

CHAPTER 10

ADMINISTRATION OF THE COLLECTIVE AGREEMENT

Preface

This chapter will examine key concepts and processes involved in day-to-day administration of a collective agreement in the work setting. This will include a review of the concept of management rights. The role of seniority and issues linked to discipline of employees will also be discussed in light of both non-union and unionized work settings. The union's representative role when interacting with management on contract administration matters and significance of the grievance procedure will be examined. Rights arbitration as a means for settling unresolved grievances will also be explained from a procedural perspective along with specific forms to this third-party resolution approach.

Learning Objectives

- 10.1 Identify possible limitations on the exercise of management rights.
- 10.2 Explain how seniority might affect the placement, layoff and recall of employees.
- 10.3 Discuss the implications of human rights legislation for the administration of the collective agreement.
- 10.4 Explain the significance and functions of the grievance and arbitration process.
- 10.5 Outline the formal and informal steps of the grievance procedure.
- 10.6 Outline the procedural and legal aspects of the arbitration process.
- 10.7 State problems with grievance arbitration and identify alternatives.
- 10.8 Describe the disciplinary measures that are available to the employer.
- 10.9 Apply discipline in compliance with the collective agreement and the law.
- 10.10 Describe the union's duty of fair representation and indicate how the employer could be affected.

Outline/Table of Contents

- I. Management Rights
- II. Human Rights Issues in the Administration of the Agreement
- III. The Grievance and Arbitration Processes
- IV. Progressive Discipline
- V. Issues and Outcomes at Arbitration
- VI. Last Chance Agreements
- VII. Non-Disciplinary Measures for Innocent Absenteeism
- VIII. Duty of Fair Representation
- IX. Review Questions
- X. Discussion Questions
- XI. Web Research
- XII. Vignette
- XIII. Case Incident

I. Management Rights

A voluntary article in a collective agreement confirms that managers and supervisors retain the right to manage the operations in an organization except where these rights, also sometime referred to as residual rights, are limited by language negotiated in the collective agreement. For example, management has the right to hire new employees. This right may be limited by language in the collective agreement that prescribes applicant recruiting methods or sets certain rules related to considering an internal applicant's seniority when selecting a successful applicant to fill the job vacancy. A management rights article is different from most collective agreement terms because its purpose is to benefit management, whereas most of the other terms in a collective agreement benefit unionized employees. Relying on this article, management can make decisions relating to methods of operation and levels of production. However, the management rights article does not allow the employer to do anything it wants; there are limitations on the exercise of management rights.

PROVISIONS OF THE COLLECTIVE AGREEMENT When the employer claims to exercise any management rights, it must comply with other provisions in the agreement. A fundamental principle in labour relations is that the collective agreement must be read as a *whole* document. If the contract requires the employer to provide clothing, the employer could not rely on the management rights article to adopt a policy on uniforms that requires employees, to pay for them.

COMPLIANCE WITH THE LAW Any action the employer takes relying on the management rights article must meet the basic requirement of complying with any relevant legislation and the common law. An employer cannot take any action that violates legislation, including human rights, employment standards, other statutes, or the common law. In one case, an employer relied upon the management rights provisions in the collective agreement to attempt to introduce a biometric payroll and timekeeping system that used employee fingerprints. Although it should be noted that the law relating to privacy is still evolving, an arbitrator prohibited the establishment of the system on the basis that it was an invasion of the employee's privacy interests. Interestingly, during the COVID-19 pandemic, the majority of court challenges of employer mandated COVID-19 vaccines and public health measures are being denied to keep workplaces safe for all stakeholders—employees and customers. Importantly, many of these cases include employee grievances in unionized workplaces. Further, one arbitrator stated that protecting the workplace falls within health and safety legislation.

ESTOPPEL The doctrine of **estoppel** may prevent the union or the employer from relying on and enforcing the terms of the collective agreement. Where a party makes a representation to the other, by way of words or conduct, indicating that an issue will be dealt with in a manner different from the provisions of the agreement, the party who made the representation will not be able to later insist upon the collective agreement being enforced.

Statements made by a party to the agreement could be the basis for an estoppel. In one case, a collective agreement provided that layoffs would occur in reverse order of seniority. The employer, a hospital, hired two laboratory technicians. The hiring manager assured both technicians when they were hired that they would not be laid off because of funding cuts or the

return of other employees to the department. However, the hospital laid off the technicians 14 months after they were hired when other employees returned to the bargaining unit. When the employees objected, they were told that the collective agreement was clear on the question of seniority on layoffs and there was nothing that could be done because they had the least seniority. A grievance was filed, and the arbitrator held that the doctrine of estoppel applied.ⁱ Because of the representations made to the technicians before they were hired, the employer could not rely on the collective agreement, and the layoff of the technicians was nullified.

The union and the employer should be alert to the possibility of estoppel based on conduct or past practice. In one case, the collective agreement provided that certain benefits would be paid to employees after a three-day waiting period.ⁱⁱ Despite the terms of the collective agreement, the employer had a long-established practice of paying employees benefits during the three-day period. When the employer indicated it would enforce the three-day waiting period in the future, the union filed a grievance relying on estoppel. The arbitrator upheld the grievance and ordered the employer to continue to pay the benefits according to its practice for the balance of the term of the agreement.

Similarly, a union might be caught by an estoppel argument based on prior past practice if it failed to enforce all the terms of the agreement. For example, a collective agreement will usually provide for a probationary period. If the employer made a habit of extending the period, in breach of the agreement, and the union took no action, the union may not be allowed to object to an extension of the period on the basis of estoppel.

An estoppel will not be established by a single failure to comply with or enforce the collective agreement; however, employers and unions should be aware of the risk of repeated failures to enforce a term of the agreement. An employer who wanted to vary from the collective agreement to deal with a short-term issue should consider consulting with the union and attempting to reach an agreement that would prevent an estoppel argument being raised when the employer wished to revert to the terms of the agreement. For example, if the agreement provided for a rate of remuneration for employees who drove their own cars, and the price of gas increased significantly, an agreement might allow the employer to increase the mileage allowance for a time and avoid any possible estoppel arguments later.

Estoppel does not mean that a party will be prevented from enforcing the terms of the agreement indefinitely. An estoppel will cease at the next round of contract negotiations if the union or the employer advises the other that it will rely on the strict terms of the agreement in the future. The party that has previously relied on the variation from the collective agreement will have to negotiate a change to the agreement. If it fails to do so, it will be deemed to have agreed to the application of the agreement as written.

Seniority

Accumulation and Termination of Seniority

Seniority is a key factor in many elements of collective agreement administration. It is used by unions to protect bargaining unit members from arbitrary or prejudicial decision-making by

management through the use of an objective factor—the member's length of service with the employer. Employers must ensure that seniority is recorded in accordance with the collective agreement and the law. Seniority continues to accumulate during periods when employees are not working, including a leave or layoff, unless the agreement provides otherwise. Employment standards legislation typically requires seniority to continue to accumulate during leaves such as pregnancy and parental leave. Collective agreements that do not permit seniority to accumulate may contravene such legislation. Grievances have been filed in cases where employees have lost jobs because their seniority did not accumulate during absences caused by illness or accident, and arbitrators have found this discriminatory. It is also possible for the collective agreement to specify whether time spent working outside of the bargaining unit would be counted toward seniority.

The collective agreement may contain a deemed termination provision stating that if the bargaining unit member is absent for a specified time, they are automatically terminated. The administration of this provision may require the employer to notify the employee about the termination and allow them to respond. Some arbitrators have held that the employment relationship is not terminated if the employer fails to do so. A human rights issue arises if the deemed termination provision is applied to an employee who was absent because of a disability, as a termination relying on the deemed termination provision could be discriminatory. Accordingly, employers will be able to justify a termination on the basis of a deemed termination article only if it is established that the employer has met its duty to accommodate.

Job Posting and Selection Process

Although an employer might prefer to hire part-time employees to fill an opening instead of posting for a full-time job, that is not permitted if the agreement requires vacancies to be posted in the workplace. In cases where the employer gives additional work to part-time employees instead of posting to fill a full-time vacancy after a full-time employee has resigned, arbitrators have held that that is a breach of the agreement and ordered the employer to post the job.

There are procedural matters of which the employer should be aware in the job posting and selection process. Management may determine the job specifications for a position; however, those specifications must be reasonable requirements for the job. In one case where an employer provided that the ability to speak a second language was required, when in fact it was not a legitimate job requirement, an arbitrator found that the procedure was flawed and ordered the job to be reposted. The job posting procedure must be applied in a reasonable manner without any discrimination. The employer cannot post a job setting out certain criteria and then make the selection decision on the basis of different criteria. In one case, the posting for the position of a registered nurse-in-charge referred to clinical skills. However, managerial ability was subsequently added as an important criterion referred to in the selection process. An arbitration board ordered that the job be posted again with this added qualification and the selection process be repeated.

Layoffs

For non-union employees, management may not have the right to impose a temporary layoff unless such details have been incorporated into terms and conditions in their letter of hire or the circumstances leading to the layoff were a reasonable expectation in light of common practices in the industry (e.g., construction work). In a unionized workplace, the employer must refer to the negotiated definition of layoff in the collective agreement to determine whether the layoff provisions of the contract apply in a given situation. Unless the agreement provides otherwise, the employer can reduce hours of all employees in a bargaining unit, and this will not be viewed as a layoff. In a case where the employer reduced hours for some employees but not others, it was held that there had been a **constructive layoff** and the employer could not avoid the layoff and seniority provisions of the agreement in this manner. Instead of reducing the hours for some employees in a bargaining unit, the employer will be required to layoff employees, applying the seniority rules in the collective agreement.

Recall to Work Following a Layoff

Individuals who have been laid off are still employees until the collective agreement provides otherwise. The agreement may provide that a unionized worker will lose their seniority when she resigns, is terminated for cause, fails to return from a leave of absence or reaches the expiration of recall rights. One of the rights of an employee on layoff whose seniority has not yet been terminated is the right to be notified of, and recalled to, any job vacancies. The collective agreement may state that employees on layoff will be recalled in order of seniority provided they have the skill and ability to do the available work. The method of notifying the laid-off employee on a recall list of the job opportunity may differ based on length of the anticipated layoff period. For example, if the layoff is anticipated to be 10 days or less, the employer would be expected to notify the laid-off employee in person or by telephone of the recall opportunity. For longer periods of layoff the notification from the employer would send written notification by registered letter or courier to the affected employee. The collective agreement will also likely state that no new employee shall be hired until those laid off have been given the opportunity to be recalled.ⁱⁱⁱ

The employer may encounter a situation where there is a job posting requirement in the collective agreement and there are employees on layoff who have recall rights. If there is a job opening, the question the employer faces is whether the job should be filled by recalling an employee on layoff or by posting the job. Although the terms of a particular collective agreement might affect this situation, it has been held that unless the job that is open is the one an employee on recall was previously laid off from, the job posting requirement must be complied with. The employer must post the job instead of simply recalling employees on layoff.^{iv} This gives more emphasis to seniority. If the employee on layoff had two years of seniority and another employee in the bargaining unit had three years, granting the job to the employee on layoff without posting would mean that the employee with less seniority was being given priority.

