

UNFAIR LABOUR PRACTICES BY EMPLOYERS

INTRODUCTION

Section 21(1) states that employees have the right to bargain collectively with their employer. Employees must also freely choose a bargaining agent. An independent bargaining agent enables free collective bargaining and is critical to the fair administration of any collective agreement that governs the workplace.

Employers control key features of the workplace like production planning, scheduling, wage rates, layoff, hiring and termination. They can use this control to subvert employees' right to collective representation and to choose a bargaining agent. They can also use it to destabilize or neutralize a bargaining agent that has already been chosen.

For this reason, the [Code](#) prohibits certain employer practices that undermine employees' free choice of a bargaining agent and the bargaining agent's independence. These provisions are commonly known as the *employer unfair labour practice* provisions of the [Code](#). This policy discusses both unfair labour practices aimed at the bargaining agent and at employees. Unfair practices aimed at bargaining agents impair their ability to represent employees. Unfair practices aimed at employees chill the workplace and undermine the bargaining agent's support.

The policy concludes with discussion of several general principles applicable to employer unfair labour practices, such as the burden of proof, employer motive, circumstantial evidence, and Section 150 and "proper and sufficient cause." The policy does not address trade union unfair labour practices. See: [[Unfair Labour Practices by Trade Unions, Chapter 27\(c\)](#)]. Nor does it discuss statutory freezes, dispute-related misconduct, or bargaining in bad faith. See: [[Freeze Periods, Chapter 27\(e\)](#); [Dispute-Related Misconduct, Chapter 30\(d\)](#); [Bad Faith Bargaining, Chapter 27\(d\)](#)].

UNFAIR PRACTICES TOWARDS BARGAINING AGENTS

Section 148(1) prohibits employers from undermining the role and integrity of a bargaining agent.

148(1) No employer or employers' organization and no person acting on behalf of an employer or employers' organization shall

- (a) participate in or interfere with
 - (i) the formation or administration of a trade union, or
 - (ii) the representation of employees by a trade union,
- or
- (b) contribute financial or other support to a trade union.

[Section 148\(1\)\(a\)](#) prohibits an employer from interfering in the formation of or representation of employees by a trade union. This includes indirect interference by intimidating or terminating union organizers and supporters as well as direct interference by, for example, enforcing broad “no solicitation” rules against union organizing activity without a valid business reason to do so.

Formation entails the initial creation of the union in the workplace. The prohibition on employer interference with the administration of a trade union refers to actions that subvert the internal workings of a trade union. Representation includes all aspects of the union’s role in negotiating the collective agreement. It includes administering the collective agreement and maintaining the day-to-day contact with employees necessary to represent them effectively.

Section 148(2)(c) sets out an important limitation to the prohibited practice of unlawful interference:

148(2) An employer does not contravene subsection (1) by reason only that the employer (...)

(c) expresses the employer’s views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

This is the so-called right of “employer free speech.” It recognizes that an employer has a right to speak to its employees about its views despite the existence of an employee bargaining agent. Employers must, however, be cautious in exercising this right. They are in a position of power over their employees, and employer speech can much more easily appear coercive or threatening than employee or union speech. This is especially so when the employer forecasts consequences should its employees opt for union representation. The Board assesses a claim of employer free speech by asking whether in the circumstances, employees of ordinary fortitude and intelligence would view the employer’s communication as coercive, threatening or intimidating. See: [*IBEW 424 v. Force Electric Ltd.* [1997] Alta.L.R.B.R. 137].

[Section 148\(1\)\(b\)](#) addresses employer subversion of their employees’ right to collective representation by sponsoring a bargaining agent of the employer’s choosing. By preferring a weak and compliant bargaining agent—one that may owe its position and income largely to that one employer—the employer can block organizing by independent trade unions while losing little control over its operations. See: [[Employer Dominated or Influenced Trade Unions, Chapter 33\(d\)](#)]. Section 148(1)(b) tries to prevent this practice. It clearly prohibits an employer from financially supporting a trade union by direct subsidies or by paying the union’s legal fees. It also prohibits less direct forms of support. For example, in *Labourers 1111 et al. v. Sie-Mac Pipeline Contractors Ltd.* [1991] Alta.L.R.B.R. 847, the Board found that employers may not voluntarily recognize a union when the employer knows it to be unrepresentative of employees in the bargaining unit.

