpace. However, there are a handful of cases that touch on these issues, more generally. The caselaws suggest that users' privacy is limited, at best. Content available on Facebook may be introduced in evidence to contradict the opposing side's testimony.

In *Kourtesis v. Joris*,ⁱ the defendant of a motor vehicle collision was permitted to bring in photos from the plaintiff's Facebook account to argue that the plaintiff's injuries were not as serious in comparison to what was alleged.

Similarly, in a personal injury case, *Weber v. Dyck*,ⁱⁱ the court's order of further review of the plaintiff's employment was prompted by the defendant's assertion that plaintiff's MySpace page, which depicted her playing the piano, contradicted the claim that she sustained permanent injuries to her left wrist. And in another motor vehicle collision case, *Cikojevic v. Timm*,ⁱⁱⁱ the plaintiff's Facebook photos, demonstrating her financial stability were a factor in the court's denial of the plaintiff's application for an advancement of the damage award from the defendant.

Plaintiffs' Facebook pages may be admitted as evidence of their characters, though the defendants' ability to

do so is restricted by the concept of 'trial by ambush'^{iv}. In *Hollingsworth v. Ottawa Police Services Board*,^v the plaintiff's Facebook pages were used to undermine his claim that he had never been intoxicated.

Likewise, in *Westhaver v. Howard*,^{vi} the plaintiff's father's Facebook pages were used to paint him as a person of poor judgment and thus to deny him access to his son (the defendant's child).

The decisions in these cases are in line with privacy policies used by social network providers. Facebook, for example, stipulates that it "may be required to disclose user information pursuant to lawful requests, such as subpoenas or court orders, or in compliance with applicable laws" and may share users' information with other companies, lawyers or the government when it is necessary to comply with the law, to protect Facebook's interests, to prevent illegal activity or to prevent imminent bodily harm. Therefore, regardless of the social network provider's extensive privacy options and settings, it may nonetheless be required to disclose users' personal information to authorities.

Facebook's privacy policy also warns that the sharing of information is done at users' own risk. In effect, the disclosure of personal information on one's profile and posting of materials (such as written comments, other messages, photos and videos) are activities that render the content publicly available.

Unlike e-mail and instant messaging (usually a form of person-to-person communication), social networking sites are not meant to ensure that the information communicated will only be limited to the user's intended recipient(s) or will fall under the employer e-mail



steward updates

exception. Indeed, once information is posted online it cannot be considered completely private. Consider, how others may print out and/or save your information. As a result, users should not have a reasonable expectation of privacy on social networking websites.

In *R v. Sather*,^{vii} the accused posted threatening messages on his Facebook account concerning his wife and Children's Aid Services, and was charged for uttering threats to cause bodily harm contrary to Section 264.1(2) of the *Criminal Code*.^{viii} The court found that the messages were neither posted for the purposes of instilling fear nor of intimidation because, according to experts, Facebook users often deliberately say provocative things to elicit a response from their 'friends'. Other factors led the court to acquit the accused for the threatening offence including the fact that the postings were a means of 'blowing off steam'. Nonetheless, the court held that Children's Aid Services and the police were justified in being alarmed by the objectively violent content of the messages and that the subsequent arrest was appropriate in the circumstances.

Had *R v. Sather* occurred in the employment context, the decision probably would have been very different. It seems that the argument of using Facebook as an outlet to relieve stress and the fact that users' messages are often exaggerated would likely hold much less weight in the employment context. The posting of inappropriate content on a social networking site may be grounds for termination, particularly in cases where the content in question compromises the employers' reputation.

For example, in January 2007, several employees were terminated from Farm Boy, an eastern Ontario grocery chain, for making derogatory comments on Facebook about the company, its customers and staff. And later in that same year, an arbitrator upheld the dismissal of a personal caregiver for comments and pictures posted on her blog. In that case, *C.A.W. Local 127 (J.C.) v. Chatham-Kent (Municipality)*,^{ix} the grievor disclosed personal information about residents that she cared for and graphically discussed aspects of her daily work in distasteful language. Her conduct was deemed to be insubordinate and amounted to breach of the

confidentiality agreement. The arbitrator concluded that the grievor's seniority, display of remorse and post-dismissal financial hardship did not mitigate the justified penalty of termination given the nature and extent of her misconduct.

