EVOLVING REMEDIES IN LABOUR DISPUTES

ONTARIO LABOUR RELATIONS BOARD REMEDIES

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The Ontario Labour Relations Board has broad remedial powers to address complaints made to it by unions, employers and individual workers. Its jurisdiction includes the *Labour Relations Act, 1995*, applications for review of the decisions of Employment Standards Officers under the *Employment Standards Act, 2000*, reprisals under the *Occupational Health and Safety Act* and the *Smoking in the Workplace Act*, along with a number of other pieces of labour-related legislation.

This paper only addresses some of the remedial aspects of the Board's decisions under the *Labour Relations Act, 1995* (the "LRA") as it is under this piece of legislation that the Board makes most of its substantive decisions. Furthermore, it is under the LRA that the Board has its broadest powers to fashion remedies that are responsive to the particular situations before it.

Legislative authority

Under the LRA the Board derives its general remedial authority from sections 96(4) and (7) of the Act which state as follows:

> "96. (4) **Remedy for discrimination**. – Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing, may include, despite the provisions of any collective agreement, any one or more of,
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> (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
> (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or
> (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally. R.S.O. 1990, c.L.2, s. 91(1-4).

…

(7) **Effect of settlement**. – Where a proceeding under this Act has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers' organization, person or employee who have agreed to the settlement and shall be complied with according to its terms and a complaint that the trade union, council of trade unions, employer, employers' organization, person or employee who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint under subsection (1). R.S.O. 1990, c. L.2, s. 91(7); 1992, c.21, s. 36(4)."

The Board also has other specific powers outlined throughout the Act. In section 11(5) the Board has the power to "do anything to ensure that a new representation vote ordered under [section 11] reflects the true wishes of the employees in the bargaining unit" when it finds that an employer has contravened the *Act* in the course of an organizing drive.

It has the power to reinstate an employee to employment (s. 1(2) and s. 96(4) (c)); to order procedural interim relief (s. 98(1)); to order a party to cease and desist from doing something; to rectify an act that has been complained of; and generally to order what, if anything, it wants a party to have to do or stop doing in order to address a breach of the *Act* (s. 96(4)).

In a threatened or actual illegal strike or lock-out, the Board can order a trade union, an employer, or any person to do or to refrain from doing whatever the Board feels is necessary to bring the illegal action to a halt (ss. 100 and 101).
The Board can issue a consent to prosecute under the LRA (s. 109).

In the arbitration and resolution of construction industry grievances the Board has the power to order that damages and the costs of filing a section 133 application and reasonable legal costs be paid by the losing party.

Pursuant to section 111 of the Act the Board has significant powers that it may exercise in the performance of its duties. In addition to the general powers to order the production of particulars and documents, to summon witnesses, enter onto the premises of companies, and so on, the Board has the power to bar an unsuccessful applicant from making a similar application for any period not exceeding one year from the date of the dismissal of an application (s. 111(2)(k)). It can also refuse to entertain a new application by an unsuccessful applicant for up to one year (s. 111(2)(k)). While this is a provision that trade unions and employers are familiar with in the context of certification applications, the section is actually of general application, and would likely be arguably available to the Board if frivolous or vexatious applications were being brought by one party against another.

Finally, the Board has the power to reconsider its own decisions pursuant to section 114(1) of the Act.

The Board exercises its remedial powers, which are broad, in order to place an aggrieved party in the position it would have been in but for the breach of the Act. Remedies are designed to be compensatory rather than punitive in nature, and must have a rational connection to the breach found.

Remedies in unfair labour practice complaints regarding organizing campaigns

The Board has been called upon to rule on complaints of unfair labour practices which have thwarted a union's organizing campaign to the point that it cannot get sufficient membership evidence to apply for certification.

In *526093 Ontario Inc. c.o.b. as Taxi-Taxi* [1999] OLRB Rep. Sept./Oct. 897, the Board considered a union's section 96 application in which it alleged that the employer had threatened to close its business, had promoted an employee association as an alternative to the union, had dismissed an employee and had implemented undue surveillance of its employees in order to counteract the union's organizing drive. Ultimately the Board found that the employer had committed a number of unfair labour practices by threatening to close the business down if the union was successful and by promoting an employee association as an alternative to the union. The Board further found that the principal consequence of the employer's conduct was that the union was unlawfully deprived of the opportunity to attempt to organize the company's employees.

By way of remedies the Board ordered the employer to post Board notices for 60 days and to read the notice over its dispatch system, once during each shift, for a period of 10 days. The employer was required to mail a copy of the notice to each employee in the union's proposed bargaining unit. Finally, the employer was required to provide to the union a list of the names, addresses and telephone numbers of all of the employees who would fall into the union's proposed bargaining unit.