Though not itself an unfair labour practice provision, [Section 133\(1\)](#) of the [Code](#) complements the prohibition against employer support of a union in [Section 148\(1\)\(b\)](#):

133(1) Any collective agreement entered into between an employer or an employers' organization and a trade union may be declared by the Board to be void when in its opinion the administration, management or policy of the trade union is

(a) dominated by an employer, or

(b) influenced by an employer so that the trade union's fitness to represent employees for the purpose of collective bargaining is impaired.

Section 133(1) ensures that, if a union lacks the ability to independently represent employees, the Board can invalidate the product of the unlawful employer-union relationship. The Board has not yet attempted to distinguish between “dominance” and “influence.” They are likely just different points on the scale of a union’s lack of independence. The Board has noted that a finding of prohibited support under Section 148(1)(b) does not necessarily result in a finding that the trade union is unduly under the employer’s influence. See: [*Sie-Mac Pipeline Contractors Ltd.* [1991] above].

[Section 148\(2\)\(a\) and \(b\)](#) makes exceptions to the general prohibition against employer support of a trade union. It says:

148(2) An employer does not contravene subsection (1) by reason only that the employer

(a) in respect of a trade union that is a bargaining agent for the employer’s employees

(i) permits an employee or a representative of a trade union to confer with him during working hours or to attend to the business of the trade union during working hours without deduction in the computation of time worked by the employee and without deduction of wages in respect of the time so occupied,

(ii) provides free transportation to representatives of the trade union for purposes of collective bargaining, the administration of a collective agreement and related matters, or

(iii) permits the trade union to use the employer’s premises for the purposes of the trade union,

(b) makes to a trade union donations to be used solely for the welfare of the members of the trade union and their dependants, or

These exceptions protect several well established forms of financial support of a trade union whose purpose is legitimate. For example, allowing union representatives to perform union business during working hours with full pay helps administer the collective agreement. Loaning meeting space on employer property to the trade union helps the union communicate with employees to carry out its legitimate objectives.

UNFAIR PRACTICES AGAINST EMPLOYEES

Section 149 prohibits employer conduct that undermines the [Labour Relations Code](#) and employee rights under it. This section discusses Section 149 prohibitions by the interest they protect.

Conduct Undermining the Union's Exclusive Bargaining Agency

Section 149(e) says:

149 No employer or employers' organization and no person acting on behalf of an employer or employers' organization shall

(e) bargain collectively for the purpose of entering into a collective agreement, or enter into a collective agreement, with a trade union in respect of a bargaining unit if that employer or employers' organization or person acting on behalf of it knows, or in the opinion of the Board ought to know, that another trade union is the bargaining unit for the unit.

Section 149(e) complaints are rare. Few employers try to negotiate with organizations (as opposed to individual employees) other than the union holding bargaining rights for their employees. A Section 149(e) complaint is most likely to arise where an employer tries to negotiate with an in-house employee association during an extended strike or lockout. It may also arise where a successor employer attempts to negotiate employment terms for employees in a newly acquired bargaining unit. If the successor employer negotiates with its own union rather than the bargaining agent for employees of the acquired employer, it violates Section 149(e). Section 149(e) complaints may also arise in a multi-union workplace where the employer negotiates with one union about positions that are the subject of a boundary dispute with another union.

Conduct Undermining the Right to Participate in a Trade Union

Several parts of Section 149 prohibit practices that penalize or exclude employees from the workplace who exercise the right to belong to a trade union or who support the idea of collective representation. The applicable parts read:

149 No employer ... shall

(a) refuse to employ or to continue to employ any person or discriminate against any person in regard to employment or any term or condition of employment because the person

(i) is a member of a trade union or an applicant for membership in a trade union, [or]

(ii) has indicated in writing the person's selection of a trade union to be the bargaining agent on the person's behalf, (...)

(viii) has exercised any right under this Act.

(b) impose any condition in a contract of employment that restrains, or has the effect of restraining, an employee from exercising any right conferred on the employee by this Act;

(c) seek by intimidation, dismissal, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or other penalty or by any other means, to compel an employee to refrain from becoming or to cease to be a member, officer or representative of a trade union.

Subsections (a) and (c) overlap. They are often used as joint or alternative characterizations of the same employer conduct. Subsection (a) protects union members, membership applicants, and persons who sign a certification petition. It prohibits refusing to hire, terminating, or imposing inferior employment conditions on such a person because of their views, real or inferred, on collective representation.