Users' limited privacy rights while engaged in online social networking are further limited in the labour and employment context, since individuals are not protected by the rules of evidence. Sections 92(1)(b) of the *B.C. Labour Relations Code*^x and 60(1)(c) of the *Canada Labour Code*^{xi} state that an arbitration board has the power to "receive and accept evidence and information on oath, affidavit or otherwise as in its discretion it considers proper, whether or not the evidence is admissible in a court of law". These provisions have serious implications, since they can be used to override protections (which are afforded to accused persons in the criminal law context) to the detriment of employees.

It is important for members to be familiar with the rules of internet usage during work hours and on employers' property (desktop computers, laptops, Blackberries). In particular, members would be wise to accept the fact that the internet is fundamentally a public place and thus anything posted online may be viewed by anyone and may remain in cyberspace indefinitely.

Facebook is not the computer age's equivalent of the proverbial water-cooler; rather, the posting of comments online about employers means those comments, whether positive or negative, have entered the public forum and made their way to the public record.

(Endnotes)

ⁱ [2007] O.J. No. 2677, [2007] O.J. No. 3606

ⁱⁱ [2007] O.J. No. 2384

ⁱⁱⁱ [2008] B.C.J. No. 72

^{iv} *Knight v. Barrett*, [2008] N.B.J. No. 102

^v [2007] O.J. No. 5134

^{vi} [2007] N.S.J. No. 499

^{vii} [2008] O.J. No. 918

^{viii} R.S., 1985, c. C-46

^{ix} [2007] O.L.A.A. No. 135 (QL)

^x [RSBC 1996] Chapter 244

^{xi} R.S., 1985, c. L-2



SUPREME COURT OF CANADA

Decision makes it harder to advance claims for punitive and aggravated damages

BY CATHERINE SULLIVAN AND LORI LEUNG

In the *Honda Canada v. Keays* decision issued in June 2008, the Supreme Court of Canada confirmed that only in rare cases will judges or arbitrators award punitive or aggravated damages when employees are wrongfully terminated.

Kevin Keays was an assembly line worker who worked for Honda Canada for 14 years. He suffered from chronic fatigue. The employer accommodated Mr. Keays's absences due to his disability – for a certain period of time. The employer was concerned about the frequency of his absences and asked him to see an occupational medical specialist to determine how his disability could be accommodated. Mr. Keays repeatedly refused to attend the medical appointments. The employer terminated his employment and he sued for wrongful termination.

At the lower level court, Mr. Keays was awarded 15 months severance and an additional nine months in Wallace damages (Wallace damages are awarded to penalize employers who act in bad faith by being untruthful, misleading or unduly punitive). Mr. Keays was also awarded \$500,000 in punitive damages as the court found that the employer committed acts of discrimination and harassment against him. The punitive damage award was reduced to \$100,000 by the Court of Appeal.

The Supreme Court of Canada set aside the Wallace damages of nine months, finding that the trial judge made an error in concluding that the employer's conduct was a display of bad faith. The court found that the employer rightly relied on the advice it received from its medical experts, that the occupational medical specialist was not playing 'hardball' nor setting up Mr. Keays for failure, and that the employer's decision to

stop accepting medical notes was not reprisal for Mr. Keays seeking legal counsel.

The court also set aside the punitive damage award. Punitive damages will only be awarded in exceptional cases where an employer has committed wrongful acts that are harsh, high-handed, malicious, outrageous, vindictive, reprehensible and deserving of denunciation and deterrence. Punitive damages focus on the defendant's conduct, not the employee's loss. Therefore, since damages in the context of wrongful terminations are intended to be compensatory, not punitive, this type of award will be rare.

The court said that damages are not generally available for the pain and distress that often comes as a consequence of being terminated. To obtain an award for damages for mental distress, the mental distress must be substantive. The normal distress, hurt feelings and frustrations associated with termination are not compensable. The degree of mental suffering caused by the employer's breach must be significant and will require proof of damages.

