

APPENDIX A CASES

The cases in Appendix A explore the following issues:

Case:

Found: An Unsigned Card

Are we “In The Zone”?

Where's the Money

Goodtime Food Products Ltd.

Issues:

Union organizing drive and unfair labour practice by employer

Preparation for bargaining and establishing a bargaining zone

Administration of collective agreement. Payment of union dues.

Discipline and discharge, review of termination by arbitration

FOUND: AN UNSIGNED CARD

This case illustrates the review of the certification process as well as examples of unfair labour practices by an employer.

1. What evidence is there in the case that Wesley has interfered with the rights of the employees in this case?

Wesley interfered with the rights of employees on two occasions. First, Wesley called a meeting with all employees Tara Wieznetski was in contact with and threatened a potential plan closing if a union were certified. Second, Wesley terminated Tara, who was the employee suspected organizing the union drive.

2. Looking at the legislation and labour relations board information in your province or territory, set out arguments that could be made by the union before the board against this employer for its actions against Tara Wieznetski.

Most provincial and territorial legislation provided protection of employees during the course of a union drive. In most provinces and territories, it is sufficient to show the employers actions are based on an anti union hostility to demonstrate an unfair labour practice. In this case Tara was the employee signaled out as the likely organizer of a union drive and they were the only employee terminated. These could be grounds for a success allegation of unfair union practices.

3. What outcome do you suspect regarding the employer's actions in this case?

Students will have a variety of responses depending on the province or territory. Typical outcomes can be an appeal to the board for an unfair labour practice. In this case a labour relations board can

require a certification vote or certify the union without a vote.

ARE WE “IN THE ZONE”?

This case illustrates the importance of developing a bargaining zone before entering into negotiations.

1. Work out estimated bargaining zone levels (initial, target, and resistance) anticipated from union negotiators for each of these three contract items.

Students may have varying opinions. The following is presented as a guide to the instructor. The key concept would be to ensure that the bargaining zones identified provide strategic alternatives from the most desirable to the least desirable levels.

Call in pay

(Initial = 5 hours, Target 4 hours, Resistance Point = no change)

Seniority links to vacation entitlement

(Initial = 4 weeks after 5 years, Target = 4 weeks after 3 years, Resistance Point = 3 weeks after 3 years)

Cost of living (Percentage) For a three-year agreement

(Initial = 3.5% per year, Target = 3% per year, Resistance Point = 2.5%, 2.75%, 3.2% respectively)

2. Work out estimated bargaining zone levels (initial, target and resistance) to be developed by the employer in this case?

Students may have varying opinions. The following is presented as a guide to the instructor. The key concept would be to ensure that the bargaining zones identified provide strategic alternatives from the most desirable to the least desirable levels.

Call in pay

(Initial = no change, Target 3.5 hours, Resistance Point = 4 hours)

Seniority links to vacation entitlement

(Initial = no change, Target = 3 weeks after 5 years, Resistance Point = 3 weeks after 3 years)

Cost of living (Percentage). For a three-year agreement

(Initial = no change, Target = 2% per year, Resistance Point = 2.5%, 2.75%, 3.2% respectively)

3. On each of these issues, how would you answer Rikki's question, “Are we 'in the zone'?”

Student opinions will vary depending on how they configure their zones. In the example above Seniority links to Vacation and Cost of living increases share a resistance point. This makes the possibility of a strike likely.

WHERE'S THE MONEY

This case illustrates the final stage of the labour relations process, administration of the collective agreement. In this case the employer continually has not remitted the union dues deducted from the employees to the union in accordance with the provisions of the collective agreement.

1. What is the role of a union local's grievance committee?

The role of the union's grievance committee is to review the unresolved grievances or complaints facing employees or the union local and determines if the case should be submitted, or remain, in the grievance procedure. The committee could also be involved in any decision to resolve the dispute.

