ALBERTA LABOUR RELATIONS BOARD

INFORMATION BULLETIN

#23 REMEDIES AND COSTS

I. INTRODUCTION

In labour relations, as elsewhere, rights are only as effective as the remedies that enforce them. The *Labour Relations Code* and *Public Service Employee Relations Act* give important rights to employers, employees and trade unions. The legislation gives the Board a corresponding authority to grant remedies to rectify violations of those rights.

It is important to understand the Board issues **remedies**. Remedies are meant to rectify a situation. Successful complainants should be in the position they would have been in had there been no violation of the statute. For example, the Board may order an employer to reinstate an employee terminated in violation of the *Labour Relations Code*. The Board may also order the employer to provide back pay to the date of termination. The Board does **not** award punitive award damages and does **not** normally award damages for pain and suffering.

This Bulletin addresses:

- the Board's remedial powers;
- the principles guiding remedies;
- the types of remedies;
- the obligation of parties to mitigate their loss; and
- the Board's approach to awarding costs.

II. BOARD'S REMEDIAL POWERS

Several sections of the *Labour Relations Code* give the Board remedial powers.

- Section 16(8) allows the Board to give any remedy appropriate to a "complaint, reference or application".
- Section 17(1) is specific to complaints. It gives the Board broad power to "rectify" breaches of the Code. It sets out specific remedial powers the Board most often uses to rectify a breach of the Code but the list of remedial powers is not exhaustive.
- Section 17(2) provides that the Board may not make any remedial order to certify a trade union or revoke a trade union's bargaining rights without a confirming employee vote.

III. PRINCIPLES GUIDING REMEDIES

The Board's remedial powers are broad and remedies are individually fashioned to consider the specifics of each complaint. The Board's remedial powers are, however, limited. The Board observes the following principles in fashioning remedies.

- **Remedies must relate to the complaint**: There must be a clear relationship between the illegal act found by the Board and the remedy imposed. Remedies must respond to the damage caused by the specific unfair labour practice(s) in issue. Remedies cannot, for example, address past incidents that do not relate to the present dispute or are stale from the passage of time.
- **Remedies should be appropriate to a continuing relationship**: The parties to a labour dispute usually must continue their relationship after the dispute ends. The Board resists giving remedies that may be destructive of this relationship. Where possible, remedies try to repair such damage and enhance the future prospects of the bargaining relationship.
- **Remedies must be restorative**: Section 17(1) allows the Board to "rectify" a violation of the Code. To "rectify" means to restore to an original state. Successful complainants should be in the position they would have been in had there been no violation of the statute. Remedies should be fully compensatory, and this sometimes requires the Board to compensate for non-wage losses that are real but hard to quantify. Occasionally a complainant will apply for a "make whole" order that includes its costs in prosecuting the unfair labour practice complaint before the Board. The Board has expressed reluctance to award "general" damages, or damages for non-monetary loss like injury to an employee's reputation, except perhaps in extreme cases. *See: European Cheesecake Factory v. UFCW 401 [1994] Alta. L.R.B.R. 30*.
- **Remedies may not be punitive**: A remedy becomes *punitive* when it so exceeds what is necessary to restore and compensate, that one must conclude the intent is to punish the violator of the Code simply for having violated it. The Code does not permit the Board to grant punitive remedies (although see Section 114, 115 and 158-162 below). The public interest is in harmonious labour relations, not labour relations aggravated by considerations of retribution and punishment. A remedy is not, however, punitive just because it is embarrassing to the guilty party. *See: National Bank of Canada v. Retail Clerks International Union et al. (1984) 84 C.L.L.C. 14,037 (S.C.C.)*.
- **Remedies may consider principles of deterrence**: *Deterrence* means discouraging repetition of the illegal act. Deterrence is only a secondary aim of labour relations remedies. It cannot be pursued to the point that the remedy departs from the principle of compensation and becomes an exercise in punishment.
- **Damages must not be too remote**: The Board grants remedies only for damage that is reasonably foreseeable from the violation of the Code. The Board will not consider remedies for damage too far removed from the unfair labour practice. *See: Brewery, Beverage and Soft Drink Workers 250 v. The Brick [1993] Alta. L.R.B.R. 204*.
- **Effect on third parties should be heard and considered**: Remedies sometimes affect third parties. If a remedial Board order significantly and directly affects a third party, then that party should have an opportunity to be heard before an order affecting it issues. *See: Midwest Pipeline et al. [1990] Alta. L.R.B.R. 445*.
- **Remedies must recognize voluntarism**: Collective bargaining is premised upon the principle of voluntarism. Union's must have the support of employees. Unions and employers must determine on their own the rules by which they will manage their relationship. Labour Boards are generally leery of (and the Alberta Board is statutorily unable to) imposing a collective agreement or forcing certification on a group of employees as this runs contrary to the principle of voluntarism. *See: Nova Scotia (Labour Relations Board) [1983] 2 SCR 311; Section 17(2)*.