The Supreme Court of Canada has narrowed the opportunity for employees to argue an entitlement to punitive and aggravated damages. This decision means that a claim for additional damages will require clear objective proof of employer misconduct and clear substantiated medical proof of damage to an employee caused by the employer's actions. It will be harder in the future for employees to meet these tests.



NEGOTIATING HOURS OF WORK

Advice for members under the government Master Agreement

BY DARLENE ROBERTSON

Many of our members enjoy a flexible work schedule that was negotiated by the union on their behalf. Some have worked under a flexible schedule for the entire length of time they have worked for government service. Other government workers only wish they could be so lucky, or have been told by their employer that they can't have one, and simply accept that this is so. It is not so.

Article 14.2 of the master agreement is the main article to review for guidance when negotiating flexible work schedules (or modified work schedules in some components). However stewards must also be familiar with the specific articles in the component agreements that govern hours of work. Each component has different language, and understanding these differences is important to the successful negotiation of an Hours of Work (HOW) agreement.

The first thing a shop steward needs to do to get or keep a HOW Agreement is to thoroughly read Article 14.2. Don't skim it – study it and think about how it applies to your worksite. Next, read the section in your Component Agreement that applies to HOW. In some Component Agreements it is quite simple. Others, like Corrections, can be quite complicated and probably understood better by the steward in those worksites.

Let's use Component 12 for an example. You are a steward in a Crown Counsel Office and members have approached you expressing interest in a modified work week. You arrange a meeting with all the administrative services employees in your work unit. This may also include the office supervisor if they are in the bargaining unit. The members should discuss what kind of modified work week the majority want and the ways the schedule could be changed to benefit both the workers and the employer.

Keep in mind:

- Article 14.2(f) (1): "Work schedules shall meet the hours of operation and shall consider unusual or seasonal demands and functionally linked work groups within and without the bargaining unit."
- Article 14.2(f)(2): "Work schedule changes, within existing hours of operation, must not result in increased cost to the employer and where possible shall result in decreased cost to the employer and/or improved efficiency and/or improved service to the public."
- Article 14.2 (b): "The employer determines the hours of operation and the numbers of employees required to provide the service."

These articles mean that you will **NOT BE** successful negotiating a modified work week if it includes overtime for coverage or a change in hours of operation. You must keep in mind that the employer (a Crown Counsel Office for example) is open for business between 8:30 a.m. and 4:30 p.m. and there must always be someone to provide coverage during those hours.

You might prepare a schedule that would show the manager how the work would be done, who would cover for whose absence, how work that must be done immediately would get done by others while other employees are off on any given work day, etc. You will need to be able explain the efficiencies to be obtained. For example, staff preparing their desks and



steward updates

front counters with needed supplies before opening the doors, and having clean up time after 4:30 p.m. Paperwork that requires concentration could be completed in the period of time before opening and after closing much more accurately and faster than during daytime service hours when workers are faced with constant interruptions.

After the steward has met with the members and agreed upon a proposed schedule, the steward must make an appointment with the manager to discuss the proposal. You would then attend the meeting with the manager and formally give notice (under Article 14.2(2)) to the manager that you wish to negotiate a HOW Agreement. The parties (the steward and the manager) have 14 days after the notice is given to negotiate an agreement.

You will then inform the manager of the benefits of the proposed schedule and the ways that the employer's needs are met by the proposed schedule. You may be advocating (if the members voted for this change) that a half hour lunch break instead of an hour would allow more staff to be present at a peak time. You would mention the benefits of employees having more time with their families, having time to schedule medical appointments on a day off instead of disrupting a regular work day, that office and employee morale would be improved and therefore the employer would also benefit.

If you are able to reach agreement, you and the manager can prepare the new agreement. **Before you sign it off, you should review the agreement with your assigned staff representative to ensure that it is consistent with the collective agreement.**

The manager may also want to negotiate with you. Perhaps you have proposed a schedule with a day off every week. The employer may propose a day off every two weeks. The steward should consult and ensure you have the support of the members for any proposed changes.

In some work settings, the employer will refuse to negotiate with the steward or even consider the possibility of a modified work week. That is when you,

the steward, will move the process to the next step. If you haven't come to an agreement within 14 days, the matter is referred to an Hours of Work Umpire on the appropriate form.