Subsection (c) duplicates this protection, but aims at controlling overt forms of intimidation designed to drive off existing or potential union supporters. It prohibits threats and “pecuniary or other penalties.” It also extends to efforts to influence employees not to serve as union officers or representatives. The choice of officers and representatives is properly only a matter for the union membership to decide. A prime example of the conduct prohibited by Section 149(c) is captive audience meetings at which the employer threatens employees’ job security should they unionize. Both subsections (a) and (c) require anti-union motivation on the part of the employer.

Section 149(a)(viii) protects employees disciplined or discharged for exercising “any right under this Act.” The other rights that this subsection may protect include employees’ right to hold preliminary discussions with trade union organizers on the subject of unionization. See: *[IWA-Canada 1-207 v. Sundance Forest Industries [1992] Alta.L.R.B.R. 745]*.

Subsection (b) prohibits the employer from hiring only those people willing to sign a contract not to join or support a trade union. It applies only where the employer has actually imposed such a condition in an employee’s contract of employment.

Section 149(d) indirectly supports the freedom of employees to use their rights under the [Code](#). It does so by prohibiting employers from disciplining or terminating employees who refuse to help the employer by participating in an unfair labour practice.

149 No employer ... shall

(d) suspend, discharge or impose any financial or other penalty on an employee, or take any other disciplinary action against an employee, by reason of that employee's having refused to perform an act prohibited by this Act.

Section 149(d) would, for example, protect an employee who refused an employer order to infiltrate a lawful union picket line and incite a violent incident, contrary to Section 154.

Conduct Undermining the Right to Strike

The right to bargain collectively and engage in a union's lawful activities includes the right to participate in a lawful strike. Two parts of Section 149 address employer actions that subvert the right to strike.

149 No employer ... shall

(a) refuse to employ or to continue to employ any person or discriminate against any person in regard to employment or any term or condition of employment because the person (...)

(vii) has participated in any strike that is permitted by this Act, (...)

(f) suspend, discharge or impose any financial or other penalty on an employee, or take any other disciplinary action against an employee, by reason of the employee's refusal to perform all or some of the duties and responsibilities of another employee who is participating in a strike that is permitted under this Act.

Section 149(a)(vii) is a straightforward prohibition of employer reprisals against employees who engaged in a lawful strike. It does not prohibit discipline or discharge of employees who engage in an unlawful strike. Nor does it protect a lawfully striking employee from the consequences of unlawful picketing conduct.

Section 149(f) prohibits an employer from disciplining a non-striking employee for refusing to do the work of a striking employee. Because the subsection applies only to disciplinary action against an "employee", an employer can require management staff to perform strikers' duties on pain of discipline.

Unlawful Application of a Union Security Clause

Section 29(1) permits unions to negotiate "union shop" and "closed shop" clauses with employers. See: [[Trade Union Dues Provisions, Chapter 33\(g\)](#)]. Such clauses require all employees covered by the agreement to be or become members of the union. Union members, however, may lose their membership as a result of union discipline meted out under the union's constitution. Under most union security clauses, a union may call on the employer to terminate an employee who is no longer a member. Section 149(a)(iii) prohibits an employer from terminating the employee unless the employee has failed to discharge his financial obligations to the union by paying periodic dues and assessments.

149 No employer ... shall

(a) refuse to employ or to continue to employ any person or discriminate against any person in regard to employment or any term or condition of employment because the person (...)

(iii) has been expelled or suspended from membership in a trade union for a reason other than a failure to pay the periodic dues, assessments and initiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or retaining membership in the trade union.

There is a parallel prohibition against a trade union requiring such a termination in Section 151(g). Sections 149(a)(iii) and 151(g) together uncouple union membership and employee status for existing employees. So long as the employee meets the employee's regular financial commitments to the union, these sections insulate the employee from losing the employee's job indirectly through a loss of union membership.

Conduct Undermining Administration of the Code

Several provisions prohibit employers from using their control over the workplace to undermine the administration of the [*Labour Relations Code*](#).

149 No employer ... shall

(a) refuse to employ or to continue to employ any person or discriminate against any person in regard to employment or any term or condition of employment because the person (...)

(iv) has testified or otherwise participated in or may testify or otherwise participate in a proceeding under this Act,

(v) has made or is about to make a disclosure that the person may be required to make in a proceeding under this Act,

(vi) has made an application or filed a complaint under this Act,

(g) discriminate against a person in regard to employment or membership in a trade union or intimidate or threaten to dismiss or in any other manner coerce a person or impose a pecuniary or other penalty on a person, because the person

(i) has testified or otherwise participated in or may testify or otherwise participate in a proceeding authorized or permitted under a collective agreement or a proceeding under this Act,

(ii) has made or is about to make a disclosure that the person may be required to make in a proceeding authorized or permitted under a collective agreement or a proceeding under this Act, or

(iii) has made an application or filed a complaint under this Act.

