IMPACT OF UNION REPRESENTATION CLAUSES IN ALBERTA

May 2010

FRANK MOLNAR

CHRISTIN ELAWNY

Many collective agreements provide that in advance of certain meetings between the employer and a bargaining unit employee, the employee is entitled to request or is required to have a union representative present at the meeting. Typically, this right to union representation is limited to situations involving discipline.

Where an employee has not been provided access to this type of representation, the union will often argue at the arbitration hearing that the discipline is null and void because of violation of the union representation clause. Arbitrators are then confronted with the question of whether or not the employee was entitled to union representation in the circumstances and, if so, if the discipline should be declared null and void as a result of the employer's violation of the union representation clause.

TYPES OF REPRESENTATION CLAUSE

In Alberta, as in many other Canadian jurisdictions, the answer to these questions depends on the specific wording of the union representation clause in question. In general, arbitrators are willing to apply broad interpretations to most union representation clauses.

There are several different types of union representation clauses. Some clauses mandate that a union representative be present during any discussions between the employer and employee involving potential discipline; this is best referred to as a mandatory union representation clause. For example, in the case of *U.F.C.W., Local 401 v. Canada Safeway Ltd. (Alta. C.A.)*[1] *("Canada Safeway:)")*, the union representation clause provided:

> When an employee's work performance is such that it may lead to discipline or discharge and is the subject of discussion between the employee and the employer, the union steward **shall** be present. (Emphasis added).

The issue in *Canada Safeway* was whether the absence of a union steward at a meeting between the grievor and the employer about the grievor's possible complicity in another employee's conversion of the employer's funds, violated the representation clause. Accordingly, the question before the arbitrator was whether the meeting related to "work performance" and triggered the mandatory attendance by a union representative. The Court held that the clause was not violated because the subject of the discussion was not "work performance". The possible involvement of the employee in the conversion of the employer's funds was better classified as personal conduct or personal misconduct and not "work performance". This emphasizes the fact that whether or not a union representation clause will be considered to have been violated

1 [1989] A.J. No. 142 (Alta. C.A.), leave to appeal refused, 101 A.R. 80 (S.C.C.)

EDMONTON
2000, 10235 - 101 STREET
EDMONTON AB T5J 3G1
PH 780 423 3003
FX 780 428 9329

CALGARY
400, 604 - 1 STREET
CALGARY AB T2P 1M7
PH 403 260 8500
FX 403 264 7084

YELLOWKNIFE
201, 5120 - 49 STREET
YELLOWKNIFE NT X1A 1P8
PH 867 920 4542
FX 867 873 4790

WWW.FIELDLAW.COM

will depend a great deal on the specific wording of the clause in question.

Another form of representation clause provides that an employee is to be provided with notice of a disciplinary meeting and that the employee may be accompanied by a union steward at the meeting. This type of notice clause gives the employee the option of being accompanied by a union representative and the time to arrange for such a representative to attend the meeting.

A clause like this was reviewed in Alberta and *A.U.P.E. (Cordingley-Wagner)*[2] *("Cordingley-Wagner").* The clause provided:

> Article 28.02
> An Employee who is to be interviewed with respect to disciplinary action as referred to in Clause 28.01 shall be notified of the time and place of the interview and if desired by the Employee he may arrange to be accompanied by a Union Representative or Union Steward…

The union claimed that the employee's meeting with an investigator about whether or not she had faxed some confidential documents to a third party outside of the office was a meeting about which the employee was entitled to receive notice and to have the option to have a union representative present at the meeting with her. The majority of the arbitration board determined that because the purpose of the meeting with the investigator was to obtain admissions of inculpatory or exculpatory information which would be taken into account in deciding the disciplinary action to be taken against the employee, the employee was entitled to notice of the meeting and the opportunity to have a union representative present. The majority of the arbitration board noted that in this case there was no further investigation after this meeting and therefore the investigation meeting was the final meeting that essentially settled the grievor's fate. Accordingly, the grievor's representation rights were found to have been violated.

Another type of representation clause provides that an employee must be advised of his or her right to union representation before any disciplinary action takes place. In *Calgary Board of Education and C.U.P.E. Loc. 40 (Payne)*[3] ("Calgary Board of Education") the clause specified:

> An employee who is to be disciplined must be notified by the Board of their right to union representation before such disciplinary action takes place.

Arguably, the requirement of notification as to the right to union representation would not be required if the school board had been carrying out an investigatory meeting and no discipline had yet been determined, nor was discipline going to be handed out at the meeting. However, in this case, a suspension, and ultimately the termination of the employee's employment by the Operations Supervisor occurred without the employee being advised of his right to union representation before the discipline was imposed. The meeting started out as a discussion of the grievor's failure to wear safety shoes at work and escalated into a yelling confrontation, and then the suspension of the grievor. The grievor believed that a "suspension" was actually the termination of his employment and continued in the confrontation with the supervisor on that basis. Ultimately, the Operations Supervisor terminated the grievor's employment. At no point prior to the termination was the grievor advised of his right to union representation. The arbitrator noted that this was a dispute that had escalated unnecessarily based on an employee misunderstanding which could have been corrected if the employee had obtained the "objective and considered" advice of a union representative.