At this point you, the steward, must involve your staff representative. Your rep will assist you by booking the Hours of Work Umpire and by providing examples of successful and unsuccessful proposals and awards so you can assess the likelihood of success at the hearing. The staff rep can give you guidance, advice and, time permitting, may be able to assist you at the hearing. We can arrange your leave to attend the hearing and, depending on how complicated the proposal is, may assist you to get permission from your component to book a day off to prepare for the hearing. We can also provide you with the necessary form for the referral to the umpire.

The umpire will then contact both the steward and the manager involved to reach agreement on a hearing date. The timeline for the hearing is within 14 days of the request or, with mutual agreement, can be extended for a further 7 days. It will happen quickly.

It is a very informal hearing compared to an arbitration. The umpire is aware you may not have done previous hearings and will allow a lot of leeway for you to make your points. You may take a co-worker with you as well if there are points you believe they may be able to explain more directly than you could. The employer will make their arguments and will likely have an HR advisor or two with them. At the end of the hearing the umpire will tell you when to expect his/her decision.

The process is not complicated, but it will be unsuccessful if you don't do your homework. With the support and assistance of your co-workers, your local executive and your area office staff representative, the process can be broken down into a series of steps that, if successful, will more than compensate for your time and effort. Further, if you are unsuccessful you can then reflect on the umpire's decision and, after some time, try it again with a different proposal and a lot more confidence on your part.

Good luck!



DISCIPLINARY ACTION

Members' right to have a steward present

BY CATHERINE SULLIVAN AND LORI LEUNG, CO-OP STUDENT

Members are strongly encouraged to exercise their right to have their steward present at any discussion with management which the employee believes might be the basis of disciplinary action.

Collective agreement language provides for this important substantive right, a right that all members and stewards should be familiar and comfortable with, particularly in terms of its operation and effects. Specifically, employees and shop stewards need to understand the responsibilities that come with invoking rights under their agreement

Employers/supervisors are legally obliged to use their disciplinary powers in accordance with required procedures and limitations.

For instance, Article 10.8(a) of the government master agreement stipulates that "where a supervisor intends to interview an employee for disciplinary purposes, the supervisor shall make every effort to notify the employee in advance ... in order that the employee may contact their steward, providing that this does not result in an undue delay of the appropriate action being taken".

Arbitrators have held that employers must give an employee reasonable opportunity to contact a representative, should a situation trigger this collective agreement provision.

Origins

The right to have a steward present is rooted in the principles of due process and procedural fairness. Due process and procedural fairness have been well established in the areas of administrative, criminal and constitutional law.

These twin principles have also been imported into the labour context and are now given effect largely through the interpretation of collective agreements.

The right to have a steward present arises from the union's statutory designation as the exclusive representative of all employees covered by the collective agreement in all of their dealings over terms and conditions of employment. For example, as part of the principle of procedural fairness, unions argue that employees should have the opportunity to explain their side of the story before any discipline is contemplated or imposed. This right is a fundamental substantive right and thus cannot be waived.

Implications

Implications of breaching the right to have a steward present illustrate the importance of this right. An employer's breach of an employee's right to union representation, and thus a breach of the collective agreement or of contractual process rights, will be subjected to the *William Scott* analysis. The arbitrator, in deciding what the effect of the breach will be, will ask:

- (1) Was there just and reasonable cause for the discipline given?
- (2) Was the discipline imposed proportionate to all the circumstances of the case? and
- (3) Should an appropriate remedy be substituted?



steward updates

Some older cases support the argument that whatever discipline that was imposed by the employer during which the employee's right to have a steward present was violated must be void *ab initio* (Latin term meaning "from the beginning").

Recent awards suggest that the ultimate decision falls on how the adjudicator characterizes this right. Where the circumstances indicate that violation of the right to union representation constituted a violation of a substantive right, any disciplinary actions imposed by the employer will be deemed null and void.

On the other hand, where the circumstances indicate that violation of the right amounted to a violation of a procedural right, the imposed sanction will likely be upheld.

Limitations

Right to a steward language in collective agreements distinguish between operational and disciplinary meetings.