In a recent case, *Sewer-Matic Services* [2003] OLRB Rep. May/June 482, the Board refused to order a representation vote as a remedy to an unfair labour practice complaint wherein the union claimed that the employer had behaved in such an egregious manner in the course of the organizing campaign that the union could not collect membership evidence from 40% of the proposed bargaining unit. The union was asking the Board to order a representation vote as a remedy to the section 96 complaint.

In *Sewer-Matic* the union had filed two certification applications with less than 40% membership evidence, and a section 96 complaint. The Board ultimately decided that even if it assumed without finding that all of the union's unfair labour practice allegations could be proven, and that they were egregious, and even if it does have the authority to order representation votes as unfair labour practice remedies, it would still not have the authority (by virtue of section 96(8) of the Act) to certify a union as a bargaining agent if the union was successful in the vote. In order to be certified an applicant union must first have made an application for certification in which it can show at least 40% membership support in the first instance.

What these decisions suggest is that while the Board is prepared to grant remedies that attempt to put a union back in the position it would have been in but for an employer's illegal attempts to thwart the union's organizing campaign, it will not and cannot allow a union to seek certification through the guise of an unfair labour practice complaint alone.

Remedies in certification applications

Since changes made to the LRA in Bill 31, the Board has not had the power to certify a union as a bargaining agent even when it has found egregious conduct on the part of the employer in the course of an organizing drive.

Notwithstanding that this was a power little used by the Board, and only in the very worst cases of unfair labour practices, the loss of this remedial power has had a significant effect on union organizing in the province of Ontario. Since all employers know that the worst that the Board can order is a second vote, even if terrible unfair labour practices are found to have occurred, there is little disincentive to an employer to breach the Act during an organizing campaign.

In an effort to ameliorate the worst excesses of rogue employers and the loss of the power to automatically certify in such circumstances, the Board has entertained and ordered some creative and far-reaching remedies utilizing its powers under sections 11(5) and 96(4) of the Act.

In *Baron Metal Industries* [2001] OLRB Rep. May/June 553 (request for reconsideration denied [2001] OLRB Rep. July/Aug. 931), the Board ordered its most far-reaching remedies in a certification application case in which significant unfair labour practices were found to have been perpetrated by an employer. In that case the union filed a certification application in 1998. Immediately thereafter the employer hired two new employees who were members of a violent Tamil gang. The two new employees began to threaten and intimidate the existing employees of Sri Lankan origin, and indicated that they would kill some Sri Lankan employees if the union won the representation vote. The two then disappeared from the workplace, but news of their threats spread throughout the plant. The employer was advised of the threats but did not contact the police or conduct an investigation itself. The representation vote held in the certification application

resulted in a tie, and the matter then proceeded before the Board for an inordinate period of time as the union claimed that the employer's actions had tainted the vote.

In a decision that issued in May 2001 the Board found against the employer and ordered significant remedies which included the following:

- the employer was to reimburse the union for its organizing costs;

- the union was entitled to a second representation vote, to be held when the union wanted within 6 months of the Board's decision;

- the employer was required to post notices in the workplace and provide each employee with such a notice in the employee's first language stating that the employer had violated the LRA, and informing employees of their rights under the Act;

- the employer had to permit the union to hold monthly general meetings with the employees on the employer's premises;

- the employer had to permit the union to have individual meetings with all new hires since November 1998;

- for six months after the decision issued, or until a second representation vote was held, the employer was to provide the union with an office that was accessible to employees, on the employer's premises;

- the employer had to provide the union with the names, addresses and phone numbers of all employees in the bargaining unit who would be eligible to vote;

- if an employee was suspended or discharged before a second representation vote was held, the employer had to hold a meeting with the union to discuss the matter if the union so requested;

- once the union requested the second representation vote, the employer had to permit the union to distribute leaflets to employees in the workplace until the date of the vote.

In *N.S.E. 2000 Inc.*, [2002] OLRB Rep. March/April 239, the Board considered a certification application and an unfair labour practice complaint arising out of an organizing campaign at an electrical contracting company during which an employee was terminated. The representation vote held resulted in a tie. The Board found that the employer had sought to defeat the union by threatening employee job security and saying that it would close down the company if the union got in. A principal of the company had met with employees individually to reiterate the threats to job security, and with at least one employee, had asked how the person would vote. The Board therefore found that the first vote held did not likely truly reflect the true wishes of the employees.