Assessing Skill and Ability

The collective agreement may require the employer to determine the ability of employees when filling job openings, laying off and recalling employees. When employers are determining

the skill and ability of employees competing for a job, they may use a range of tools. Testing can be used; however, tests must be reliable, valid and conducted fairly, the same for all employees, and relevant to the job requirements. Interviews can be used; however, they must be conducted fairly, be related to job requirements, and given the appropriate weight. The weight that should be given to the interview will depend on the type of job involved. In one case where the position being filled was in maintenance and involved welding and other manual work, the employer did not consider the application of a candidate who was unresponsive during the interview. An arbitrator found that the employer put too much emphasis on the interview and should have referred to other methods to assess the candidate's ability such as his work record and observation. How valid and fair are interviews conducted by employers? A study that examined labour arbitration cases where the interview was in dispute indicates there is room for improvement. The study examined all reported arbitration cases relating to the employment interview from two sources, *Labour Arbitration Cases* and *Canadian Labour Arbitration Summaries*, from 1987 to 1996. In a majority of the 56 cases (52 percent), it was found that the interview was unfair. Grievances were allowed in 46 percent of the cases. The grievances were not allowed in all cases where the interview was found to be unfair because it was not the only factor in the selection process. There were cases in which the interview was found to be unfair but the grievance was dismissed because the grievor had not been selected for other valid reasons. The main problems found with the interview process were: (1) using interview questions that failed to measure the knowledge, skills and abilities required for the job; and (2) giving the interview results too much emphasis and failing to consider factors such as prior performance appraisals and work history.

Remedies at Arbitration

Arbitrators considering promotion decisions made by management take two different approaches. Some only intervene when it is established that the decision process has been arbitrary, discriminatory or unreasonable. They think they should defer to management's decision unless evidence shows it to be fundamentally flawed. Others look into whether the management decision was actually correct. In cases relating to job posting and promotions, the most common remedy is an order that the employer post the position again and repeat the selection process. However, in some circumstances, an arbitrator may simply award the job to the grievor. In layoff cases, the arbitrator has the authority to order an employee to be placed in a particular job and award damages for lost earnings.

II. Human Rights Issues in the Administration of the Agreement

Human rights issues are critical in the administration of collective agreements. One arbitrator has summed up the importance of human rights legislation as follows: "The growing pre-eminence of human rights laws in Canada has profound implications for both our established labour relations institutions and the administration of the workplace itself."^v

The principles of human rights legislation were considered in Chapter 2. In the following examples we will look at the implications of human rights legislation regarding the obligations imposed on both the employer and in some cases the union in the administration of a collective agreement.

Employer and Union Obligations

EMPLOYERS AND ACCOMMODATION Employers are prohibited from discriminating on the basis of any of the prohibited grounds provided in human rights legislation. The employer has a duty to accommodate provided that the accommodation would not impose an undue hardship. A rule or requirement that is discriminatory is permissible if it is established to be a bona fide occupational qualification (BFOQ) or bona fide occupational requirement (BFOR). The elements required to establish a BFOR were also reviewed in Chapter 2. In particular, it was noted that a discriminatory rule or requirement cannot be a BFOR if the employee can be accommodated. For example, a requirement that an employee have a specified level of hearing could not be established as a BFOR if the employee could use a device or equipment that would compensate for a hearing deficiency.

UNIONS AND ACCOMMODATION Unions are prohibited from discriminating on protected grounds outlined in human rights legislation. They also have a duty to accommodate when they are found to be a party to such discrimination. A union could become so involved in two ways:

1. The union participates in the formation of a rule that has a discriminatory effect, by agreeing to the rule or provision inside or outside of the collective agreement; or
2. The union does not participate in the formulation of the rule but becomes a party to the discrimination by impeding the employer's reasonable efforts to accommodate.

The nature and extent of the union's accommodation obligations will vary depending on how the duty arises. A union that has agreed to a discriminatory term is *jointly* responsible with the employer to seek accommodation for the employee. Although the employer will normally be in a better position to facilitate an accommodation, the union still has a responsibility to put forward measures to accommodate. In the second situation, where the union has not agreed to the discriminatory measure, the employer must canvass methods that do not involve the union or a disruption of the collective agreement before calling upon the union to participate in the accommodation. The union's duty only arises when its involvement is required to make an accommodation possible because no other reasonable accommodation can be found.

DISCIPLINE Employees cannot be disciplined for behaviour caused by a disability. If it was established that an employee guilty of misconduct related to their bipolar disorder that could be controlled with medication, an arbitrator would likely overturn any discipline imposed. The employee would have an obligation to control the situation by taking the necessary medication. In situations involving an employee's absence related to a disability, the employer cannot impose discipline. However, the employer is allowed to respond; this is discussed in a separate section below.

Last Chance Agreements (LCA) Last change agreements can be applied to certain human rights accommodation situations. However, the employer may face special problems regarding the enforceability of LCAs. For example, dependency on alcohol or drugs is a disability requiring accommodation by the employer up to the point of undue hardship. It is discrimination

to withhold employment or treat a person differently because he or she has a disability. An LCA involving an employee with a disability cannot (1) impose conditions more onerous than those imposed on other employees or (2) impose excessively stringent conditions if less stringent conditions would not impose an undue hardship on the employer. It is advisable for the employer to seek legal counsel when preparing a last chance agreement in such circumstances.

JOB POSTING AND SELECTION If any requirement in a job posting is discriminatory, an arbitrator will order that it be eliminated unless the employer can show that it is a BFOR. For example, the job posting may not specify the gender of applicants unless that is a BFOR. In determining an employee's seniority, the employer must ensure that periods of absence caused by the disability are not excluded.

ACCOMMODATION OF EMPLOYEES AND SENIORITY Although employees may require accommodation because of any protected ground under a human rights code, most accommodation issues relate to religion, gender and disability. The employer does not have to create a position that is unproductive or serves no useful purpose for the employer, because that would impose an undue hardship. The union has an obligation to cooperate with the employer's attempts to accommodate. However, the union does not have to agree to any measures that would impose undue hardship upon other employees in the bargaining unit or the union. If there is no way to accommodate other than an arrangement that involves a variation from the collective agreement, the union must agree to this variation, provided it does not impose an undue hardship. In one case, the collective agreement provided that work done on a Sunday required the payment of overtime. When an employee was not able to work on Saturday because of religious belief, the company proposed that the employee be allowed to work Sundays without the payment of overtime. The union did not agree with this proposal and insisted that any work done on Sunday be paid at the overtime rate as provided in the agreement. In the end, it was held that the union's failure to agree to a variation from the agreement to allow the employee to work Sundays without the payment of overtime was a violation of its human rights obligations. The union does not have to agree to a variation from the agreement unless other measures to accommodate that do not involve a breach of the collective agreement cannot be found.

The employer's duty to accommodate may lead to a conflict with seniority provisions in the collective agreement. For example, a possible accommodation might involve moving an employee to a job that is open; however, another employee who has more seniority may want the same job. Cases have established that accommodation can override seniority only as a last resort to allow an employee with disabilities to be given preference. Other measures that do not require a variation from the collective agreement must first be considered. A distinction has been drawn between bumping an employee with more seniority from their job to accommodate and allowing an employee in need of accommodation to move into an open job ahead of other employees. Arbitrators have not been willing to require an incumbent employee with seniority to be displaced from a job as part of an accommodation. They may be willing to allow an employee who needs accommodation to move into an open job ahead of employees who have more seniority, but only if there is no other way to accommodate.

III. The Grievance and Arbitration Processes

Labour legislation requires a collective agreement to have language outlining grievance and arbitration processes. The grievance and arbitration process, not the court system, is used by management and the union to resolve disputes concerning the interpretation, application or administration of the collective agreement. Such processes may have more steps as negotiated in collective bargaining between management and the union.

DISPUTE SETTLEMENT A dispute settlement mechanism is necessary because there are many potential sources of conflict between management and the union during the term of the collective agreement. It is likely that there will be disagreements regarding the interpretation or meaning of contract terms. During collective bargaining, union and management teams may not anticipate that particular language drafted for the agreement is ambiguous or ill-defined. In other cases, contract language may be left vague when it is negotiated because the parties cannot agree on more specific terms. For example, the collective agreement might refer to certain benefits being paid to employees who are hospitalized, without clarifying what the term hospitalized means. If an employee received treatment as an outpatient and did not remain in hospital overnight, there might be a dispute about whether the employee was hospitalized.

The grievance procedure will provide a mechanism to resolve the meaning of the term and the rights of the employee. The grievance procedure also provides a mechanism to resolve disputes flowing from management decisions made as a result of the terms in the collective agreement. A management decision to discipline and discharge a bargaining unit member for just cause or to determine in an employee selection process whether an employee has sufficient ability to perform the listed duties are examples of this decision-making. It is likely that employees or the union will disagree with some of these decisions. There might also be disputes when two or more collective agreement terms appear to be in conflict with each other. The management rights article might appear to allow the employer to install new equipment, but another article dealing with technological change might appear to prohibit such a change.

Canadian labour relations legislation prohibits strikes and lockouts during the term of a collective agreement and complements this with a requirement that disputes relating to the administration of the agreement must be referred to arbitration. This is summarized in the **obey now, grieve later** rule, which means that unless the disputed management directive is illegal or would entail a safety risk, the employee must follow it, even if it appears to violate the collective agreement, and pursue a grievance later.

ENFORCEMENT OF THE COLLECTIVE AGREEMENT The grievance and arbitration process can be used to enforce the collective agreement and remedy any breaches. If an employee was not assigned overtime hours that he or she was entitled to, the grievance process provides a way to recover the wages lost due to this management oversight. If a grievance was filed and the matter was not settled, an arbitrator can order the employer to pay the compensation owing to the affected bargaining unit member.

