

# The Duty of Fair Representation in Collective Agreement Negotiation

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The duty of fair representation (DFR) in contract negotiations arises from a certified bargaining agent's exclusive bargaining rights. Judson J. put this exclusivity most clearly in *Syndicat catholique des employés de magasins de Québec Inc. v. Compagnie Paquet Ltée*, [1959] S.C.R. 206:

There is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated, the collective agreement tells the employer on what terms he must in future conduct his master and servant relations. ... The terms of employment are defined for all employees, and whether or not they are members of the union, they are identical for all.

Ontario is one of three jurisdictions in Canada that explicitly extends the duty of fair representation from the administration of collective agreements (grievance) to requiring the duty also be observed in collective bargaining. Two types DFR complaints can arise from bargaining: those over content and those over process.

## Negotiating the content of a collective agreement

Unions share control over the content of bargaining with the employer and have no control over what proposals the employer might reject. Labour boards therefore give a great degree of deference to the union in regard to the substance of collective agreements, applying the minimal standard of reasonableness (as opposed to the higher standard of review of correctness). However, there are two areas in which union members have been successful in DFR complaints – negotiated terms that discriminate against a group of members on a ground prohibited by a human rights statute and unfair changes to the allocation of scarce work.

For bargained terms that negatively impact a sub-group of members, the union must consider competing interests and make rational judgements.<sup>1</sup> Making logical and reasonable concessions in the terms and conditions of employment and the allocation of scarce work – even if the concessions only affect specific groups of employees – will not sustain a DFR complaint unless the negotiated settlement is also discriminates on a prohibited ground. One point that intersects with process must be emphasised here – **majority support for a discriminatory clause does not protect** a union from being found to have failed in the duty of fair representation nor, in Ontario, from losing a case in the parallel jurisdiction of the Human Rights Tribunal.

## The process of negotiating

The duty of fair representation is straightforward for the process of negotiation. If a union has negotiated and ratified an agreement following past practice, has given adequate notice of the

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<sup>1</sup> [1985] O.L.R.B. Rep.134, [1984] O.L.R.B. Rep.691.

ratification vote, has provided the content of the proposals prior to ratification, and has given adequate opportunity for individual members to voice their preferences, then a DFR complaint will not succeed.<sup>2</sup> Members who misunderstand the implications of an accurately described agreement will not succeed with a DFR complaint.<sup>3</sup>

While the Ontario Board has found that a union has a duty to consult with its membership<sup>4</sup>, it is not required to bargain for every group or individual demand.<sup>5</sup> Indeed, a union cannot defend against a DFR complaint by claiming that it was acting on the wishes of the majority<sup>6</sup> - the “tyranny of the majority” may be discriminatory, arbitrary or in bad faith. If another course of action is made reasonable by relevant considerations, a union may choose it over the wishes of the majority.<sup>7</sup>

There are a couple of final points to remember in relation to process. First, while union members cannot file a DFR complaint in relation to internal union affairs, where a union fails to follow its constitution in the establishment of a bargaining committee in order to suppress minority views it can be found to have acted in bad faith.<sup>8</sup> Second, a union may be criticized for miscalculation, honest mistakes and errors of judgement by members after negotiations, but these do not form the basis for a DFR complaint.<sup>9</sup>

### **Remedies**

There is limited jurisprudence in the area of DFR and negotiation of agreements and therefore few examples of Board imposed remedies. It is obvious that being found by the Board to have failed in the duty of fair representation is not good press for a union.

### **Comments**

While DFR complaints in relation to the substance of bargained proposals and the process of bargaining are rare, I would note that two factors may lead a union into dangerous waters. The first factor is an over-reliance on the will of the majority for determining bargaining proposals as noted above. The second factor is the time pressure of bargaining under a conciliator with a strike deadline looming. Both factors can lead to insufficient care and attention to the implications of proposals and concessions

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<sup>2</sup> *Green and General Motors of Canada Ltd. (Re)*, [1994] O.L.R.B. Rep. June 677.

<sup>3</sup> *Group of Employees and CAW, Local 222(Re)*, [1997] O.L.R.D. No. 1207

<sup>4</sup> *RWDSU and Cuddy Food Products Ltd (Re)*, [1988] O.L.R.B. Rep. 1211

<sup>5</sup> *Atkinson and RWDSU, Local 414 (Re)*, [1983] O.L.R.B. Rep. 1654

<sup>6</sup> *Morin and CAW (Re)*, [1988] O.L.R.B. Rep. 506

<sup>7</sup> *Blasdell v. Ontario (Labour Relations Board)* (2006), 207 O.A.C 50 (Div. Ct.)

<sup>8</sup> *Ahokas and CUPE, Local 87 (Re)* (1983), 3 C.L.R.B.R (N.S.), [1983] O.L.R.B. Rep. 781.

<sup>9</sup> *Ward and PGW, Local 1962 (Re)*, [1982] O.L.R.B. Rep. 1964