With respect to the employee who had been terminated, the Board found that the employer had manufactured a reason to terminate him because he was the inside union organizer. The employee

had been an unregistered apprentice, and the employer knew that fact. However, it had terminated his employment during the organizing campaign on the pretext that the employee had falsified his application regarding his apprentice status. The Board ordered the employer to reinstate the employee to employment with a contract of apprenticeship.

The Board also ordered that a second vote be held, with a voting constituency of the original list of voters even though all except one of the original employees had left the company. Relying on the Board's decision in *My Building Corporation*, [1999] OLRB Rep. Nov./Dec. 1058, the Board quoted from that decision wherein the panel was of the view that under section 11(5) of the Act "the Board is empowered to do anything to ensure that the employees are in a position to indicate their true wishes as to whether they want to be represented by a union for the purposes of collective bargaining. To find a voting constituency on any basis other than the application date would have the effect of condoning the activities of the employer as it may prevent some and potentially all of the employees who originally were entitled to vote from being able to participate in a new vote, free from the mischief occasioned by the responding party" (para. 45 of *My Building Corporation*, para. 66 of *N.S.E. 2000 Inc.*).

While the Board accepted that the allegations in this case were not of the *Baron Metal Industries Inc.* (cited above) type, it nonetheless ordered the employer to reimburse the union for an amount for reasonable costs expended by the union for organizing efforts. As in *Baron Metal* the Board ordered a new vote in 6 months, to be held at a time chosen by the union; postings in the workplace and in employee pay cheques; that the employer was to provide the union with a list of the current employees' names, addresses and telephone numbers, and such information for all new hires; the employer was to permit the union to hold a meeting with the employees in the workplace during working hours; and a copy of the decision was to be posted and to be sent to all employees.

The most interesting new remedy ordered by the Board in this case was that between the date of the decision and the final disposition of the application for certification, the employer was only permitted to discipline or discharge any employee for just cause. That right could be enforced by the union through a section 96 application to the Board, and if the employer was found not to have had just cause, it would have to pay the union's costs for bringing those proceedings, including the union's legal costs.

It is worth noting that in *Baron Metals*, cited above, the union had asked for the imposition of the just cause standard, but the Board did not grant that remedy. Notwithstanding that the facts in *NSE* were not as troubling as in *Baron Metals*, one year later the Board was prepared to extend the remedies it would grant in cases of improper employer conduct during an organizing drive to include the imposition of the just cause standard for discipline and discharge.

The remedies granted by the Board in this case suggest that the Board is prepared to entertain and grant broad remedies in cases where there are section 11 allegations. In this instance the Board made efforts to grant remedies that would attempt to overcome the chilling effects of the

employer's comments and actions, and to give employees the sense of what it would be like to have the protections of a union. It would appear that the Board was attempting to ensure that in a future representation vote employees would feel comfortable about voting freely.

It is obvious from the two decisions outlined above that the Board will entertain and grant creative and far-reaching remedies in order to attempt to correct the negative impact of an employer's unfair labour practices.

Remedies in unfair labour practice complaints

In addition to the panoply of remedies that have already been outlined in this paper, on occasion the Board has ordered more unusual remedies if it feels that the circumstances so warrant.

In *Rapid Transformers Ltd.*, [1999] OLRB Rep. July/Aug. 675, the Board addressed a large number of unfair labour practice and other complaints against a newly organized employer. Among many other unfair labour practice findings, the Board found that the employer had been removing production from its Cornwall plant after it was unionized in order to avoid dealing with the union. Relying on the remedial powers in section 96(4) of the LRA, and Board caselaw dating from 1977, the Board ordered the employer to return production to the Cornwall plant from Quebec. It further ordered the employer to reinstate employees it had laid off as a result of the removal of production from the Cornwall plant, and to compensate them for all lost wages and benefits.

This is a particularly unusual remedy for the Board to order, and is one which will likely only be ordered in the most egregious circumstances. However, *Rapid Transformers* was not the only case in which the Board has made an order requiring an employer to return work or production to where it may be done by bargaining unit workers. See also *Humpty Dumpty Foods Limited*, [1977] OLRB Rep. July 401; *Sunnycrest Nursing Homes Limited*, [1981] OLRB Rep. Feb. 261; *Plastics CMP Limited*, [1981] OLRB Rep. May 726; and *Plaza Fiberglas Manufacturing Limited* , [1990] OLRB Rep. Feb. 192.

Remedies in duty of fair representation complaints

Pursuant to section 74 of the LRA a union has an obligation to act in a manner that is not arbitrary, discriminatory or in bad faith in its representation of the employees in a bargaining unit it is certified to represent.