IV. TYPES OF REMEDIES

An application to the Board must clearly state the relief or remedy sought. The Board is not, however, bound by the remedies asked for by the parties. It may fashion any remedy it determines appropriate given the remedial principles discussed above. The Board commonly grants the following remedies.

- **Directives**: Section 17(1) of the Code allows the Board to issue directives. A directive is an order from the Board to do or cease doing an act. Board directives commonly contain instructions to do something that will, as far as possible, restore the parties to a situation as if the unfair labour practice had not occurred. We often think of directives in the context of cease and desist orders for illegal strikes or lockouts. The Board also issues directives regarding organizing drives (e.g., allowing unions to speak to employees) and collective bargaining freeze periods (e.g., scheduling bargaining dates, altering a bargaining proposal). *See: GCIU 34-M v. Southam Inc. [2000] Alta. L.R.B.R. 177; Royal Oak Mines Ltd. v. CASAW 6 (1996) 1 SCR 369*.
- **Interim directives:** Under Section 12(2)(e) the Board can grant an interim *preservative* directive to preserve a party's rights pending a prohibited practice hearing. The Board can also issue an interim directive as a remedy under Section 17 of the Code. The Board may give an interim *remedial* directive only after it has found a breach of the Code. Interim remedial directives can be used as a first step in resolving an unfair labour practice complaint. An interim remedial directive may be appropriate where the damage caused by the unfair labour practice remains unclear because the labour relations situation is in a state of flux. *See: Economic Development Edmonton v UFCW 401 [2002] Alta. L.R.B.R 161*; *UFCW 280-P v. Gainers Inc. [1986] Alta. L.R.B.R. 323.*
- **Posting and mailing decisions and notices**: The Board can require an employer or union to post or mail notices and Board decisions. This shows employees that there has been a breach of the Code. It assures other employees that employers and unions must abide by the Code. It helps individuals realize that someone more authoritative than the employer or the union has a voice in determining what the individuals' workplace rights are. The Board does not, however, direct forced apologies. An insincere apology is of no value. Further, such an order can infringe upon a person's right of free speech and make the order look punitive. *See: UFCW 401, et al. v. Mariposa Stores [1986] Alta. L.R.B.R. 661*.
- **Reinstatement:** Reinstatement with back pay is a common remedy in employer unfair labour practices where employer anti-union motive played any role in the decision to terminate or lay off the employee. An employee is entitled to a decision free of anti-union considerations. Reinstatement, however, is not automatic. "Rectifying" the unfair practice does not mean freeing the employee from all the consequences of acts worthy of discipline. Nor does it insulate the complainant from other developments in the workplace. The Board can order another suitable remedy if it is not appropriate to reinstate an employee. For example, it may partially compensate, but not reinstate, an employee if a legitimate general layoff has occurred in the meantime. The Board may even uphold a tainted dismissal if the employee's conduct was so worthy of termination that even an employer unmotivated by anti-union considerations would have done the same. *See: CEP 1118 v. Macmilliam Bathurst Inc. [1992] Alta. L.R.B.R. 253; IWA Canada 1-207 v. Zeidler Forest Industries Ltd. & ALRB [1989] Alta. L.R.B.R 341; affd. [1990] Alta. L.R.B.R. 437(Q.B.)*.
- **Compensation:** The Board may order compensation for lost wages. Often the Board orders compensation for lost wages only in general terms, and offers the parties a chance to agree on the amount. The Board reserves authority to rule on the amount if there is no agreement. The Board can order reimbursement of union dues to employees where a Union collected them as a result of