Employees do not have a right to a steward for operational meetings, that is, where a supervisor seeks only to assign work, to give instruction, and/or to carry out routine tasks that are part of the ordinary daily relationship between employees and a supervisor.

If an employee believes (and there must be some foundation for that belief) that a meeting with a supervisor may be disciplinary in nature, they should make a request for a steward to attend. Generally, most employers advise members upfront to bring a steward to a scheduled meeting.

Role and responsibilities of stewards

It is important to appreciate that stewards can play an important role in the disciplinary process. Employees asked to attend a meeting where disciplinary measures may be imposed are especially vulnerable and often incapable of properly representing themselves (they may be upset and emotional).

Stewards, with their training, experience and knowledge can help counterbalance the imbalance of power

by giving advice to employees and by drawing the employers' attention to issues that they might otherwise fail to consider. More specifically, stewards are relied upon to:

- provide support to the employee during the disciplinary meeting;
- assist the employee in explaining the circumstances surrounding the incident;
- serve as a witness to the exchange between the employee and employer/supervisor;
- take accurate notes of what is said during the meeting;
- provide responsible and considered advice about the employee's rights and the potential consequences of enforcing those rights;
- advise the employee to admit their mistake if they did engage in misconduct; and
- advise the employee not to engage in conduct which might subsequently prejudice them in the event that disciplinary action is taken.

In carrying out these duties, stewards are required to be objective by separating their personal feelings from their responsibilities.

It is also important for stewards to understand the extent of their role in order to avoid exposing themselves to potential discipline.

In the workplace, stewards wear two 'hats'. Under one hat, stewards are employees, just as their fellow union members and thus subject to the same rules, requirements and disciplinary procedures like all other employees. Under the other hat, stewards are the face of the union and thus have the frontline responsibility to enforce the collective agreement and protect employees' rights.

The dual role of the steward prompts one to ask, 'when am I an employee and when am I a steward?' For the most part, the 'work now – grieve later' rule answers this question.



steward updates

Unless the matter is urgent, involving health and safety and/or emergency situations that cannot be effectively addressed by a later grievance, stewards should remain in their role of employee.

In the *BCGEU (Younie)* decision, the arbitrator found that the grievor (who was also a steward) was deserving of discipline because she failed to accept that her basic contractual obligation as an employee was to report for work and perform the duties assigned to her without challenge.

Stewards cannot abandon their assigned duties whenever a supervisory initiative may be viewed as contrary to the collective agreement. Stewards must be well aware of their roles and responsibilities not only as stewards but also as employees. As a result, stewards are obligated to file a grievance (if a reasoned conversation with management does not resolve the problem) on the behalf of a co-worker in a manner consistent with the grievance procedures provided by the collective agreement.

The two-hat model becomes more complicated where a steward becomes a potential grievor. The right to have a steward present logically extends to include stewards themselves.

Most agreements have language which states that “a steward shall have the right to consult with a staff representative of the union and to have a local union representative present at any discussion with

supervisory personnel which the steward believes might be the basis of disciplinary action against the steward, providing that this does not result in an undue delay of the appropriate action being taken”.

Simply put, stewards who are being disciplined may seek representation from a union staff representative. Stewards should not act on their own behalf in a disciplinary meeting. From another perspective, employers should not assume that employees who are also union representatives are able to represent themselves.

To summarize, stewards are the vital and most important link between the union and its members.

Stewards must educate members to exercise their right to a steward language so that the representation system properly functions. Only where a steward is present during disciplinary meetings can the union get first hand dispassionate information about the issues and the circumstances discussed with the employer. Then armed with this information, the union can work on the member’s behalf to seek the appropriate resolve.

Right to representation language must be exercised responsibly by all parties: employers, employees and their stewards. The right to have a steward present is a fundamental right, long recognized in labour and constitutional history as an extension of the extremely important principles of due process and procedural fairness.



arbitration award summaries

► **BENEFITS**

GOVERNMENT OF BC AND BCGEU
November 28, 2007
Expedited

The issue concerned the level of benefit entitlement while the member was on maternity and parental leave. The member had been working on a part-time job share of her previous full-time position. She took a temporary assignment with another ministry (.75 position). The member understood that her job sharing arrangement had ended and at the conclusion of the temporary assignment, she would be expected to return to work full time.