2. What is a policy grievance and why was it used in this case?

A policy grievance is when the union complains that a management action violates the agreement. It usually deals with contract interpretation, not an individual complaint. In this case the employer has failed to comply with the agreement due to unilateral actions on the employer's part. An employee, or group of employees, are not directly impacted.

3. Explain why there is merit in improving the language to the check-off clause now seen in the contract.

The language of the contract needs to be improved as the employer is not honouring the current provisions. It is of interest to note that the grievance did not identify a remediation other than the dues be paid.

4. What additional HRM action might also be taken with employees not formerly within the HRM department but whose job responsibilities are linked in some way to union businesses?

The additional actions by HRM could include meeting with the accounts payable manager to gain cooperation and confirming their commitment to make the payments pursuant to the collective agreement, during next bargaining, specifically state the duties of the accounts payable department, and potentially include a financial penalty, such as interest payable, for late payment.

ONE LAST CHANGE

This case illustrates the purpose and risks of last chance agreements with respect to employee discipline.

1. Explain how a last-chance agreement can meet the expectations of a human rights tribunal regarding whether or not the employer has demonstrated reasonable accommodation for an employee in Rob's circumstances.

Last change agreements can meet the needs of a human rights tribunal if the agreement is made in good faith, the employee is aware of all the conditions, and the employee was not coerced into signing the agreement. It is also important to note that the Last Change Agreement may not result in an automatic discharge. The employer, and the union, must demonstrate that an additional accommodation would represent an undue hardship.

2. Can you think of any other conditions in the agreement that Grace should have inserted and negotiated with the union? If so, please describe and be prepared to offer a rationale.

Additional options could include the employee would not be able to submit a grievance in this case, and that the employee agrees that the agreement is not in violation of the Human Rights Act, and that he was not coerced into signing the agreement.

GOODTIME FOOD PRODUCTS

This case illustrates the review of discipline and discharge at arbitration. Students could be assigned roles of union and employer representatives and instructed to make arguments to an arbitrator.

1. What is meant by expedited arbitration and why would it be used in this instance?

Expedited arbitration is an alternate form of arbitration that tends to be more timely way to reach a resolution. It often involves the parties submitting a joint statement of facts and then presenting their respective case for any disputed facts. It would be used in this case as an employee has been discharged. The advantage to the union and the employee is that the dispute will be resolved quickly, and the employee may return to the employer is successful. The advantage to the employer is that if they are not successful in defending their decision to terminate the employee, it will limit any financial liabilities.

2. What arguments would be presented by the union at the arbitration hearing?

3. What arguments would be presented by the employer at the arbitration hearing?

At an arbitration hearing dealing with discipline or discharge there are two key issues to be determined:

- 1) has there been any misconduct that merits discipline or discharge, and,
- 2) was the discipline imposed by the employer excessive, or should the penalty imposed by the employer be reduced?

In this case it is clear that there has been misconduct and the only issue is whether the discharge of the employee should be upheld. Students should refer to Key Considerations 9-1, which lists the factors arbitrators will consider when reviewing the discipline imposed by the employer.

Employer Arguments

Serious nature of the behaviour. The grievor intended to harm or injure the supervisor.

The fact that there were two incidents, the first with the scissors, and the second with the knife, suggests that the second incident was premeditated.

The supervisor was merely carrying out their job responsibilities when they went to the inspection area where the grievor was working.

The grievor has not rendered an apology.

Union Arguments:

The grievor was merely gesturing with the knife and scissors and did not intend to harm the supervisor. The supervisor must not have felt there was an intention to cause harm because they approached the grievor after the first incident with the scissors.

The two incidents happened so closely together that they should be viewed as one spur of the moment emotional outburst rather than premeditated action. The scissors and the knife that were involved were tools situated at the workstation that the grievor picked up in the heat of the moment, not weapons they brought from another location.

The grievor has seven years of service.

The grievor has been a capable employee with a clean record.

The grievor was provoked. The employer did not explain why they was being moved, and the supervisor crumpled up and threw away the grievance. The supervisor went to the area where the grievor was working prior to the second incident with the knife.