ADDITIONAL BARGAINING DURING THE TERM OF THE AGREEMENT The grievance process may provide a forum for additional negotiation between the parties during the term of the collective agreement. An article may specify general terms relating to work conditions that need to be clarified or expanded upon to settle the grievance, thus providing further bargaining between the parties on the disputed matter. For example, if an article provided for a workload formula for teachers, there might be a dispute about the application of the formula in a particular case. A settlement of the grievance might include an elaboration or clarification of the disputed article in the current collective agreement. The settlement might then be incorporated into the collective agreement during its remaining term and possibly carried forward into the next round of collective bargaining.

Benefits of Grievances and Arbitration

The grievance process has potential benefits for the union, the employer, and unionized employees.

BENEFITS COMMON TO ALL THE PARTIES All parties will benefit if disputes are resolved without a stoppage of work. Employers will maintain productivity and employees will not lose compensation. Settling disputes during the term of the agreement instead of allowing them to build up until the next contract negotiations may also help the parties improve their relationship and make future contract negotiations easier.

BENEFITS TO MANAGEMENT The grievance process could be used as a communication or consultation mechanism through which management may learn of possible workplace problems and take timely corrective action. The procedure may also improve the quality and consistency of decision-making by managers because they know that employees can access the grievance process if decisions are not made fairly and consistently with the collective agreement. It has been suggested that employees who are dissatisfied have two primary methods to deal with their situation: *exit* or *voice*.^{vi} This means that dissatisfied employees can either leave the employer or stay and attempt to resolve problems. Unionized organizations have lower turnover rates, which may benefit employers. It has been argued that unions also give employees this *voice* through the grievance process.

BENEFITS TO UNIONS AND UNION OFFICIALS The union may be able to use the grievance procedure as a pressure tactic against management by filing a large number of grievances prior to contract negotiations. Unions could also use the grievance procedure to oppose and even overturn some management directives. For example, in one case a municipality employed ambulance drivers and attendants. The employer adopted a policy requiring lights and sirens to be used on all calls that were designated as emergencies. The rule was a change from past practice, which allowed drivers some discretion in the use of lights and sirens. The ambulance drivers and attendants thought that the policy posed a safety risk for themselves and the public. The employees filed grievances claiming that the new rules were unreasonable. An arbitrator found that there was no justification for the rule and that any discipline imposed under the rule would be unjust. It ordered that the policy be suspended. A grievance might also increase union solidarity by rallying support against the employer. The procedure might benefit union leaders seeking re-election, because the membership sees them fighting for employee interests.

BENEFITS TO EMPLOYEES Employees may benefit from having unresolved workplace disputes proceed to arbitration, providing a resolution by an impartial third party. If an employee was passed over for a promotion, a grievance might result in the employee being awarded the job. Even if the employee does not win the grievance, the procedure may prove satisfying to the employee by creating a forum to be heard. The procedure also provides job security in instances where terminated employees, through the grievance process, are reinstated to their jobs.

Potential Concerns of Employers Regarding the Grievance Process

Because the grievance process can be used to challenge management decisions, it has the potential to be a source of problems for the employer. Collective agreement terms and the grievance procedure will also impact several HRM practices including employee recruiting, selection, training and discipline.

The extent and success of attempts to resolve disputes before a grievance is filed, or prior to the arbitration hearing, are likely related to the relationship between management and union representatives. Where the relationship is more cooperative, there will be more attempts to settle a dispute prior to arbitration. At least one study has confirmed that there is a relationship between the labour relations climate and grievance outcomes. It found that when there was a lower grievance rate in an unionized organization, the unions were most often more cooperative with greater consultation.

Grievance Procedures

Conflict is seen in all workplaces for a variety of reasons. However, not all problems and complaints become grievances. In many workplaces, there is an attempt to resolve an issue by having a discussion between the line manager and employee prior to filing a grievance. This is frequently identified as a complaint stage in the grievance process.

If the complaint is not resolved, the union initiates the grievance procedure by preparing a grievance form and submitting it to the employer representative, usually the supervisor of the unionized employee, or as specified in the agreement. The union may use preprinted grievance forms that contain basic information and are completed by a union official, who fills in the particulars.

After a grievance has been filed, informal discussions may take place to try to resolve the issue, in addition to the meetings prescribed in the collective agreement. The supervisor presented with the grievance may consult with their supervisor and the organization's labour relations or HRM department. Such consultations during the grievance process are further attempts to settle the dispute and avoid arbitration.

The **grievance rate** is the number of grievances filed divided by the number of employees in the bargaining unit. The grievance rate is higher in bargaining units where the labour relations climate is poor. It should be noted that there may not be a causal relationship between the labour-management relationship and the grievance rate. Furthermore, it is not clear whether a

more cooperative relationship leads to lower grievance rates or lower grievance rates lead to a more cooperative relationship.

Ownership of the Grievance

The **ownership of the grievance** refers to the issue of who decides whether a grievance is filed, settled, withdrawn or referred to arbitration. In most cases, it is the union and not the employee who has ownership or control of the grievance, subject to the duty of fair representation. It is up to the union, not the employee, to decide whether a grievance will be filed and how it will be resolved. From the union's standpoint, and keeping in mind unions are a business entity, the prospect of pursuing a grievance on a certain dispute that has not successfully been upheld at arbitration, which is an expensive undertaking, does not make good business sense. There may be rare exceptions to this rule in some unions. For example, the constitution of the Ontario Public Service Employees Union (OPSEU) provides that the individual employee has control over a grievance.

Grievance Procedural Matters

The discussions between management and union representatives at grievance meetings are considered **privileged communications**, meaning they cannot be referred to at any subsequent arbitration hearing. It is also the case that any admissions or offers to settle made during the course of grievance meetings cannot be presented as evidence at the arbitration hearing. Documents that are part of the formal grievance procedure, including management's replies at each step of the grievance process, may be introduced as evidence at the hearing. Accordingly, the employer's replies should be clear and concise, and any offers to settle should be in separate documents. Written communication between grievance meetings should be labelled as **without prejudice**, meaning that the documents cannot be referred to at a subsequent arbitration hearing. For example, if the union in a letter headed "Without Prejudice" offered to settle a grievance relating to a dismissal by having a suspension imposed on an employee, this offer could not be referred to at the hearing.

The parties should be aware that a failure to follow the procedural requirements set out in the grievance process by one side may require a response from the other. A **waiver** is a legal concept meaning acceptance of the rule that if a party does not object to a procedural error, for example, a missed time limit, it cannot raise the issue later. For example, if the grievance procedure in the collective agreement provides that after Step 1 the union had 10 days to refer the grievance to Step 2, and the union did not act for 20 days, the employer should object in writing before proceeding to the Step 2 meeting. If the employer goes ahead with the meeting and waits until the arbitration hearing to raise the issue of the failure to meet the time limit, it may be found to have waived the failure to comply. Alternatively, the employer may want to carefully consider whether it wants to rely on the time limits to dismiss a grievance on a technicality. In a majority of jurisdictions in Canada, legislation provides that arbitrators have the authority to allow an arbitration to proceed even though a time limit in the grievance process was not met.

Settlement Agreements

If a grievance is settled prior to the conclusion of the arbitration hearing, which is often the case, the settlement should be set out in a written document, which may be referred to as **minutes of settlement** or a *memorandum of settlement*. This document should refer to the grievance, confirm the grievance has been resolved, and set out the terms of the settlement, such as a reinstatement of a terminated employee or payments for owed overtime to be made to the unionized employee. The settlement documentation should be signed by the employer, the union and any employees involved. Consideration should also be given to providing that the settlement is done on a **without precedent** basis, meaning it cannot be referred to in any subsequent proceedings. Why is such a consideration important? Imagine the employer dismissed an employee who was in possession of an illegal substance in the workplace and a settlement included reinstatement of the employee. If the settlement was on a without precedent basis, it could not be referred to in any subsequent case, and the employer would be free to discharge another employee later for the same offence.

Arbitration

Although only a few grievances, approximately 2 to 3 percent of those filed, proceed all the way to arbitration, employers and unions must understand the arbitration process. The alternative forms of arbitration that the collective agreement might provide for, including a single arbitrator or an arbitration board. Arbitration is an adversarial process in which representatives of management and the union present documentation, witness testimony and references to prior cases to the arbitrator or arbitration board, which makes a final and binding decision to resolve the disputed grievance.

Rights versus. Interest Arbitration

A distinction must be drawn between grievance, sometimes referred to as **rights arbitration** and **interest arbitration**. Grievance or rights arbitration resolves disputes relating to the interpretation, application or administration of the collective agreement. If an employee was discharged, they could file a grievance alleging that there was a violation of the collective agreement because there was not just cause. If the dispute was not settled through the grievance process, it could be referred to rights arbitration for final resolution, including possible reinstatement of the employee. Interest arbitration relates to an entirely different type of dispute that arises during collective bargaining where the negotiating parties cannot agree on the terms of a collective agreement. In interest arbitration, the employer and union present evidence and make submissions regarding what the agreement should contain, and the arbitrator's decision sets out the terms of the contract. Interest arbitration is used primarily in areas of the public sector such as police and fire services, in which strikes are not allowed.

Arbitrators

The selection of an arbitrator may be decided upon by management and the union. In cases where the parties cannot agree on the selection of an arbitrator, one will be appointed by a labour relations board. Alternatively, the collective agreement or other agreed-to procedure may

provide an arbitrator based on a set roster. Most arbitrators have a legal background, but there is no requirement that the arbitrator be a lawyer, although many arbitrators are university professors and lawyers. Although a few do arbitration work full-time, many do arbitrations on a part-time basis. Usually a few experienced arbitrators are handling a disproportionately large number of cases in each province or territory. The parties may be interested in the track record of an arbitrator to see how much experience they have and to determine how they have decided cases similar to the one at hand.

The Arbitration Hearing

The proceedings for unresolved grievances between union and management representatives are commonly referred to as a hearing. At the hearing, these representatives will be allowed to make an opening statement, present evidence through witnesses and documents, cross-examine the other side's witnesses and make a final argument. Lawyers may represent the parties, but this is not required. If both sides have agreed on some or all of the facts, such as dates of employment or certain events that have occurred, they might prepare and present to the arbitrator at the start of the hearing an **agreed statement of facts**. The facts set out in this statement will not have to be proven at the hearing, which will shorten the time required to establish the factual issues and allow the parties to move on quickly to the argument stage of the hearing.

The hearing is held at a neutral site, typically a meeting room in a hotel. Each side is responsible for ensuring that its witnesses are present, and arrangements can be made to subpoena witnesses to compel them to attend. The arbitrator might render a decision immediately in cases that are clear; however, the arbitrator usually requires more time to review the evidence, resulting in a delay in the decision of several weeks or longer depending on the complexity of the case.