During the temporary assignment, the member commenced maternity leave. She was paid the maternity/parental leave allowance for the remaining time of the temporary position but her allowance was reclassified based on the part-time job share rather than a full-time position.

The arbitrator accepted the union argument that her employment status was full-time at the conclusion of the temporary assignment.

► **BENEFITS**

**NIL/TU,O CHILD AND FAMILY
SERVICES SOCIETY AND BCGEU**
August 27, 2008
BC Court of Appeal

NIL/TU,O is a First Nations social services agency. The union applied for certification in 2005. The employer objected to the application claiming the agency was not covered by provincial legislation. The Board rejected the employer argument and the union was granted certification in 2006.

The employer appealed the Board decision to BC Supreme Court. The Supreme Court agreed with the employer and cancelled the certification. The union appealed the Supreme Court decision and in the meantime applied for and was granted federal certification.

In the recent Court of Appeal decision, the union successfully defended the Board decision that the delivery of social services is provincial not federal work and the employees are governed by provincial not federal legislation. The Court of Appeal ordered the board certification to be reinstated.

► **CONVERSION**

BCGEU AND B C PAVILLION CORP.
June 18, 2008
Arbitration 969

The arbitrator accepted the union's argument that part-time and event-time employees met the test for eligibility (having worked at least 1,800 hours in 12 months) to be converted to regular positions. The members were entitled to be converted to full-time positions and entitled to compensation for the employer's failure to convert them.

The employer filed a section 99 review of the arbitration award. The board issued reasons on August 29, 2008 dismissing the application as disclosing no reasonable basis for an appeal.

► **CONVERSION**

**BCGEU AND MINISTRY OF
CHILDREN AND FAMILIES**
April 23, 2008
Settlement

The member filed a grievance alleging the employer's failure to convert her status from auxiliary to regular was a violation of her human rights. The member was a long standing service auxiliary employee who could not work full-time hours due to health problems that would meet the definition of a disability.

The parties were able to resolve the issues on a without prejudice basis on terms that resulted in a retroactive conversion to part-time regular status for the member and a financial payment to compensate her for the sick leave benefits she did not receive because of the employer's failure to convert her.



arbitration award summaries

➤ DISMISSAL

ARGO ROAD MAINTENANCE AND BCGEU
November 7, 2007
Arbitration 933B

The member, a 16 year stockman employee was terminated by the employer under the tech change language in the collective agreement. The employer argued the employee was unable to satisfactorily perform the new duties of the job using the new computer technology. The tech change language states that loss of a job due to technological change results in the offer of a vacancy or severance.

The arbitrator found the employer had provided training, familiarization and on the job coaching on the new computer system. The arbitrator rejected the union's characterization of the termination as a dismissal for a non-culpable inability to perform the requirements of the job. The arbitrator concluded the employer discharged its onus of proving it made a reasonable and bona fide assessment of the member's performance in relation to the standards, and dismissed the grievance. As the employer's offer of severance had not been withdrawn, the arbitrator ordered that it be paid to the member.

➤ DISMISSAL

BCGEU AND BC PUBLIC SERVICE AGENCY
October 1, 2007
Arbitration 957

The grievor, a four year member, was terminated for inappropriate behaviour. The union filed a termination grievance. The employer raised a preliminary objection arguing the member had breached 8.10 which prohibits members from pursuing grievance issues through other forums or processes. The member wrote a series of letters to the Deputy Minister regarding the termination.

The arbitrator found that the evidence established the member had attempted to pursue the subject of the grievance through another channel outside of the grievance process. By operation of Article 8.10(b) the

arbitrator concluded the grievance had been abandoned.

➤ DISMISSAL

THOMPSON AND GOVERNMENT
OF BRITISH COLUMBIA AND BCGEU
July 17, 2007
Arbitration 942A

In an earlier award, the arbitrator awarded that the member's termination be substituted with a six month suspension. The union challenged the content of the employer's amended letter of suspension which raised concerns about the member's conduct not in evidence at the hearing. The employer argued that it had the right to set expectations and that the arbitrator did not have jurisdiction to decide the issues raised in the grievance.