2 [2006] A.G.A.A. 86 (Horning).

3 (1997), 63 L.A.C. (4th) 319 (Smith).

The type of clause found in the *Calgary Board of Education* is best referred to as a condition precedent union representation clause. Notification of the right to union representation must be provided to the employee before any disciplinary action can be imposed; the notification is a condition precedent to discipline.

We have provided examples of three different types of union representation clauses: the mandatory union representation clause as seen in the *Canada Safeway* decision; the notice type of union representation clause, as seen in the *Cordingley-Wagner* decision; and the condition precedent union representation clause as seen in the *Calgary Board of Education* decision. Many variations of these representation clauses exist. In some cases the clause may specify what type of meetings the employee is entitled to have representation. For example, the clause may state that the meeting must involve discipline in some way or the clause may explicitly exclude investigation meetings from the purview of the union representation clause.

As mentioned previously, whether the employee was entitled to union representation in the situation at hand will depend on the wording of the clause and the circumstances surrounding the employee's meeting with the employer. It is clear from the case law that where the purpose of the meeting between the employee and the employer is to obtain inclupatory or exculpatory information and the collective agreement provides the employee with the right to union representation in disciplinary situations, the absence of representation at that meeting and the absence of waiver by the employee of those rights, will result in an arbitrator finding that the collective agreement had been breached.

An employee may also be entitled to union representation in scenarios involving non-disciplinary terminations. In *Alberta (Health Services) and H.S.A.A. (Munro)*[4] *("Alberta Health Services")*, the grievor was terminated due to her excessive absenteeism as a result of her multiple sclerosis. The grievor was notified of her termination by way of a letter delivered to her home. She had not previously been notified that termination was being contemplated nor had a meeting between the employer and the employee been held to discuss the situation. The union argued, *inter alia,* that the employer had therefore violated the union representation clause and the termination was null and void.

There was no specific provision in the collective agreement which set out a procedure to be followed in the case of a non-culpable dismissal of an employee. However, the general union representation clause provided that when circumstances permitted the employer was "to provide at least twenty-four (24) hours advance notice to an employee required to meet with the Employer for the purposes of discussing and/or issuing discipline. The employee may be accompanied by a representative of the Association at such meeting." The arbitration board held that even though this clause only used the word "discipline" it was reasonable in the circumstances to interpret "discipline" as including non-culpable dismissal.[5] The arbitration board declared the termination to be null and void and reinstated the employee. The board also awarded the employee compensatory damages for the loss of dignity and suffering caused by the unduly insensitive conduct of the employer in dismissing the grievor while failing to comply with the union representation article.

Circumstances do arise where the employee does not wish union representation at a meeting where he or she has union representation rights. An employer in these circumstances will want to tread carefully. An employee's waiver of his

4 (2009), 187 L.A.C. (4th) 129 (Price).
5 Ibid, para. 79.

representation rights can be binding. However, there is significant risk that the employee will later allege that he did not waive those rights, did not understand he was waiving those rights, or worse, was coerced by the employer to waive those rights.

An employer faced with an employee refusing representation at a meeting where he clearly is entitled to representation, would be best to give the union notice of the meeting. That way the employee can tell the union that he does not want the union at the meeting. Alternatively, the employer should have the employee sign a statement confirming that he had been advised of his right to union representation and that he had advised the employer that he did not want union representation at the meeting. There is always risk with this second alternative that the employee will later argue that he had not signed the statement voluntarily or had not understood what he had signed or that had he understood the true purpose of the meeting he would have insisted on union representation.

CONSEQUENCES OF BREACH OF UNION REPRESENTATION RIGHTS

What is the consequence of a finding of breach of a union representation clause? Does it matter if there is no harm or prejudice suffered by the grievor as a result of the breach?

The cases in Alberta dealing with this issue vary in result. Some cases, such as *Alberta Health Services*, have held that the violation of a union representation clause renders the discipline issued null and void, while others have determined that where the breach was technical and caused no harm to the grievor nullification is not an appropriate remedy.