an unfair labour practice. The Board has the authority to award compensation for economic loss from an illegal strike or lockout. It uses this authority cautiously, however, because of the common practice of negotiating away such damages in collective bargaining. *See: CLRa v. UA 488 [1993] Alta.L.R.B.R. 47*.

- **Reinstatement to trade union membership:** This remedy is typically given to a complainant who successfully establishes a complaint of discriminatory application of the union's membership rules or disciplinary standards. *See: James Johnson v. Boilermakers Local 146 [1989] Alta. L.R.B.R. 416*.
- **Rescission of disciplinary action:** This remedy is appropriate for both employer and union discipline. The Board may use it to order tainted disciplinary proceedings, like warning letters and suspensions, removed from an employee's employment record. Where a union imposes the discipline under its constitution, the Board may override and either cancel or modify the penalty imposed. *See: UFCW 401 v. European Cheesecake Factory Ltd. [1994] Alta. L.R.B.R. 30*.
- **Access orders:** Serious employer unfair labour practices can severely damage communication between employees and their bargaining agent. In a proper case the Board might order relief granting the union access to the names and addresses of all bargaining unit employees. The Board can direct union access to employees on company time and premises or to bulletin boards at the worksite. In some circumstances, like projects in remote sites, an employer may interfere with the representation of employees by a bargaining agent of their choice simply by asserting its power to exclude union representatives from the site. Blind enforcement of property rights where employees seeking union representation have no alternative to on-site organizing can be an unfair labour practice. *See: United Electrical Workers 504 and Westinghouse Canada Ltd. [1980] 2 Can.L.R.B.R. 469 (O.L.R.B.)*.
- **Costs:** See below.
- **Plant shutdown and relocation orders:** An employer may choose to evade a union or its collective bargaining obligations by shutting down or moving its operations. Other Boards have granted affected employees access to vacancies in nearby operations of the same employer. They have combined this with orders for the employer to absorb employees' relocation costs and to protect seniority of relocated employees. So far the Alberta Board has not ordered this remedy.
- **Extending grievance timelines:** The Board can extend the timelines for a grievance to be processed should it find a union violated Section 153 (the duty of fair representation). *See: Bulletin 18*.
- **Other:** Under Section 114, the Board can suspend an employer's obligation under a collective agreement to collect and remit union dues in the wake of an illegal strike. Section 115 provides corresponding penalties for employers in the case of an illegal lockout. Sections 158-162 further discuss prosecutions and fines related to illegal acts. The Board can also void a collective agreement under Section 133 should the Board find either the union or the employer so influences the other that the other is unfit to bargain collectively. *See: AUPE et al. v. PHAA et al. [2002] Alta. L.R.B.R. 230*.

V. MITIGATION OF LOSS

A damaged party must make reasonable efforts to *mitigate* (i.e., reduce) the loss suffered. The innocent party may not be idle and allow avoidable loss to accumulate at the wrongdoer's expense. A wrongdoer can show that the innocent party failed to mitigate its loss and have the damages award reduced. This reflects that the innocent party has contributed to its own loss.

The onus is on the complainant to prove damages. The respondent must then show the employee's failure to mitigate, and why this should reduce Board-ordered damages. If the Board accepts that a complainant should have mitigated his or her losses, it reviews several factors. Delay in filing a complaint may reduce the compensation payable. If an employee has turned down or failed to pursue reasonable alternative employment opportunities, the Board may reduce the compensation award by a lump sum. It may cut the compensation off at a specified date, if it can identify a date on which roughly comparable employment elsewhere was refused. The Board, however, is not likely to penalize an employee for failure to mitigate loss if the employee had good cause to believe they would not be hired.