The labour relations legislation of each jurisdiction sets out the authority of arbitrators. Arbitrators have been given the authority to do whatever is necessary to conduct a hearing, including fix the dates for hearings, issue summonses for witnesses and determine the admissibility of evidence.

BURDEN OF PROOF In any arbitration case, either the union or the employer will bear what is known as the **burden of proof**—that is, it will have the responsibility to prove the facts in dispute. The general rule is that the burden of proof is borne by the party filing the grievance, which in the majority of cases is the union. Discipline and discharge cases are an exception. In such cases it is the employer that bears the burden of proof. The burden of proof will be significant if the arbitrator cannot decide whose version of the facts is true, because in that event the party bearing the burden of proof will lose. If a union filed a grievance alleging that an employee had sufficient ability for a job vacancy, and the evidence was not clear, the burden of proof would not be met and the arbitrator would dismiss the grievance. Another way to state this is that the union had the **onus** to show that the employee had sufficient ability and it failed to do so.

ARGUMENT IN THE ALTERNATIVE Either side can make an **argument in the alternative**. This means that neither the union nor the employer is restricted to putting forward only one claim or defense. They can make secondary or alternative arguments if the arbitrator does not agree with their primary position. In effect, either side can say, “Our position is A; however, if you do not agree with A, we submit that you should find B.” An example of a union making an argument in the alternative might arise in a discipline and discharge case as follows. The union’s first position might be that there was no misconduct by the employee; however, if the arbitrator finds there was misconduct, the union’s alternative position might be that the penalty imposed by the employer was unreasonable and should be reduced. The authority of an arbitrator to reduce a penalty is discussed later in this chapter.

Arbitration Decisions

Thousands of arbitration decisions are made every year. Previous decisions on an issue are often influential on later ones; however, they do not establish binding precedents. Because arbitrators may have different views on some matters, it is possible to have conflicting decisions or two *schools of thought* on some issues. On the issue of the appropriate remedy for an employer’s failure to properly distribute overtime, some arbitrators take the approach of providing the employee with the next opportunity to work overtime. Others think the remedy should be an award of cash to compensate the employee for lost earnings.^{vii}

At the hearing, the union and the employer will both try to refer to previous cases that support their position. In the cases dealing with the dismissal of employees, the arbitrator has to decide whether to uphold the dismissal or substitute a lesser penalty. At the hearing, the employer would refer the arbitrator to previous decisions in which arbitrators upheld the dismissal of employees guilty of similar misconduct. The union would try to present similar cases in which arbitrators ordered reinstatement.

One source of arbitration decisions is *Labour Arbitration Cases*, a series that reports important decisions. Commentary on arbitration cases useful to both employers and unions can be found in *Canadian Labour Arbitration* (5th ed.) and *Leading Cases on Labour Arbitration*. Some arbitration decisions are also available online at the Canadian Legal Information Institute. Previously decided cases establish points of labour law that can also guide the parties when negotiating the collective agreement. For example, numerous decisions have clearly established that the employer is permitted to contract out work unless the agreement prohibits it. Knowing this, the parties can negotiate accordingly. The union will seek to have the collective agreement limit the employer’s right to contract out, perhaps even making a concession in another area to obtain some limitation. Employers will try to avoid limits on the right to contract out, knowing they can contract out unless the agreement provides otherwise. The parties may also use previous decisions to help settle a grievance. In a situation in which an employee has been guilty of minor insubordination, the matter to be resolved is the discipline that should have been imposed. If it were found that previous decisions set the penalty at a one-day-to-one-week suspension, this would guide the settlement negotiations. Arbitrators are bound by the relevant legislation in their jurisdiction and by court decisions interpreting that legislation. The Supreme Court of Canada has confirmed that arbitrators have the authority to enforce the rights and obligations provided in human rights and other employment-related statutes.

Arbitrators must deal with questions of fact and questions of law. For example, regarding questions of fact, an arbitrator would have to determine whether an employee was guilty of theft, or whether an employee has sufficient ability for a job. For a question of law, an arbitrator may have to determine whether an employer has met the duty to accommodate. In the course of determining points of law during arbitration hearings, references will be made to legislation and to previous court and arbitration decisions.

Arbitrability

The arbitrator does not have authority to deal with all disputes that might arise between the union and the employer. **Arbitrability** refers to whether an arbitrator has the authority to hear the dispute and render a decision. A dispute is referred to as *arbitrable* if the arbitrator has the authority to hear it, and *in arbitrable* if he or she does not. There are several possible reasons why a dispute is in arbitrable. When is a Dispute Arbitrable refers to a situation in which there was a question of arbitrability:

When is a Dispute Arbitrable?

An employer established an early retirement plan that offered financial incentives to employees to participate. The plan provided that the employer could deny an employee's request to participate if the organization would have to hire a new employee to replace the prospective retiree. On this basis, the employer denied several requests to participate in the plan. The collective agreement did not refer to the issue of early retirement.

When some employees who were denied access to the plan filed grievances, an arbitrator dismissed them. It was held that because the disputes related to a matter not referred to in the collective agreement, the grievances were not arbitrable. In order for a grievance to be arbitrable, it must deal with an alleged breach of a term of the agreement or a violation of employment legislation.

Cost of Arbitration

The employer and the union may have lawyers represent them at an arbitration hearing. This will be a factor affecting the cost for each side. A collective agreement may provide details on these costs. It is more likely that these fees will be discussed by management and the union with the arbitrator. In situations where there is only one interest arbitrator, the parties will split the professional fees and expenses regardless of who wins. Arbitrator's fees range from \$2,000 to \$3,500 per day for the hearing and writing up the award. There will be additional expenses, including the cost of the room for the hearing. If an arbitration board is used instead of a sole arbitrator, the parties will also have to pay the additional fees owing to their representatives on the board. Depending on whether lawyers are used and the length of the hearing, arbitration can be expensive. The costs can be especially significant for a small union or employer and may be a factor in reaching a settlement prior to the arbitration hearing. One of the parties may back down, or the parties may compromise, to avoid the significant expense of going to a hearing. The cost of arbitration is one of the factors leading some academics and practitioners to recommend alternatives, such as grievance mediation.

Remedies

Arbitrators have authority to issue orders that will resolve the violation of the collective agreement. For example, arbitrators have the authority to: order the reduction of discipline imposed upon employees, including ordering reinstatement; make a declaration that a party has violated the agreement and direct compliance; and order the payment of damages for financial loss. In one case where it was found that a supervisor had been guilty of harassing an employee and the employee had been off work as a result, the arbitrator ordered the employer to restore the employee's sick leave credits, pay the difference between the employee's regular pay and sick leave pay for the time the employee had been away from work, ensure that the employee would not come into contact with the supervisor in the future, establish an anti-harassment training program for managerial staff and pay the employee \$25,000 in general damages.^{viii} In another case, one arbitrator extended the remedies granted in arbitration. The employer terminated an employee who had 23 years of service with the federally regulated employer, claiming they had been guilty of making a false sick leave claim. The arbitrator found that the employer's investigation was superficial and the employer had failed to comply with the collective agreement when it did not request an independent medical examination as required by the agreement. The arbitrator upheld the grievance and awarded the grievor in excess of \$500,000 for a bad faith dismissal. It was found that the employer's extreme conduct had been the cause of the employee's mental condition, and the arbitrator awarded \$50,000 for emotional stress, \$50,000 in punitive damages, lost salary and losses for future pay and benefits.^{ix} This latter case was appealed to the Divisional Court and the outcome of this appeal is summarized in the following section.

Review of Arbitration Decisions

What can the employer or the union do if it thinks that an arbitrator's decision is wrong? In most jurisdictions, it is possible, although a rare occurrence, to make an application for judicial or court review of an arbitration decision. In British Columbia, decisions can be reviewed by the Labour Relations Board. The Supreme Court of Canada has restated the law relating to the judicial review of decisions by tribunals and arbitrators.

In the above-referenced case involving the employee terminated for allegedly falsifying a sick leave claim, the employer appealed the decision to the Divisional Court. The Court found the arbitrator correctly considered the terms of the collective agreement, the *Ontario Labour Code* and the particular facts of the case. However, it quashed the \$50,000 in damages awarded by the arbitrator for mental distress and pain and suffering along with the additional \$50,000 for punitive damages. It ordered the arbitrator to decide how much of the first \$50,000 was due to mental distress and what portion of the amount was attributed to pain and suffering. Regarding the matter of punitive damages, the Divisional Court noted the arbitrator had failed to justify this particular award on two of the three required elements for an award of punitive damages in a contract case. The arbitrator was ordered by the Court to review and decide whether punitive damages against the employer were possible or appropriate in light of the judicial review of this case.

When a court reviews an arbitration decision, the standard applied is one of reasonableness as opposed to correctness. The standard of reasonableness has been described in one case as follows: “Reviewing courts cannot substitute their own appreciation of the appropriate solution but must rather determine if the outcome falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. There may be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferred outcome.” Accordingly, it is possible that an arbitration decision could be viewed by some as incorrect; however, a judicial review will not be successful because the decision meets the reasonableness standard.

Problems with Arbitration

The arbitration process has been criticized as being too legalistic, expensive and slow. Some alternatives may be less expensive and more expeditious solutions.

Expedited arbitration resolves issues more quickly by providing shorter time limits for arbitration. They might also agree to a process that will not allow lawyers or limit required evidence to be in written statements. The labour relations legislation in seven jurisdictions—Alberta, British Columbia, Manitoba, Newfoundland and Labrador, New Brunswick, Nova Scotia and Ontario—provides for an expedited procedure that is available upon the request of one of the parties.^x There is some variation between jurisdictions on the details. Generally, the legislation provides that either the union or the employer may request the Minister of Labour to appoint a single arbitrator. The Minister is required to appoint an arbitrator who must commence hearings on the matter within a specified number of days of the request. In some jurisdictions, if the parties agree, the arbitrator is required to deliver an oral decision immediately or as soon as possible after the conclusion of the hearing.

Grievance mediation is a confidential process in which a mediator helps the parties negotiate a settlement. Instead of hearing evidence and providing a binding decision, the mediator helps the parties reach a voluntary agreement.

When grievances are referred to arbitration, it usually takes six to nine months to move from the request for arbitration to the final award. It takes much less time to start the grievance mediation process. Grievance mediation will not take as long as arbitration because the parties are not delayed by the painstaking examination and cross-examination of witnesses. For example, in the Canadian Federal Public Sector Labour Relations and Employment Board, “the grievor is required to submit the reference to adjudication to the Board no later than 40 calendar days after receiving the employer’s decision at the final level of the internal grievance process, or 40 days after the expiry of the period within which the decision had to be made.