The arbitrator finds for the union and orders the employer to comply with the award by deleting certain paragraphs of the suspension letter. It was not appropriate for the employer to raise new grounds for discipline.

➤ DISMISSAL

BCGEU AND LIFESTYLE RETIREMENT
COMMUNITIES LTD.
June 14, 2007
Arbitration 952

The member was a care aide at a retirement facility. She was a six year employee who was terminated on October 16, 2006 for misconduct. The union acknowledged the member had made intemperate remarks to a co-worker but argued termination was an excessive penalty.

The arbitrator gave the benefit of the doubt to the member regarding the evidentiary conflicts about the content of the member's remarks. The arbitrator upheld the grievance and reinstated the member. The discharge was replaced by a one month suspension and the member was directed to attend anger management training.



arbitration award summaries

➤ DUTY TO ACCOMMODATE

GOVERNMENT OF BC AND BCGEU

June 11, 2008

Arbitration 968

The member was not placed in a position through the job search process administered by the Rehab Committee. The employer refused to extend the period of job search and terminated the member's employment.

The union argued that the *Human Rights Code* applies to the placement process and the employer's efforts to place the member did not satisfy the duty to accommodate short of undue hardship.

The arbitrator found that the employer did have a duty to accommodate the member while she was before the Rehab Committee. The grievance failed because the member did not co-operate with her obligation to facilitate the accommodation process.

The member's conduct became a relevant factor because it impaired the placement/accommodation process in two ways: the member refused to respond to the employer's requests for updated medical information (and a refusal to agree to an independent medical review) and did not provide information to support a broader skill set. The member's lack of cooperation in response to reasonable requests made of her during the placement process relieved the employer of any duty to pursue additional accommodation measures.

➤ GRIEVANCES

COUPLAND AND DAVIS BCLRB

September 26, 2008

Arbitration B147/2008

Two members filed a section 12 complaint against the union related to the union's turnaround of a grievance.

The Board found the union took many steps before deciding the grievance couldn't succeed. The decision states the union "pursued a grievance; it decided to

withdraw the grievance; it accepted an appeal by the complainants; it sought a legal opinion; it had a hearing to determine an appeal of the legal opinion; and ultimately decided not to proceed with the grievance".

The Board concluded the union, through its various processes, gave an exceptional amount of thought and deliberation to the grievance before making its ultimate decision. It did not act with blatant and reckless disregard in its representation of the complainants.

➤ HOLIDAYS

EMCON SERVICES INC. AND BCGEU

December 6, 2007

Arbitration 962

The parties chose certain representative grievances to illustrate their differences regarding the interpretation of the holiday provisions set out in Article 17 of the collective agreement.

The arbitrator concluded that the language expressly contemplated that overtime payments will be paid on a pro-rated basis and that workers will be entitled to overtime payments for any hours they work on a designated holiday (holiday defined as a 24 hour period).

The employer argued, relying on a memorandum of understanding, that all statutory holidays are shut down days and therefore no employee ever works on a designated holiday.

The arbitrator accepted the union's argument that the application of the stat holiday language is triggered by the employee's regular shift rotation. If a designated holiday falls on an employee's day off in their regular shift rotation, then Article 17.2 applies, and if a designated holiday falls on a day of work in their regular shift rotation, then the double time provision applies.



arbitration award summaries

➤ HOURS OF WORK

LEGAL SERVICES SOCIETY OF BC & BCGEU

June 22, 2007

Consent Order

The union alleged the employer violated the collective agreement when it refused to allow certain employees a modified work week schedule.

The parties agreed that an amended version of the modified work week will be introduced for certain intake clinic employees on a trial basis for a period of two years.

The parties established a series of guidelines for the modified work week application process and established a joint committee which will conduct a review of the trial period at the end of the first year of the two year period.

There will be no modified work week at the LawLine, but that decision will be reviewed at the time of the first year review.

➤ HOURS OF WORK

GOVERNMENT OF BC AND BCGEU

December 7, 2006

LDB Hour of Work Settlement

The union presented proposals from employees at three liquor stores – 100 Mile House, Powell River and Quesnel – to change the hours of work at each store.

