

Duty of Fair Representation

This document provides general information and guidance about the duty of fair representation. It is not a legal document. It is subject to the provisions of the *Trade Union Act*, the Regulations to the *Trade Union Act*, and the Board's policies, procedures, and published decisions.

Duty of Fair Representation

Section 54A of the *Trade Union Act* prohibits trade unions, and persons acting on behalf of trade unions, from representing bargaining unit members (whether union members or not) in a manner that is arbitrary, discriminatory, or in bad faith, with respect to their rights under collective agreements. Breach of the duty of fair representation is an unfair labour practice under the *Act*.

Unions' Authority and Responsibility for Grievances

Most duty of fair representation complaints arise in connection with grievances. Trade unions have exclusive authority to act on behalf of employees who file grievances under collective agreements.

This authority gives the union:

- ▶ the power to decide whether grievances proceed to arbitration; and
- ▶ the power to decide whether to settle grievances, and on what terms.

As long as the union complies with the duty of fair representation, its decisions about grievances stand, even if the grievor disagrees. When employees make duty of fair representation complaints, the Board will consider the seriousness of the grievance when it examines a union's conduct. The Board will not interfere with the union's decisions about grievances as long as the union:

- ▶ investigates grievances fully;
- ▶ obtains full details about grievances, including the employee's side of the story; and
- ▶ makes reasonable assessments of the potential outcomes of arbitration.

Unions, or union representatives, may make honest mistakes or misjudgements regarding grievances without breaching the duty of fair representation. However, union conduct that is indifferent or grossly negligent may violate s. 54A of the *Trade Union Act*.

Arbitrary Conduct

Arbitrary conduct has been defined to include conduct which is ill-informed, reckless, or indifferent to an employee's interests. An example of arbitrary conduct would be a situation where a union automatically accepted the employer's version of a grievance without giving the employee a chance to respond to it.

Discriminatory Conduct

Discriminatory conduct has been defined to include different treatment due to personal characteristics such as the employee's race, sex, religion or disability. Discriminatory conduct also includes different treatment based on individual favoritism. Except where justified by the particular circumstances, similar situations should be treated in a similar manner. An example of discriminatory conduct would be a situation where a union refused to arbitrate grievances of bargaining unit members because their religious practices.

Bad Faith

Bad faith conduct has been defined to include conduct based on ill-will, hostility, or revenge toward an employee. An example of bad faith conduct would be a situation where a union refused to arbitrate a grievance because the grievor had opposed union officials in union elections.

When must duty of fair representation complaints be filed?

Employees may not make duty of fair representation complaints until they have pursued internal union appeal or grievance processes, or they have been denied access to those processes. Duty of fair representation complaints must be made within 90 days of the date when:

- ▶ the union breached the duty of fair representation; or
- ▶ the employee ought to have known that the union breached the duty of fair representation, as determined by the Board.

How do employees make duty of fair representation complaints? Is there a complaint form?

Employees must provide full reasons and particulars explaining why they believe a union, or union representative, has breached the duty of fair representation, when they make duty of fair representation complaints.

Duty of fair representation complaints should be made using the Board's DFR-22 Complaint Form. The Board's Program Officer will review the complaint to determine if it contains the necessary information and evidence. Often, the Program Officer will interview complainants in-person or over the telephone. The Program Officer may highlight areas that need further explanation or evidence to back up the complaint. The Program Officer will then prepare a report that summarizes the employee's complaint.

Employees are responsible for providing:

- ▶ information about the situation that caused them to file their complaint - when it happened, who was involved, and what the union did about the situation;
- ▶ information about how the union failed to represent them fairly (show that the Union's conduct was arbitrary, or discriminatory or in bad faith;
- ▶ evidence that details the union's conduct in the matter.

Staff are not permitted to advise complainants about how to present their complaints. Please be advised that any information you provide to the Labour Board may be shared with other parties if you file a formal complaint under Section 54A(3).

Complaint Process

The Board's Review Officer reviews all duty of fair representation complaints. The Officer's review will include the DFR-22 form, the Program Officer's report, and any evidence and submissions that the employee files. The Review Officer must dismiss complaints that do not contain sufficient evidence to establish that the duty of fair representation may have been breached. If the Review Officer does not dismiss a complaint after initial review, the Officer will notify the union of the complaint, and invite it to file a response.

The Review Officer will review the complaint a second time in light of the union's response. The Officer will dismiss the complaint, if he/she is not satisfied that s. 54A may have been breached. If the Review Officer does not dismiss the complaint after the second review, the Officer will ask the parties to meet, and try to help them settle the complaint.

If all parties agree to try the settlement process, the parties will meet with the Review Officer to express their views about the complaint, and develop options for settling it. The settlement process is confidential.

If the parties cannot settle the complaint, the Review Officer will refer it to the Board for a decision. The Board may decide duty of fair representation complaints with or without holding a hearing. The Board may refuse to hear and decide any s. 54A complaint it considers frivolous, vexatious, or otherwise not worthy of a hearing.

If a duty of fair representation complaint involves a grievance, the Board will not rule on the merits of the grievance. It will only rule on whether the union has failed to represent the employee fairly. If the Board finds that s. 54A has been breached, it may order that the grievance be taken to arbitration, and that time limits under the collective agreement be abridged or extended.

Can duty of fair representation complaints be appealed?

The Review Officer's decisions are final and conclusive, and are not open to question or review. Generally, the Board's decisions are also final and conclusive and not open to appeal. However, the Board may reconsider its decisions or orders; and may confirm, vary, or revoke the decision or order in question. If you require information about your rights or how the law applies to your situation, you should seek legal advice.

You may obtain further information about the duty of fair representation by contacting:

Labour Board (Nova Scotia)
902-424-6730
877-424-6730 [Toll Free]

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