The costs of grievance mediation are much lower because mediator fees are significantly less than those of arbitrators, and usually lawyers are not involved. The parties may negotiate a win-win solution through grievance mediation that will improve their relationship. In contrast, arbitration will typically leave a winner and a loser between management and the union, which may harm the relationship.

Mediation may also work better with some types of grievances. If the grievance relates to a seniority issue there may be less incentive for the employer to negotiate and make concessions, because arbitrators tend to be more deferential to management decisions in this area. In discipline and discharge cases, where there may be less certainty about the outcome of an arbitration hearing, there may be more incentive to negotiate. It appears that the process works best if the mediator is an experienced arbitrator with mediation skills. If they are familiar with the arbitration process and the possible outcomes, the arbitrator may use this information at the appropriate times to pressure the parties to avoid the costs and uncertainty of arbitration if the mediation fails. The Newfoundland and Labrador government report that grievance mediation has a success rate of 84 percent of cases referred being resolved. Because of the lower costs and other potential advantages, grievance mediation may be worth considering. It will not be suitable for all cases, particularly if one of the parties wishes to establish a precedent; in that case, they will want to proceed to arbitration.

Discipline and Discharge

Management rights language in a collective agreement permits management to take disciplinary actions against employees in order to change undesired behaviours and actions associated with the performance of job duties and general conduct on, and sometimes off, work premises. Given the power of the employer in exercising disciplinary action up to and including discharge from employment, unions serve an advocacy role in protecting bargaining union members from arbitrary and disproportionate disciplinary sanctions by management. The following section will explore grounds for discipline, progressive discipline and other procedural matters related to the discipline and discharge of union employees.

Possible Grounds for Discipline or Discharge

If an employee is guilty of misconduct away from the job, the employer cannot impose discipline unless the misconduct impacts the employer's business interests. When there is such impact, discipline up to and including discharge is possible. The nature of the misconduct and the business conducted by the employer will be important. The same misconduct may or may not justify dismissal or discipline depending on the nature of the business. In one case, a residential care worker in a facility for mentally challenged individuals pleaded guilty to theft after a shoplifting incident away from the job. The employer dismissed the worker, but an arbitrator ordered them reinstatement because it was not shown that the conviction was related to the nature of the work done by the employee and the employer's reputation was not affected. In another case, the discharge of a municipal electrical inspector who had been convicted of growing marijuana was upheld at arbitration. In short, a criminal conviction for conduct away from the job will not in itself justify discipline. The employer will first have to establish a connection with and harm to the employer's business or reputation.

IV. Progressive Discipline

An employer may impose the following discipline on an employee guilty of misconduct, depending on its severity: (1) verbal warning; (2) written warning; (3) suspension (time off without pay); (4) dismissal. Employers are expected to apply **progressive discipline**, meaning

they should impose a lesser penalty for a first offence and apply more severe penalties if there is further misconduct. Progressive discipline assumes that the purpose of discipline is to correct misconduct, reinforce desired behaviour related to job duties and organizational rules and restore the employment relationship.

Progressive discipline often begins with a verbal warning, followed by a written warning, a suspension and ultimately discharge.

1. **Verbal warning.** Here the employee and supervisor have an evidence-based discussion of the situation. The supervisor should carefully assess the situation and what perspective is provided by the employee regarding their actions. The supervisor should remind the employee what conduct is expected related to job performance and coach the employee on how to deal with future situations. The verbal meeting is usually recorded in the HRM files but not placed in the employee file. The issue of union representation at such a meeting will be a function of past practice but is typically not a procedural requirement.
2. **Written warning.** When the employee is determined to have repeated the undesired behaviour that was the basis for the verbal warning, they are called to a meeting with their supervisor. The supervisor should carefully review the evidence with the employee and note by the employee's point of view and evidence regarding their actions. Based on information learned at the meeting, the supervisor will provide a further warning to the employee to cease such behaviour, affirm what conduct is expected related to job performance and instruct the employee how to deal with future situations. At this second stage of the progressive discipline, the employee is formally advised at the meeting and in writing that future occurrences of such behaviour will lead to further discipline up to and including dismissal. The issue of union representation is advisable at such a meeting, as the warning letter will be placed in the employee's file held by HRM. The role of the union representative is an observational one when attending this meeting. The issue of subsequent written warnings due to repetition of employee misconduct should be weighed very carefully by the supervisor in consultation with the organization's HRM policies and collective agreement to avoid rendering this stage of the progressive disciplinary process to be unsuccessful in changing the employee's conduct.
3. **Suspension.** Further misconduct by the employee triggers a meeting with the supervisor, a labour relations or HRM representative, senior departmental management, and a union local official. The supervisor should carefully share the evidence of the situation and note the employee's point of view and evidence regarding their actions. Based on information learned at the meeting, the supervisor, department manager and labour relations or HRM professional will typically recess to confirm whether to proceed with a suspension with or without pay, rejoin the meeting with the employee and their union representative and inform the employee of the decision. When a suspension is imposed, the employer should advise the employee of the previous record that has been considered. A written summary of the decision and details related to the length of the suspension is provided to the employee, and a copy of the letter is placed in the employee's HRM file. This written warning again informs the employee that future occurrences of such behaviour will lead to further discipline up to and including dismissal from employment.

4. **Dismissal.** In cases of a long disciplinary history, management cannot simply decide to review the employee's file and terminate the employee's employment. There must be a **culminating incident**.^{xi} This is a further incident of employee misconduct that becomes the cause for dismissal when considering the employee's total disciplinary history. At a meeting of management and union officials and the employee, the incident of the most recent misconduct is carefully assessed and the perspective of the union member is heard. When a discharge is imposed, the employer should advise the employee of the previous record that has been considered. Failing to specify the past misconduct in reasons for the discipline might mean that the employer will not be allowed to rely on it at an arbitration hearing. Based on information learned at the meeting, the supervisor, department manager and labour relations or HRM professional will typically recess to confirm whether to proceed with the dismissal of the employee. The management representatives will rejoin the meeting with the employee and their union representative and inform the employee of the decision. A written summary of the decision to terminate the individual's employment is provided to the employee and a copy of the letter is placed in the employee's HRM file.

Restrictions on possible discipline are as follows:

- Employers cannot impose monetary fines unless the collective agreement provides for them. However, a fine should be distinguished from an order to compensate the employer for damages resulting from the employee's actions.
- Employers cannot penalize employees by reducing or eliminating their seniority.
- Employers cannot impose discipline twice on the same incident of misconduct. For example, the employer could not impose a one-day suspension and then later decide that the penalty was not severe enough and impose a three-day suspension. The employer can suspend an employee while an investigation is being conducted; however, it should be made clear that the matter is still under investigation and a final decision on discipline is forthcoming. In such cases the suspension would be with pay during the investigation period.

Procedural Matters

STATING THE GROUNDS FOR DISCIPLINE Arbitrators generally require employers to justify the discipline on the basis of the grounds stated at the time the discipline was imposed. They cannot add to the grounds or reasons for discipline after it has been imposed if the additional misconduct relates to behaviour the employer knew about or could have easily discovered. For example, if an employee was discharged for assaulting a co-worker, the employer could not try to substantiate the discharge at the arbitration hearing by arguing that the employee was also guilty of theft, unless the employer could not have known about the theft at the time of the termination. This is a point on which the union and non-union workplaces are different. If a non-union employer dismisses an employee and is defending against a wrongful dismissal action claiming there was just cause, it is allowed to refer to misconduct that came to the employer's attention after the dismissal without any problem relating to whether the employer should have previously known about and referred to the misconduct. In the above example of employee theft, even if the employer did not know about the theft at the time of the

dismissal, it may use the theft as a defense in a subsequent wrongful dismissal action brought by the employee.

Because unionized employers may encounter difficulties when they refer to misconduct not raised at the time of the dismissal, they should carefully investigate before imposing discipline. If the employer discovers additional misconduct after the termination, it should immediately advise the union of the additional grounds that it will be relying upon. In one case, a teacher was terminated on the basis of attendance and performance issues. After the termination, the employer discovered that the teacher had apparently downloaded pornographic material to the school's computer system. Although the union objected to the introduction of the evidence relating to the misuse of the computer system, because it was not referred to at the time of the discharge, the arbitrator held that it could be referred to because the employer could not have known about it previously, and the union had been immediately advised by the employer about the additional grounds for termination.

V. Issues and Outcomes at Arbitration

Employee discipline against one or more bargaining unit members may trigger a grievance response by the union.

PROCEDURAL REQUIREMENTS IN THE AGREEMENT Discipline imposed by the employer can be reversed because the procedural requirements of the collective agreement have not been complied with. Arbitrators have ordered discipline to be reversed in cases where employers have not complied with provisions requiring union representation at disciplinary meetings, written reasons for discipline and time limits for imposing discipline.

FACTUAL MATTERS The employer has the onus of proving that there was misconduct by the employee. If it is alleged that the employee has abused the employer's e-mail system or damaged employer property, the employer must establish this misconduct through witnesses and documentary evidence. If the employer fails to establish the misconduct, the grievance will be upheld and the discipline reversed. In either of these instances an arbitrator can order reinstatement—if necessary, payment of any earnings lost because of a suspension, and the removal of any warnings or related material from the employee's record. Accordingly, employers should carefully investigate before proceeding with discipline.

Some employers have attempted to use surreptitious or secret videotape evidence to show that an employee is guilty of misconduct, such as making a false injury claim. This involves making a video of the employee away from the workplace without the employee's knowledge. There is no consensus among arbitrators across Canada on the issue of whether such evidence will be admitted. Some arbitrators have applied a *relevancy test* and admitted video evidence on the basis that it is relevant to the issue at hand. However, many arbitrators are now applying a *reasonableness test* to protect the privacy rights of employees; if the employer does not meet the requirements of the test, the video evidence will not be admitted. The reasonableness test requires the employer to show that (1) it was reasonable for the employer to have engaged in video surveillance and (2) the surveillance was conducted in a reasonable fashion. To meet the requirements of the test, the employer will have to show that it considered less intrusive steps to

determine if the employee was guilty of misconduct. Below explains how the reasonableness test could lead to a video being excluded. This is an evolving area, and employers may wish to consult with legal counsel in their jurisdiction before proceeding with making videos of employees.

Is Surreptitious Video Admissible as Evidence?