Section 149(g) almost exactly duplicates Section 22 in so far as it applies to employer conduct.

The entire scheme of employee rights under the [Code](#) rests on employees' ability to assert their rights, up to and including the point of adjudication. Employees must feel free to file applications and complaints, give frank and full answers to Board investigators, and testify before adjudicators. These sections prohibit employer tampering with witnesses before they give information and employer reprisals against witnesses after they give their information.

GENERAL PRINCIPLES

Burden of Proof

The burden of proof in a complaint of an employer unfair labour practice is on the complainant—usually the trade union. The onus is, however, not a heavy one. The complainant must raise facts that, without some explanation by the employer, would justify an unfair labour practice finding on a “balance of probabilities.” In other words, if the employer remains silent, the complainant succeeds if the Board thinks it more likely than not the employer has violated a prohibition in the [Code](#). If the employer provides contrary evidence, the Board assesses all the evidence and the complainant must satisfy it that, more likely than not, a violation occurred.

Motive

Most of the prohibitions in Section 149 refer to employer actions taken “because” or “by reason of” some other factor, such as the employee's union membership. This language requires the employer to have a prohibited motive for the action. We often refer to prohibited motives generically as “anti-union motive,” or “anti-union *animus*.” The need for a prohibited motive separates discipline and dismissals based on valid employer considerations from those based on a desire to subvert rights under the [Code](#).

Often there is evidence of a mixed motive. Mixed motives exist when an employer's desire to undermine rights guaranteed by the [Code](#) coexists with valid concerns over performance or economic factors. Canadian labour relations boards take the view that employees have a right to a management decision on their workplace future completely free from prohibited considerations like union membership. Relying on a prohibited consideration to any extent taints the entire employer action because no one can be sure how the employer would have decided the issue uninfluenced by the prohibited factor. The entire tainted decision is therefore a violation of the Act even if some valid basis for the employer's action existed.

A finding of an unfair labour practice does not dictate any particular remedy. The existence of a valid basis for the action may influence the remedy. The Board may, for example, uphold tainted dismissals or discipline if it is satisfied that an employer would have reacted the same way even without taking account of the prohibited consideration.

If discipline or a dismissal lacks a prohibited motive, the Board will not intervene even though the employer's action appears to lack just cause. The validity of the discharge or dismissal is then a matter for grievance arbitration or, in an unorganized workplace, a wrongful dismissal suit.

Circumstantial Evidence

The existence of a prohibited motive is often the critical issue in a complaint. It is also the element of the unfair labour practice that is least within the knowledge of anyone other than the employer. Employers rarely reveal their motivations directly if they are aware they may be violating the [Code](#). For this reason, the Board may rely on *circumstantial evidence*. This is evidence that does not directly reveal the employer's motive, but that appears inconsistent with other motives and cries out for some other explanation. Circumstantial evidence works by excluding other, lawful reasons for the action. It works cumulatively—one piece of evidence adding to another until no explanation of the action inconsistent with prohibited motive is likely.

Where circumstantial evidence exists that supports a finding of an unfair practice, it may place an onus on the employer to give some contrary evidence or explanation that is consistent with a different conclusion. In circumstances where the employer must have had knowledge of the facts alleged, it fails to give the contrary evidence or explanation at its peril. Labour boards may assume that if an employer does not respond to the circumstantial evidence with evidence that it must possess, it is because the evidence would damage the employer's case. This is called drawing an *adverse inference* from the failure to respond. Boards consider the adverse inference along with all the other circumstantial evidence to decide whether the complainant has shown an unfair labour practice.

Section 150 and "Proper And Sufficient Cause"

All these principles come into play with [Section 150](#), which reads:

150 Nothing in this Act detracts from or interferes with the right of an employer to suspend, transfer or lay off employees, or to discharge employees for proper and sufficient cause.

Occasionally respondents argue Section 150 gives an unrestricted right to lay off or terminate employees if there is some valid reason for the action even if anti-union considerations motivated it in part. In this manner, Section 150 overrules the "taint" approach to mixed-motive cases. The Board has not accepted this view of Section 150. Section 150 simply declares that employers retain their traditional management rights to deploy and dismiss employees. It does not immunize employers from the unfair labour practice provisions.