The discharge would impose a special economic hardship on the grievor because they had limited job skills and does not speak English.

4. If you were the arbitrator, what would your decision be? Provide reasons for your decision.

Student answers could vary on this question; however, they should include references to the factors which arbitrators would consider outlined above. In an actual case similar to the one presented here, *Re Galco Food Products Limited and Amalgamated Meat Cutters & Butchers Workmen Of North America, Local P-1057, 7 LAC (2nd) 350*, the majority of the arbitration board ordered the grievor to be reinstated. The employer representative on the Board dissented. The majority of the Board observed that less serious misconduct has resulted in discharge in a number of cases but

found that the grievor did not intend to harm the supervisor and focused on the mitigating factors in this situation. When the board considered the penalty in this particular case it noted:

- the grievor had seven years of seniority;
- the grievor was a competent employee;
- the event was an isolated incident;
- the offence was not premeditated;
- the actions of the supervisor in the crumpling of the grievance; and
- the penalty of discharge would create a special economic hardship for the grievor because they did not speak English and with a discharge on their record, they would be unlikely to obtain employment.

The board ordered that the appropriate penalty was a suspension until the grievor returned to work. The significance of this is that the employer would not owe any compensation to the grievor. The board also ordered that the reinstatement was conditional upon the grievor apologizing in writing to the supervisor when she returned to work.

It should be emphasized that discipline and discharge situations will be dealt with on a case-by-case basis. It is possible that an employee guilty of less serious misconduct could be discharged if mitigating factors were not established. To make this point even clearer, students could be advised that there are cases of minor theft where a discharge has been upheld. For example, in one case the discharge of an employee who took a muffin was upheld.

RED FALLS TRANSIT AUTHORITY

This case involves a review of an employer job posting and the selection process used by the employer, including testing.

- 1. What arguments would the union make at the arbitration hearing?**
- 2. What arguments would the employer make at the arbitration hearing?**

Possible Union Arguments:

The job posting did not refer to a test and the employer does not have the right to test.

The test administered by the employer is not related to the requirements for the job.

The test was unfairly administered because one of the applicants had previously written the same test.

Given that the test used by the employer is not a valid tool, the results should not be a factor in the selection process. The grievor has skill and ability equal to the successful candidate and should be awarded the position because she has more seniority.

Possible Employer Arguments:

The employer has the right to test, relying on the management rights provision in the collective agreement.

The test relied upon by the employer was based on a job analysis it measures job related ability.

The applicant who previously wrote the test would not have an unfair advantage because their previous test had not been reviewed with them and they did not know the same test was being used.

The successful candidate and the grievor are not equal in ability. The successful candidate has more skill and ability and accordingly seniority is not a factor.

2. As the arbitrator in this case, state whether you would uphold or dismiss this grievance. Give your reasons to support this decision.

This case is based upon the decision in *Re Oshawa Transit Commission and Canadian Auto Workers, Local 222, 110 L.A.C. (4th) 345*. The arbitrator held that employers have the authority to administer tests to measure ability, provided that the tests measure requirements for the job. The arbitrator found that the test was relevant to the job requirements. However, the arbitrator held that the test was not fairly administered. The one applicant had an unfair advantage because they had previously written the same test. Although the results of the previous test were not communicated to the candidate, they would know what type of questions were asked and could prepare for the test, and other candidates would not have been able to do so. The arbitrator ordered that the matter be referred back to the employer so that the skill and ability of all of the applicants could be fairly determined. This could involve the employer administering another test.

This case illustrates the following for employers:

- employers can administer tests in the selection process unless the right to do so has been restricted in the collective agreement;
- tests must measure job related factors; and
- tests must be fairly and ethically administered.

3. As an HRM professional working for RFTA what changes might you make regarding selection testing for unionized job postings?

HRM professionals need to ensure that the selection testing treats all candidates equally and measured to job related or valid knowledge, skills, and abilities.