In *Re University of Calgary and A.U.P.E. (Cheltenham Grievance)*[6] *("University of Calgary")* the majority of the arbitration board determined that the employer's violation of the union representation clause rendered the grievor's termination null and void. Arbitrator Smith stated:

> What then is the result of such breach? In our view it results in the discipline imposed being null and void. We agree with Arbitrator Kirkwood in the *Medis* decision that the right to union representation is a substantive right and one that is not to be taken lightly or disregarded.[7]

The majority of the arbitration board in *University of Calgary* determined that the clause in question, which required that the grievor be provided with notice of any disciplinary meeting, had been violated by the University for several reasons: the University had, for all intents and purposes, concluded its investigation before the meeting; the University sought admissions from the employee in the meeting which were later used, in part, to justify his termination; although notice was technically provided to the employee, it was misleading; the meeting involved every management individual, including those with the power to terminate; the employee was suspended at the end of the meeting; and no further investigation was conducted.

The *University of Calgary* decision was followed in *Cordingley-Wagner*, discussed above. Even though the grievor's breach of the rules was serious and severe, the failure to provide union representation resulted in the termination being declared null and void. In part, the finding that the breach of the union representation clause rendered the discipline null and void was due to the fact that the provision of notice in both the *Cordingley-Wagner* and the *University of*

6 [2004] A.G.A.A. No. 28, 77 C.L.A.S. 5 (Smith)
7 Ibid, at p. 39.

Calgary decisions involved notice type union representation clauses in which the provision of notice of the meeting was a condition precedent to discipline.

The Alberta Court of Queen's Bench in *A.U.P.E. v. Alberta*[8] recently relied on the *University of Calgary* decision in determining the remedy for violation of a notice type union representation clause. Nielsen J. held in that case that the breach of a union representation type of clause "will ordinarily render any resulting discipline null and void." The union representation clause in *A.U.P.E. v. Alberta* case was identical to the clause in the *Cordingley-Wagner* decision discussed above.

However, nullification is not automatic. The Alberta Court of Appeal has stated, "Nullification… is not a remedy that should be imposed upon the parties by their arbitrators, or the courts on supervisory review, without some justification for doing so drawable from the terms of the collective agreement."[9]

The Alberta Court of Appeal in *White v. Canada Safeway Ltd.*[10], held that where the collective agreement is breached by violation of a union representation clause, the discipline will not be nullified where it is a technical breach that results in harm to no one. In that case, the issue was whether the arbitrator was correct in allowing the employer to present evidence gained through a meeting between the employer and employee at which no union steward was present. The union recognition clause was a mandatory clause. The Court determined that the arbitrator was correct in allowing the evidence on the basis that Safeway's breach of the union representation clause was technical and did not result in any harm to the grievor.

This was further expanded upon in *Calgary Board of Education* where Arbitrator Smith stated:

> Unless the collective agreement itself expressly or impliedly denies the employer the power to take disciplinary action where there has been a breach of some other term of the Agreement, by the employer, t**he consequences of the breach should be a matter for evaluation by the arbitrator in light of the purpose of the clause breached, the reasons for the breach, the prejudice to the employee and any other relevant factor.**[11] (emphasis added)

However, as noted above, Arbitrator Smith determined that the union representation clause imposed a condition precedent upon the employer to advise the employee that he was entitled to union representation before discipline was imposed. Arbitrator Smith went on to note that because the lack of union representation may have created actual prejudice and, therefore, there was the possibility of harm, the discharge had to be declared null and void and the employee was reinstated.

The consequences of breach in Alberta can be summarized as follows. If the collective agreement defines the consequences of violation of the union representation rights, then the arbitrator's hands are tied. However, where the consequences are not defined, the arbitrator will consider a number of factors; including, the purpose of the clause breached, the reasons for the breach, prejudice or harm to the employee and the potential impact of other provisions in the collective agreement. Where the employer has committed a technical breach of the representation clause with no resultant harm to the employee, the employer can argue, based on the Alberta Court of Appeal's decision in *White v. Canada Safeway Ltd.*[12], that

8 [2009] A.J. No. 368, 2009 ABQB 208, 183 L.A.C. (4th) 1.

9 Supra, note 1 at para. 9. See also Unite Here, Local 47 v. Crown Camp Services Ltd./PTI Group, [2007] A.J. no. 244.

10 [1994] A.J. No. 725 (Alta. C.A.).

11 Ibid, at p. 14.

12 Supra, note 10

the action taken by the employer should not be nullified. However, the employer will have to counter the arbitrator's inclination to nullify the discipline where the violated clause was either a mandatory, notice or condition precedent type of union representation clause.

EDMONTON
2000, 10235 - 101 STREET
EDMONTON AB T5J 3G1
PH 780 423 3003
FX 780 428 9329

CALGARY
400, 604 - 1 STREET
CALGARY AB T2P 1M7
PH 403 260 8500
FX 403 264 7084

YELLOWKNIFE
201, 5120 - 49 STREET
YELLOWKNIFE NT X1A 1P8
PH 867 920 4542
FX 867 873 4790

WWW.FIELDLAW.COM