An individual employed as a security guard at a mental health institution was off work with pay while the employer investigated a complaint against him. A co-worker advised the employer that she thought the employee was working for another employer while they were on the paid suspension. The employer hired an investigator to determine if the employee was working elsewhere. In the meantime, the employee was transferred to the job of dietary technician as part of an accommodation. The employee claimed that this accommodation was not sufficient because they had an aversion to water and the dietary technician job involved washing dishes and other cleaning. The investigator made a video of the employee in their driveway washing their car and watering a tree. In a subsequent interview with the employer, the employee denied that they were able to wash a car. The employer dismissed the employee on the basis of the video evidence and the interview.

A grievance was filed, and at the arbitration hearing the employer attempted to introduce the video as evidence. The union objected to the admissibility of the video, and the arbitrator ruled that the evidence was inadmissible. The arbitrator held that the employer did not have a reasonable basis for undertaking the surveillance of the employee to begin with. The employer did not have a policy against moonlighting, and the employee had not been told that they could not work while they were away. There was no evidence that the employee had been called to work and had declined. Because the employer did not have reasonable grounds to engage in the surveillance of the employee, the video was not admissible.

Appropriateness of the Penalty Imposed

The right of an arbitrator to reduce a disciplinary penalty imposed by management on a unionized employee is now recognized in statute in most jurisdictions in Canada.^{xii} Below lists the factors that arbitrators have considered when determining whether to uphold or reduce a penalty. In any particular case, one or more of the factors listed may be referred to. The seriousness of the misconduct is an important factor. If an employee is merely guilty of swearing at a supervisor, the penalty of discharge would likely be deemed too severe. However, if the employee struck the supervisor, a discharge would be more likely to be upheld. If the employee has a long record of service without any previous discipline issues, or was provoked by management or another employee, it is more likely the penalty would be reduced. The penalty may be reduced in cases where the offence was part of a sudden emotional outburst as opposed to being premeditated. Arbitrators have reduced the penalty in cases where it would impose a special economic hardship; for example, where the discharged employee would have special difficulty finding another job.

Employers should ensure that rules guiding employee conduct or workplace expectations are consistently enforced, because failing to do so may lead to a penalty being reduced or reversed.

If the employer has established rules relating to parking, but the rules have not been enforced, an arbitrator would not uphold a suspension.

Discipline and termination arbitration cases are decided on a case-by-case basis. Because there are so many different factors that might affect the outcome and possibly lead to a penalty being reduced, there may be different outcomes in cases that look similar. For example, in cases where employees have been found guilty of using an employer credit card to purchase gasoline for personal use, there have been different outcomes. In one case, a long-term employee with a clean work record confessed to the theft and made an offer of restitution. It was established that the employee had experienced family problems causing stress. The arbitrator ordered that a 13-month suspension be substituted for termination of employment. In another case, a long-term employee with a clean record confessed to police of a theft, but subsequently in the employer's investigation claimed that they had the right to take the gasoline. The discharge was upheld.

The following question in such situations may arise, "Does an arbitrator have to order reinstatement when it is found that the misconduct is not severe enough to merit dismissal?" The answer to this question is no. In a few exceptional cases, where employees have not shown a willingness to change their behaviour, arbitrators have awarded compensation instead of reinstatement. When dealing with a problem employee, the employer may wish to pursue a settlement with the union that avoids reinstatement, perhaps by offering a lump sum payment to the employee to voluntarily resign. If the union and the employee insist upon reinstatement, the employer may wish to get legal advice about the possibility of convincing an arbitrator to award compensation instead of reinstatement.

VI. Last Chance Agreements

A **last chance agreement (LCA)** is an agreement between the employer, the union and an employee guilty of misconduct that the employee will be retained or reinstated subject to certain conditions being met, such as maintaining a certain level of attendance or obtaining help for a substance abuse problem. The agreement further provides that if the employee fails to meet the conditions, they will be terminated and will not have the right to have the dismissal referred to arbitration, except to determine whether the agreement has been breached. If an employee has a poor attendance record, and discipline including warnings and suspensions has not remedied the problem, an LCA might be entered into. In this situation, the agreement could provide that if the employee does not maintain a specified attendance level in the future, they will be dismissed. The agreement would further provide that the only point that might be arbitrated is the determination of the attendance level to establish if the agreement had been breached.

An LCA is potentially advantageous to all parties involved. The employee avoids immediate dismissal, and the possibility of discharge may motivate the individual to rehabilitate. The union avoids the trouble and cost of an arbitration hearing. The employer retains an employee who might be valuable if rehabilitated and similarly avoids the cost and uncertainty of an arbitration hearing. There are potential human rights problems with LCAs, discussed below.

An arbitrator may make an order similar to an LCA with or without a request from one of the parties. The arbitrator has the authority to order an employee to be reinstated subject to certain

conditions, such as maintaining a certain level of attendance or obtaining medical treatment. If the employee failed to meet the conditions, he or she would be discharged.

VII. Non-Disciplinary Measures for Innocent Absenteeism

Culpable versus Innocent Absenteeism

A distinction must be drawn between culpable and non-culpable or innocent absenteeism. **Culpable absenteeism** is absenteeism in which the employee is at fault or there is blameworthy conduct. Skipping work to attend a baseball game or repeated absences on scheduled work days prior to or following a long weekend are examples of such misconduct. **Innocent absenteeism** is caused by factors beyond the employee's control, such as absences caused by sickness or injury. This distinction is important because employers cannot impose discipline for innocent absenteeism. Employers should ensure that any attendance management programs or policies distinguish between these two forms of absence from work. Although the law does not allow the employer to discipline employees for innocent absenteeism, it is still possible for the employer to act to deal with this issue.

Non-disciplinary Discharge

Employers may terminate employees for innocent absenteeism where: (1) the employee's past absence has been significantly greater than the bargaining unit average; (2) there is no reasonable likelihood of attendance improving in the future; and (3) the employer has accommodated the employee to the point of undue hardship. In one case, an employee had an absenteeism record 10 times worse than the bargaining unit average, largely due to injuries incurred while playing football. The arbitrator ruled that the employer acted improperly when it dismissed him because it had not taken into consideration the fact that they had undertaken to give up playing football, and it was likely that his attendance would improve.

The employer has an obligation to notify the employee of the standard of attendance required and the consequences of failing to meet it. Where the absence is caused by a disability, the employer cannot discharge the employee if they can be accommodated without undue hardship. For example, if the employee could be moved to an alternative position that was within their KSAs, the employee could not be discharged. A joint employer–union committee dealing with return-to-work situations is a helpful way to explore options for employees in such situations.

An employee cannot be discharged for innocent absenteeism if the discharge would prevent the employee from receiving benefits payable under the agreement for disability. If the disability payments provided for in the agreement require individuals to be employees to be eligible for payments, the employee cannot be discharged until the disability coverage has lapsed. If the disability benefits vest so that employee status is not required for the continued payment of benefits, the employee may be discharged. Disability payments, which provide employees with income when they are unable to work, must be distinguished from health benefits such as eye and dental protection. A contract provision for health benefits does not prevent a discharge for innocent absenteeism.

Responses Other Than Discharge

There might be circumstances in which a response to innocent absenteeism other than termination would be appropriate. An employer might deal with this employee issue by using alternative measures including transfers, medical leaves, flexible scheduling or demotion subject to any provisions in the collective agreement paying particular attention to employees with disabilities not being subject to these absenteeism measures. If an employee has KSAs and training for a particular department, and their absence imposes an undue hardship for the employer, it would be possible to transfer or demote the employee to another area.

VIII. Duty of Fair Representation

Nature of the Union's Duty of Fair Representation

Labour relations legislation in most jurisdictions provides that the union has a **duty of fair representation**—that is, a duty to act fairly in the course of representing employees in the bargaining unit. The *Canada Labour Code* provides that “the trade union . . . shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement. . . .”

This duty applies to the administration of the agreement and in some jurisdictions, also applies to the negotiation of the collective agreement. In one case, a group of federally regulated employees filed a complaint that a union had failed to negotiate a wage increase for them. The complaint was dismissed because, at the time, the duty of fair representation did not apply to contract negotiation in the federal jurisdiction. The Canada Industrial Relations Board now interprets the *Code* so that the duty applies to contract negotiations, and a complaint relating to a union's conduct during negotiation could be made.

In the jurisdictions in which the duty of fair representation includes the negotiation of the contract, the union does not necessarily have to follow the instructions of employees. In one case, the union negotiated a provision for a pension plan despite the fact that employees indicated they did not want the plan. The employees subsequently filed a complaint that the union had breached its duty of fair representation. The Labour Relations Board held that the union is not limited to following instructions of employees who are presently in the bargaining unit. The union was allowed to pursue the plan because it had reasonably considered the employees' wishes and determined that the plan would be in the long-run interest of the bargaining unit.

The duty applies to all members of the bargaining unit, whether or not they are union members. It has been held that unintentional errors are not a violation of the duty. However, some cases have held that gross negligence is a violation. The duty could become an issue regarding the filing of grievances and referral of grievances to arbitration. Generally, the union has ownership of the grievance and arbitration process, and it is not a violation of the duty to refuse to refer a dispute to arbitration if the union acts fairly. If the union listens to an employee's complaint and considers the matter and fairly determines that it would not be of any value to proceed, it is not a breach of the duty if a grievance is not processed or referred to

arbitration. In the jurisdictions without a duty of fair representation provided in labour relations legislation, there may be an implied duty at common law and legislation may prohibit specific union practices.

IX. Review Questions

1. Explain why an employer may not be able to implement a measure relying on the management rights article in a collective agreement.

The employer could be prevented from relying on the management rights article and enforcing the agreement because of any of the following:

- 1) Specific provisions of the collective agreement. An article in the agreement will govern the situation if it is more specific than the management rights article. An additional example is as follows. If the agreement provides that there are certain hours of operation, the management rights article could not be relied upon to change the hours.
- 2) Legal rules. Any action taken by the employer must be legal. For example, the employer could not rely on the management rights article to establish rules that discriminated between male and female employees.
- 3) Estoppel. If the employer has led the union to believe that a term of the collective agreement will not be enforced it will not be able to later insist upon the term of the agreement being applied.
- 4) Rule requirements established in the *KVP Co. Ltd.* case. If the employer is relying on the management rights article to establish rules it will find that its rule-making authority is subject to the requirements listed in Figure 10-1. In particular, the rule will have to be reasonable.

2. An employer wishes to establish rules for the workplace. Explain the criteria that would have to be met to ensure that the rules established are enforceable.

To ensure that any rules established are enforceable the employer will have to meet the requirements established in the *KVP Co. Ltd.* case.

3. What are the key points that an employer should be aware of in connection with a job posting?

The requirements in the posting must be reasonable for the job, and the selection decision must be made on the basis of the criteria posted.