After opening statements, the parties agreed to the arbitrator's suggestion that the issues be referred back to the representatives who negotiated the hours of work agreement changes through the CAIACC Committee.

The consent order provided background information, confirmed the series of steps to be taken by a party wanting to change an existing work schedule, confirmed the factors to be reviewed in deciding whether an hour of work schedule meets the parties' goals and the relevant criteria.

The proposed schedules for the 100 Mile House and Quesnel stores were denied as they would result in increased costs to the employer.

The amended schedule for the Powell River store met the required test and was approved.

➤ HOURS OF WORK

GOVERNMENT OF BC AND BCGEU

June 13, 2008

Arbitration BCLRB B91/2008

The union applied under Section 99 seeking a review of a Claims Review Committee (CRC) decision. The union argued the member was denied a fair hearing because the CRC panel relied on documents that had not been disclosed or provided to him during the hearing.

The Board found in the union's favour and ordered that the matter of the member's qualification for long term disability benefits will be referred to a different CRC panel.

➤ PROBATION

BCGEU AND MINISTRY OF FORESTS

July 11, 2008

Arbitration 970

In September 1994, the member began working as a forest technician. In June 2006, pursuant to a settlement agreement, he returned to work with probationary status. On February 21, 2007, he was rejected on probation.

The arbitrator found for the union and reinstated the member. The suitability test requires the employer to establish and communicate reasonable standards to probationary employees and to give them a fair opportunity to prove their abilities. The employer did not show it had advised the member of the expected standards, or that it had told him he was not meeting those standards and that failure to meet those standards could result in removal from the position.



arbitration award summaries

➤ SENIORITY

PROVINCE OF BC AND MATUSZEWSKI

July 14, 2008

B.C. Supreme Court

The union intervened in the employer appeal of the BC Human Rights Tribunal decision which found the employer violated the *Human Rights Code* because members do not accrue seniority while in receipt of long term disability benefits.

The court allowed the employer appeal on the issue of mootness, having concluded that the arbitration award in *Shesha* (2002) had resolved the issue in the employer's favour.

The court referred back to the tribunal the issue of whether any outstanding damages are owed to the member for wage loss, damages to dignity and interest.

➤ SETTLEMENTS

HIGHWAYS SERVICE AREA 11 AND 20

(Mainroads and Interior Roads)

Settlement Summary

In 2002 after the Liberal government came to power, they informed highways maintenance contractors that unless labour costs were cut by 10% as of April 1, 2004 there would be no successorship in the next round of contracts.

The union entered into negotiations, opening up collective agreements to find the required 10% and, in exchange, the union got successorship and long-term, 10-year contracts.

In two service areas (11 [Mainroad] and 20 [Interior Roads]), the maintenance contracts did not expire until 2006. The union learned in late 2005 that instead of getting the 10% cut in funding in those areas on April 1, 2004, the employers did not get any cuts until the fall of 2006. All of the collective agreement savings between April 1, 2004 and the fall of 2006 went into corporate profits for Mainroad and Interior Roads.

The union filed grievances against both employers for recovery of the members' money that had contributed to the windfall profits of the companies for that period.

After several days of hearing on both files, the union entered into settlement negotiations. The ministry was also at the table, as they accepted some responsibility in the matter.

With the assistance of union staff, the union was successful in negotiating a lump sum payment of \$5,000 for each Mainroad regular employee affected, including those who had left Mainroad employment, and a smaller amount for each auxiliary. The union also got them back their modified work week for this year.

In Interior Roads, the union got the same amount, but because Interior Roads had lost the contract and were no longer in the service area, the ministry picked up a half share of the final settlement costs.

Total amount of the settlement was over half a million dollars. The union believes that this is the largest grievance settlement the union has achieved.

➤ WCB

BCGEU AND FRASERVIEW

COMMUNITY SERVICES

June 5, 2008

WCB Appeal

The member was a residential care worker who was injured on the job in 2004. The union has filed many appeals since 2004 fighting for recognition of his physical and psychological injuries.

On June 5, 2008, the WCB issued a decision letter stating his permanent functional impairment award would be 46.78% and he will receive a 100% loss of earnings award.

This is the first 100% loss of earnings award for any BCGEU member since the Liberal legislative changes in 2002.