Labour Boards have also recognized that an employee's expectation of reinstatement when fired for union activity is not unrealistic. Employees may reasonably wait a certain period of time for a reinstatement order without holding themselves out as available to other employers. The Board in Alberta has clearly stated each case is looked at individually on the issue of mitigation. *See: USWA 5885 et al. v. Pacal Blades of Canada Limited [1985] Alta. L.R.B.R. 85-005*.

Mitigation arises as an issue most often in employee dismissal complaints. It may be applicable, though, to other unfair labour practice compensation orders as well. For example, one would expect the Board to require mitigation from an employer seeking damages for economic loss from an illegal work stoppage. A failure to seek a timely cease and desist order from the Board may, of itself, be a failure to mitigate.

VI. COSTS

Section 12(2)(i) of the *Labour Relations Code* allows the Board to award costs in specific circumstances. The Board has the power to award costs as part of a make whole order issued under the authority of the *Code's* remedial provisions. The Board has adopted a cautious approach to costs, for policy reasons:

[*amended June 2009*]

- awarding costs labels a winner and a loser, which is counter-productive in an industrial relations relationship;
- assessing reasonableness of costs is not something for which the Board's processes are well suited, and would detract from the Board's primary labour relations functions;
- the awarding of costs has a punitive connotation that is inappropriate in the context of Labour Board remedies;
- awarding costs does not respond to the real harm done; and
- routinely awarding costs would encourage parties to hold off settlements that might otherwise be appropriate in the hope of recovering costs.

See: Robert Hunter, Douglas Barnes and Ken Williams v. IBEW 424 [1986] Alta. L.R.B.R. 366.

Section 12(2)(i) allows costs where an application, reference or complaint is trivial, frivolous, vexatious or abusive or where a reply or defence is trivial, frivolous, vexatious or abusive. This suggests that the legislation limits costs to those cases involving some forms of abuse of process. The costs power focuses on the nature of the application or the reply. It suggests that costs should only be awarded when the matter should not have been brought to the Board at all. It similarly applies where the respondent should not, by filing a defence or reply, have forced the applicants into

proving their case. In this sense, costs appear appropriate to compensate one party for participating in proceedings the other party should not have launched or prolonged. The Board may include the necessary legal expenses of the employee as part of a remedy. *See: UFCW 401 v. European Cheesecake Factory Ltd. [1994] Alta.L.R.B.R. 30*.

The Board has the power to award costs as part of a make-whole order. The inclusion of costs as part of a make- whole order is done as part of the Board's power to grant remedial orders as found in sections 16(8) and 17(1). Unlike a cost award pursuant to section 12(2)(i), a cost award included as part of a make-whole order is directed at providing a remedy in circumstances involving particularly egregious breaches of the *Code.* See: *UFCW 401 v. European Cheesecake Factory Ltd. [1994] Alta. L.R.B.R. 30* and *Northland Properties Ltd. v. PPF Local 496 [2001] Alta. L.R.B.R. 507.*

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The Board can award "costs it considers appropriate in the circumstances". This leaves the discretion with the Board. Fundamentally, the Board must base its decision whether to award costs and the amount of any such award on the seriousness of the misconduct. Any such award must also be related to the misconduct in question. For example, a cost award arising from the filing of a frivolous defence would only relate to steps taken from the time the defence was filed and would not include for example legal costs associated with investigating and filing the claim. Finally, the award must be remedial in nature as opposed to punitive.

[*amended June 2009*]

The Board can also, notwithstanding its powers to award costs under section 12(2)(i), award any costs it considers appropriate in the circumstances on applications to review arbitrations under section 145(2).

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See also:

Rules of Procedure
Voting Rules

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