4. What are the primary functions of the grievance process?

The primary functions of the grievance process are to provide a mechanism to resolve disputes arising from the collective agreement, and a procedure to ensure compliance with the agreement. An example of a dispute arising from the collective agreement, which is expanded upon later in

this chapter, is the discipline or discharge of an employee. If the employer dismisses an employee claiming there was just cause, it is possible that the union does not agree with the employer's interpretation of just cause. The grievance procedure will be used to resolve this dispute. The assignment of overtime to employees is an illustration of the grievance process being used to enforce the agreement. If the employer did not distribute overtime correctly the employees entitled to the overtime could file a grievance to enforce the agreement and obtain a remedy. The grievance process could also provide a forum for additional bargaining during the term of the agreement. The example provided in the text on this point referred to an agreement that contained a workload formula for teachers. A grievance relating to the formula could lead to the parties reaching an agreement that clarified or added to the formula.

5. Distinguish between rights and interest arbitration.

Rights arbitration and interest arbitration both involve the parties presenting evidence and arguments to a neutral party, who renders a final binding decision. Rights arbitration may also be referred to as grievance arbitration because it is the final step taken if a grievance is not settled or withdrawn. An illustration of a matter that could be the subject of rights arbitration is the dismissal of an employee. At the hearing the arbitrator or arbitration board will determine if there was any misconduct, and if the penalty imposed by the employer should be reduced. Interest arbitration refers to the settlement of a contract dispute, usually in the public sector. If the parties are not able to negotiate an agreement they could agree to or be required to refer the dispute to arbitration. Interest arbitration involves both the union and the employer presenting evidence regarding the content of the collective agreement, including similar agreements. Interest arbitration is referred to in Chapter 11 dealing with the public sector.

6. Explain the possible benefits of the grievance and arbitration process to the employer, unions, and employees.

The possible benefits of the grievance and arbitration process to all three parties are referred to in Figure 10-3.

7. What is the meaning and significance of the burden of proof in arbitration?

The burden of proof refers to the question of which party has the onus of proving the issue in dispute. One way to illustrate the significance of the burden of proof is to consider a case where the evidence presented to the arbitrator could be viewed as a tie. That is, there is credible evidence supporting the position of both sides. In this setting, the party with the burden of proof will lose. In a dispute relating to seniority involving skill and ability the union bears the burden of proof and in this situation the grievance would be dismissed. In a grievance dealing with discipline and discharge the employer bears the burden of proof and the employer would be unsuccessful.

8. At an arbitration hearing either of the parties can make arguments “in the alternative.” Explain what this means and give an example of a union argument that illustrates this concept.

Making an argument in the alternative means that a party at an arbitration hearing is allowed to put forward one argument or position, and also put forward a second position or alternative for the arbitrator to consider if the arbitrator does not accept the first position or argument. At a discipline or discharge arbitration the union could put forward the primary argument that the employee was not guilty of any misconduct and put forward the alternative position that if the arbitrator finds the employee was guilty of misconduct the penalty imposed by the employer should be reduced.

9. Explain the meaning of the terms *arbitrable* and *in arbitrable*. Provide an example for each.

These terms refer to the issue of whether the arbitrator has the authority to hear and decide the dispute. A grievance is arbitrable if the arbitrator has the authority to hear it, and it is in arbitrable if the arbitrator does not have the authority to hear it. An example of an arbitrable dispute would be a grievance relating to discipline when the union has complied with the time limits provided in the grievance process in the agreement. An example of an in arbitrable dispute would be a grievance relating to discipline where the union failed to comply with a mandatory time limit and the arbitrator determines it would not be fair to extend the time limit. A dispute could also be in arbitrable if it does not relate to an issue in the collective agreement. For example, if the union filed a grievance alleging that the employer promoted the wrong person to a position outside of the bargaining unit this would be in arbitrable because it is not covered by the collective agreement.

10. Explain why an employer may or may not wish to resolve a dispute using grievance mediation.

Grievance mediation has several advantages for the employer:

- it is faster and less expensive than arbitration
- it protects the relationship with the union
- there is the potential to develop better and more creative solutions, in contrast to the win-lose results of arbitration.

11. An employee with a poor disciplinary record who was caught stealing the employer's property has been terminated. The union has filed a grievance. Does the union have to take the grievance to arbitration?

The purpose of this question is to illustrate the ownership of the grievance and the union's duty of fair representation. In most cases the union has the ownership or control over the grievance and arbitration process, which means that it is the union that decides whether the grievance is referred to arbitration. This is subject to a duty of fair representation that is provided for in most jurisdictions. The union does not have to take the grievance to arbitration as long as it fairly considers the chances of success at a hearing.

12. Explain the meaning of a *last chance agreement*.

A last chance agreement provides that an employee guilty of misconduct will be retained or reinstated subject to certain conditions being met. The conditions could specify maintaining a certain level of attendance or obtaining help for a substance abuse problem.

13. What are the advantages of a last chance agreement to employers, unions, and employees?

A last chance agreement has advantages for all parties:

- employees avoid dismissal
- employees may be motivated to rehabilitate
- employers may retain a potentially valuable employee
- the costs and uncertainty of an arbitration are avoided

14. When can an employer discharge an employee for innocent absenteeism?

An employer can dismiss an employee for innocent absenteeism if three conditions are met: the absence has been significantly greater than the bargaining unit average, there is no likelihood of attendance improving in the future, and the employee cannot be accommodated without undue hardship.

15. What is the union's duty of fair representation and explain how the employer could be affected by this obligation?

The union's duty of fair representation means that the union must act fairly without discrimination in the course of acting for employees. An employer could be affected by this obligation if the union failed to process a grievance. One of the remedies that a labour relations board can grant is an order directing the grievance to proceed.

X. Discussion Questions**1. A collective agreement between a hospital and the union contained the following:**

- a management rights article
- a provision regarding contracting out that provided: "12.01. The Hospital shall not contract out any work usually performed by members of the bargaining unit if, as a result of such contracting out, a layoff of any employees other than casual part-time employees results from such contracting out"
- a technological change article that provided for notice to the union for technological change plus notice to employees who might be laid off

The hospital proposed adoption of a new food preparation system that would involve food being assembled elsewhere by an outside company. The final preparation would be done at the hospital using new equipment that would be installed. The system was similar to one used in the airline

industry and involved a \$5.5 million investment. If the new system was adopted some hospital employees including cooks would be laid off.

- (a) Assume you are a union official. On what basis might the union challenge this?
- (b) Assume you were an employer representative. On what basis might the employer defend the plan?
- (c) If you were an arbitrator dealing with this situation, what would your decision be?

a) The union could file a grievance alleging that the change would be a violation of the contracting out article.

b) The employer would claim that it had the authority to make the changes relying on the management rights and technological change articles.

c) An arbitrator in a case similar to this problem held that the plan violated the contracting out provisions of the collective agreement. This situation deals with contracting out because another firm would do work that was now being done by employees. The employer cannot rely on a general management rights article when there is another specific contract term covering the situation.

2. The collective agreement for a fire department provided that promotions would be based on KSAs and that, where applicants were equal, seniority would govern. The employer posted the job of lieutenant, indicating that applicants would be evaluated on their KSAs. The employer used written tests and a selection interview to determine qualifications. To assess dependability the employer relied solely on the interview, and the applicants were asked questions such as "What does dependability mean to you?" The employer scored the results of the interviews and tests and insisted that applicants would have to have scores that were absolutely equal before seniority would be considered.

(a) On what basis, if any, can the union file a grievance?

(b) What outcome do you expect at an arbitration hearing? Explain.

a) The union can file a grievance claiming that the process was unfair because it relied on general subjective interview questions and that equality in the agreement does not mean that scores must be equal to two decimal places.

b) In the arbitration decision that this problem is based upon the arbitrator upheld the grievance and ordered the employer to repeat the job competition. The arbitrator noted that the employer should not rely exclusively on interviews to determine dependability; reference should also be made to past performance. The arbitrator also did not accept the employer's argument that the reference to equality in the agreement allowed it to score the results to two decimal places. This problem illustrates that employers cannot rely exclusively on interviews, and interview questions should more objective. *See Re Halifax*, 19 LAC (4th) 392.

- 3. A collective agreement provided that seniority would govern for promotion decisions if KSAs were relatively equal. The employer posted a job for a hospital porter and evaluated the applicants on the basis of an interview, written test and past performance. The results were scored. The second and third applicants were within 5 percent and 10.8 percent of the highest-scoring candidate. The job was given to the highest-scoring applicant. On what basis, if any, can a grievance be filed? What outcome do you expect?**

The purpose of this question is to draw attention to and explore the meaning of relatively equal. A grievance would claim that the employer violated the collective agreement because the second and third scoring candidates were relatively equal in ability to the successful candidate. The issue here is what does "relatively equal" mean, or how much of a difference can there be between two candidates and they can still be considered relatively equal? In the decision this problem is based on the arbitrator held that both the second and third place candidates were relatively equal to the successful candidate. The employer here had a policy that treated candidates within 10 percent of each other as relatively equal. See *Re Religious Hospitallars of St. Joseph of Hotel Dieu (Kingston) and O.P.S.E.U Local 465*, 43 LAC (4th) 156.

4. Comment on the following statement: "Merit does not matter in a unionized workplace because of the seniority principle":

This statement exaggerates the effects of seniority. Straight seniority or seniority as the only factor determining promotions is not common. Most agreements refer to ability as an additional factor in promotions. This question should take students to a discussion of sufficient ability and relative ability provisions in an agreement. A sufficient ability provision provides that the person with the most seniority will be awarded a job if they have enough ability to do the work - it does not matter that someone else has more ability. A relative ability term provides that seniority is only referred to if two employees have equal ability. With a relative ability term, ability is the primary factor and seniority may not even be referred to.

5. Do you agree with the decision of an arbitrator refusing to admit a surreptitiously or secretly recorded video as evidence? Under what circumstances would you allow this type of evidence to be used?

The issue of surreptitious videotape is also dealt with in the Decorative Concrete Products case incident at the end of the chapter. Students will have different opinions on this issue. Some may have difficulty understanding why a videotape that shows an employee is dishonest cannot be referred to because the employer did not have a valid reason to pursue the surveillance

6. A collective agreement contains a grievance procedure providing that if a grievance is not resolved at Step 1 the union has five days to refer the matter to Step 2. If the union fails to refer the dispute to Step 2 until a month after the Step 1 response is received, what should the employer do?