The Board has set a relatively low standard for what a union's representation should be in that it recognizes that most union representatives are not lawyers or professionals, and that honest

mistakes may be made. However, the Board expects that a union should investigate employee complaints or grievances in a more than cursory manner, that it turn its mind to all relevant considerations, that it reach a decision about how to handle the employee complaint or grievance in a manner that is not discriminatory or in bad faith, that it represent the employee's interests, and that it keep the employee informed about what is happening with his or her matter. If a union decides not to proceed to arbitration with a grievance, the union is expected to so advise the employee, and to tell the employee if there are appeal avenues available. Ultimately, the Board does not generally concern itself with a union's internal affairs under section 74 of the Act.

When a breach of section 74 is found, the Board will try to put the complainant back in the position he or she would have been in but for the union's breach. In this regard the Board has the power to waive time limits for grievances so that an employee's grievance may be reactivated in certain circumstances.

In *Hills*, [2001] OLRD No. 4457, the Board considered a complaint made by an employee against her staff association. While the Board dismissed a part of her complaint, the Board found that the staff association had breached section 74 of the Act when it failed to properly investigate a proposed grievance about the employee's layoff. The Board went to some lengths in its decision to outline the types of things that the staff association should have considered before deciding whether it was going to file a grievance or not. The Board considered various elements of the collective agreement that should have been explored in considering the merits of a grievance about the layoff. It expressed concern that the staff association had not met with the employee to discuss documents she had sent in support of her claims, and had not explained to her why it was not filing a grievance on her behalf on a matter that was of great importance to the employee, her layoff from employment. Consequently, the Board found that the staff association had been arbitrary in its conduct.

The Board ordered the bargaining agent to investigate the employee's proposed grievance thoroughly and fairly to determine the merits of filing a grievance. It directed that the complainant be given an opportunity to offer her view on the matter before a decision was reached. Once a decision was made about whether or not to file a grievance, the complainant was to be advised about the decision, and to have it explained to her. The Board appears to have encouraged the staff association to seek a legal opinion on the matter. Finally, the Board directed that if the matter was to be grieved, the employer was to waive all applicable time limits in the collective agreement to facilitate the filing of such a grievance.

Ongoing communications with grievors is a significant expectation of a trade union. In *Paul Brunet*, [2003] OLRB Rep. Jan./Feb. 24, the Board considered a complaint that a union had breached its duty of fair representation when it failed to properly investigate the discharge of an employee, failed to advise the employee of the progress of the case, decided not to pursue the grievance, and refused to conduct a meeting with the employer in French. While the Board dismissed most of the allegations, the Board found a breach of section 74 in the union's seven

month delay in communicating with the grievor that it had decided not to pursue his discharge grievance. The Board found that at a minimum the union has an obligation to maintain ongoing communication with a grievor about what is happening with his or her case, particularly in discharge grievances.

By way of remedy the Board ordered the union to post French and English copies of the decision in the workplace for 30 days, and the employer was directed to cooperate.

In *Joyce Miles* (as yet unreported, Board File No. 3889-02-U, August 8, 2003 and December 10, 2003) the Board again considered what was an appropriate remedy where the union had delayed inordinately in dealing with a discharge grievance. The Board was of the view that the union had generally dealt with the employee's grievance adequately, and had properly made the decision not to proceed to arbitration with the matter. However, the Board found a breach of section 74 in that the union had an unexplained 16 month delay in dealing with the employee's discharge grievance. In the December 10, 2003 decision the Board ordered the union to post a copy of the August 8th decision for thirty days in the workplace where it would come to the attention of employees.

The Board made an interesting observation in its decision regarding the delay in processing issue. It noted that unions, as responding parties to duty of fair representation complaints, regularly ask the Board to dismiss such complaints for being untimely as "labour relations delayed are labour relations denied". In the Board's view the same principle applies to unions in the processing of grievances, particularly in discharge grievances.

Conclusion

As is clear from the remedies that have been granted by the Ontario Labour Relations Board in the recent past, the Board is prepared to respond to whatever situation it has before it in a manner that is designed to put a wronged party as closely as possible in the position it would have been in but for the breach.

Therefore, parties who believe that they have been wronged should suggest creative remedies to the Board, remedies that they believe will be most responsive to their particular situation. So long as the remedy requested is rationally connected to the breach, and is within the Board's extensive remedial powers, the Board is likely to consider the request seriously. Furthermore, if parties can show that remedies that the Board has granted in the past have not worked, the Board may be more inclined to extend the ambit of a remedy.