This question illustrates the concept of waiver in the grievance process. If the employer proceeds in the grievance procedure without objecting to the failure of the union to meet the time limit it may be deemed to have waived the breach of the agreement by the union. The employer should confirm in writing that although it is proceeding in the grievance process, it still reserves the right to assert that the grievance is inarbitrable because of the missed time limit.

7. A collective agreement included the following articles:

(a) “If the Union fails to submit a grievance at each level in the grievance procedure within the time limits stipulated in this article, the grievance shall be deemed abandoned. Similarly, if the Corporation fails to reply to a grievance in writing within the time limits stipulated in this article, the grievance may be referred to the next level of the grievance procedure, including arbitration.”

(b) “After exhausting the provisions of the grievance procedure, either of the parties may notify the other party in writing within thirty (30) days of the final level reply of its intention to submit a grievance to arbitration.”

The employer discharged an employee and a grievance was filed on his behalf by the union. The grievance went through the steps in the grievance procedure and the union received the reply from the employer at the last step in the procedure, denying the grievance, on July 9. The union referred the matter to arbitration on September 20. Subsequently the parties agreed to an arbitration date of July 5 in the next year. One week before the hearing, the lawyer for the employer advised the lawyer for the union that an objection would be made to the arbitrator's jurisdiction. What is the basis of the employer's objection, and will the arbitrator allow the arbitration to proceed?

The employer could argue that the time limit in the collective agreement was mandatory and the grievance was inarbitrable. However, an arbitrator would allow the matter to proceed because the employer has waived the failure to submit the grievance to arbitration within the time provided in the agreement.

8. A collective agreement provided that when a disciplinary interview was held a union steward would be present (hereafter referred to as Article 6). An employee left work on a Friday afternoon prior to the end of his shift. The employee's position was that he had permission to leave. The employer's position was that the employee did not have permission to leave early. On the day of the incident a manager called the employee at home and talked with him. In the course of the telephone conversation the employee was advised he would be suspended for one week. The employee asked that the suspension be reduced and it was agreed that there would be a meeting to review the matter on Monday. On Monday there was a meeting at which a union steward was present; however, there was no change in the suspension. A grievance was filed that stated there was an “unjust suspension” and did not refer to Article 6.

(a) What argument will the union make at the arbitration hearing?

(b) If you were the arbitrator, what would your decision be?

(c) If the grievance is allowed, what remedy should be ordered?

- a) The union will argue that the phone conversation was a disciplinary interview that was held without a union steward being present in contravention of the agreement. Accordingly the suspension is void and the grievor should be compensated.
- b) An arbitrator in this situation has held that the suspension was a violation of the agreement and allowed the grievance. See *Re CHEP Inc.*, 60 LAC (4th) 380.

The remedy ordered would be the removal of this item from the employee's file and compensation for the time lost.¹⁰ After an employee left work without permission, a supervisor imposed a two-day suspension after consulting with the HRM labour relations specialist. One week later, a more senior manager reviewed the situation and found that the employee had previously been suspended for two days for the same misconduct and that the problem of employees leaving work early was increasing. The senior manager ordered that the suspension be increased to one week. Can the union challenge this?

Yes, the union can challenge this. The employer can only impose discipline once for misconduct. An arbitrator would order that the increase in the suspension was void and the employee would be compensated for the additional time lost.

9. Is there a problem if an employer negotiates a last chance agreement that contains conditions that the employee will not likely be able to meet? Explain.

Yes, there is a problem. An arbitrator may not enforce an agreement that contains conditions that are excessively stringent if less onerous conditions would not impose an undue hardship on the employer.

10. An employee was guilty of misconduct, including threatening a supervisor. They were terminated and a grievance was filed. During the grievance procedure it became apparent that the employee had an alcohol addiction. The grievance was settled pursuant to an agreement that provided the grievor would be on probation for a year and seek treatment. The agreement also provided that if the employee was absent from work without a reason acceptable to the organization they would be terminated without recourse to the grievance and arbitration procedure. Four months after the grievor was reinstated, there was another absence for two days. The employer terminated the employee.

(a) Can a union and the employer agree that the grievance and arbitration procedure will not be used?

(b) Is there any problem with this agreement? That is, is there any way the union can avoid the termination?

- a) Yes, the employer and the union can enter into this type of agreement. This illustrates a last chance agreement.
- b) Last chance agreements are generally valid and enforceable; however, this particular agreement is void because it imposed a discriminatory condition. Note that a condition was

placed upon the grievor because of his handicap, imposing a review process upon him that was not placed on other employees. In the case this problem is based upon the arbitrator ordered the grievor's reinstatement. See *Re Fantom Technologies*, 70 LAC (4th) 241.

XI. Web Research

Sufficient ability implies that employees who meet the minimum knowledge, skills, and abilities to perform the job will be considered. When used with a seniority provision, implies that the employee with the sufficient ability and the most seniority will be the successful applicant.

Relative ability implies only the employee with the highest knowledge, skills, and abilities will be a successful applicant for a position.

Mediation may be less costly and allows the parties to jointly resolve their differences. The Mediator does not have the formal authority to rule on the unresolved issues.

Students will have a variety of responses to what they learned about how union representatives handle a grievance.

XII. Vignette

Management Rights

In every collective agreement, management has the right to manage the workplace and therefore employees. Specifically, these management rights include the right to determine what work will be done, when it will be done, and which employees will perform the work. These rights therefore run counter to the frequent comment that unionized employees are not able to complete work if it is outside of their job descriptions.

Managers and employers also have the authority to transfer employees' tasks and responsibilities. Managers can also assign tasks and responsibilities from bargaining units that have been laid off or reduced. However, in this more complicated situation, such as occurred with some employers during the COVID-19 pandemic, there are factors managers and employers must consider when doing so.

The manager must first review the collective agreement language, paying particular attention to any protection of bargaining unit clauses. This will help assess any limits on an ability to transfer duties or the consequences of these transfers of work. The next consideration in the instance of assigning work across bargaining units, is the manager must have a sound business rationale for the redistribution of employees and their work. Also, redistribution of tasks and responsibilities cannot eliminate jobs of the bargaining unit. Finally, the redistributed tasks and responsibilities cannot assume a substantial portion of the tasks and responsibilities of employees of the bargaining unit.

Source:

<https://www.mross.com/what-we-think/article/transferring-work-and-duties-of-union-workers>

<https://www.oakbridges.ca/what-are-management-rights#:~:text=Management%20has%20the%20right%20to,to%20anyone%20other%20than%20management>

XIII. Case Incident: Bentley School Board

The purpose of this case is to illustrate how job requirements in a posting must be reasonable, the application of a sufficient ability clause, and how the employer's selection process can be affected by a collective agreement.

Questions

1. On what basis can Jorge file a grievance?

Jorge could file a grievance claiming that the qualifications established by the employer in the job posting were unreasonably high. Jorge could also claim that because he was capable of filling the position and had more seniority, the employer violated the collective agreement when it awarded the job to Li.

2. On what basis can the union file a grievance?

The union could file a grievance alleging that the employer had established job requirements that were unreasonable and might also claim that the employer had tailored the job requirements to suit a person the employer favoured for the job.

3. If Jorge and the union file grievances, what outcome do you expect at an arbitration hearing? Explain.

Possible Union Arguments	Possible Employer Arguments
The actual work involved in this job is simple labour.	The employer has the right to establish job qualifications.
The qualifications established by the employer or were too high for the position. In particular the requirement for two years experience is unreasonable. The description of the work by the foreman confirms that it can be learned within a few days.	The employer wants to hire the best possible people. The employer wants to establish qualifications for jobs so that jobholders will be able to move to higher job classifications.

The employer is attempting to change a sufficient ability provision in the collective agreement to a term based on merit or relative ability. The collective agreement provides that the candidate must be capable, and does not require that the candidate be the most qualified.	
Because there were only two applicants for the job, and Jorge is capable and has the most seniority, the job should be awarded to Jorge.	If it is found that the job posting is unreasonable the job should be reposted.

This incident is based upon the situation in *Re Board of Trustees, Delta School District and Canadian Union of Public Employees, Local 1091*, 46 LAC (4th) 216. The arbitrator found that the qualifications set by the employer were unreasonable and ordered the employer to redraft the job qualifications and post the job again. Franks was not awarded the job because if the job requirements had been properly stated another employee might have applied.

This case illustrates the following:

- 1) employers can establish job qualifications, however, the qualifications must be reasonable requirements for the job,
- 2) an employer can only specify qualifications relating to the job being filled,
- 3) a sufficient ability clause means that the employer may not be able to select the most qualified or proficient employee.

ⁱ *Re Grey Bruce*, 35 L.A.C. (4th) 136.

ⁱⁱ *Re CN/CP Telecommunications and Canadian Telecommunication Union*, 4 L.A.C. (3rd) 205.

ⁱⁱⁱ Agreement between MAPLE LEAF CONSUMER FOODS INC. St. Marys and THE UNITED FOOD AND COMMERCIAL WORKERS CANADA, Local 175. Expires: January 31, 2020, pp. 13–14,
[https://www.sdc.gov.on.ca/sites/mol/drs/ca/Manufacturing%20%20Consumables/311-36870-20%20\(103-0016\).pdf](https://www.sdc.gov.on.ca/sites/mol/drs/ca/Manufacturing%20%20Consumables/311-36870-20%20(103-0016).pdf), accessed May 30, 2018.

^{iv} *Re Metroland*, 4 L.A.C. (4th) 307.

^v Donald J. Carter, *Canadian Labour Law at the Millennium: The Growing Influence of Human Rights Requirements* (Kingston, ON: Industrial Relations Centre, Queens University, 2000).

^{vi} Richard B. Freeman and James L. Medoff, *What Do Unions Do?* (New York: Basic Books, 1984).

^{vii} Marguerite Jackson, "Lost Overtime Opportunities: Cash or In Kind Remedies?" *Labour Arbitration Yearbook*, 1996–97 (Toronto: Lancaster House), p. 347.

^{viii} *Toronto Transit Commission and A.T.U.*, 132 L.A.C. (4th) 225.

^{ix} *Greater Toronto Airports Authority and P.S.A.C., Local 004*, 191 L.A.C. (4th) 277.

^x George W. Adams, *Canadian Labour Law*, 2nd ed. (Aurora, ON: Canada Law Book, 2006), paragraph 4. 900.

^{xi} Laurence Olivio and Peter McKeracher, *Labour Relations: The Unionized Workplace* (Toronto: Emond Montgomery Publications Limited, 2005), p. 178.

^{xii} Laurence Olivio and Peter McKeracher, *Labour Relations: The Unionized Workplace*, (Toronto: Emond Montgomery Publications Limited, 2005), p. 177.