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Relief valve to vent frustrations

When it comes to grievances, settling the 'losers' and litigating the 'winners' should give an employer credibility and lead to reduced conflict

BY TIMOTHY LIZNICK

"Peace is not the absence of conflict, it is the ability to handle conflict by peaceful means," according to Ronald Reagan, the 40th president of the United States. Through the careful, thorough and rigorous application of the grievance procedure, management can minimize the number of grievances that ultimately reach arbitration. This improves the odds of successful arbitration and the overall climate of labour relations, thus reducing conflict and increasing peace.

In relations between unions and employers, the grievance procedure is the process by which grievances are filed, discussed and carried to arbitration. In turn, arbitration is the mechanism by which conflict is peacefully handled during the life of a collective agreement.

The grievance procedure serves several purposes management should keep in mind. It provides a relief valve for the parties to vent their frustrations, clearing the air and improving the climate of a workplace. It is a process — akin to pleadings and discovery in civil claims — by which the parties gain understanding of the scope of the dispute and discover the case they will have to meet at arbitration. It also gives the parties a chance to explore the possible resolution of a dispute and arrive at a mutually acceptable settlement, avoiding the cost and disruption of arbitration.

Preliminary issues

In most collective agreements, grievances are defined as any difference arising from the "interpretation, application, administration or alleged violation of this agreement, including questions as to whether a matter is arbitrable," according to Ontario's Labour Relations Act, 1995.

It is important, therefore, for management to be intimately familiar with the provisions of the collective agreement. If a grievance does not raise a matter covered by the agreement, an arbitrator might not have jurisdiction and an argument to this effect should be made.

Collective agreements also routinely establish time limits for the processing of issues through the grievance procedure and on to arbitration. Failure to comply with the time limits could, depending on the agreement, result in a matter no longer being arbitrable.

A collective agreement can also specify certain pre-steps and steps through which a grievance must be processed. Failure to follow all of the steps may render it inarbitrable. Similarly, the grievance procedure can establish different processes for different types of grievances (for example, individual, group, policy or union and discipline grievances).

To diffuse the frustration that led to the grievance, and to avoid creating further frustration, objections should be raised at the earliest opportunity. Openness, rationality and predictability in terms of adherence to the requirements of the grievance procedure will reduce a union's frustration.

Raising objections early is also necessary to preserve a company's ability to raise those objections at arbitration. If objections are raised late or only at arbitration, a company can expect to be told they have "waived" the objection and are barred from pursuing it. Therefore, the objections must be verbally raised at the outset of the grievance procedure, or as soon as they arise, and maintained at each step of the procedure.

Each written response to the grievance should also recount that the objections were raised and are being maintained. As well, the response on the merits of the grievance should state it is given without prejudice to the company's objection.

'Relief valve' in a one-on-one

Grievance procedures often have a pre-step in which the employee claiming to be aggrieved must discuss the complaint with her supervisor prior to filing a grievance. Where applicable, this allows the greatest opportunity for the people directly involved to discuss and sort out the problem informally, before it takes on a life of its own. This one-on-one interaction also provides an immediate relief valve for day-to-day tensions in the workplace.

To be successful, supervisors must actively listen and be empowered to deal with complaints in their area. Most importantly, they must be trained with respect to the collective agreement and supported by HR.

Once a formal grievance is filed, the grievance meetings allow the employee and union representative to air their dispute. The dispute can often be deflated if management is perceived as listening, allowing it to be dropped or abandoned.

The key is to actively listen — understanding, interpreting and evaluating what the employee and union are saying, not just repeating what was said. This approach also tends to support the discovery and settlement aspects of the grievance procedure as it promotes a deep understanding of the issue and may shed light on other ways to resolve the dispute.

Discovery looks at who, what, when, where, how

The grievance meeting is also an opportunity for the employer to discover the strengths and weaknesses of the union's case and its own case. At the grievance meeting, the company should directly ask the union to identify the specific provisions of the collective agreement it is alleging were breached. Initially, the company's questions should be open-ended, asking the "who, what, when, where and how" of the alleged breach. It should ask for the identity of persons who may have knowledge of the matter or witnessed the events, as well as any documents or notes the union or employee may have that support their claims.

Once the union has detailed its claim and before responding to the grievance, the company should conduct a thorough investigation. This can mean obtaining signed witness statements and securing key evidence — physical, videographic, photographic, documentary or electronic — before memories fade, data is overwritten and materials are lost.

Once the investigation is complete, the company should respond to the grievance in writing. Some collective agreements require that reasons be given, others do not.

The response will be read by an arbitrator, so this is the first opportunity for a company to set out a compelling defence. It should only say what can be proven and the case should not be overstated. If significant admissions from the union or employee were obtained through the grievance procedure, they should be described in the response. While there may be issues about the admissibility of grievance procedure admissions, there is no downside to recording them in the response.

Settlement

In the grievance meetings, a company should listen for the real needs and interests of the union and employee (these may not coincide) so it clearly understands what each side views as necessary to settle the matter.

Once the investigation is completed, and before responding to the grievance, the strengths and weaknesses of the company's case should be assessed. The company should seek advice and understand its risks. A reasonable approach is to settle the "losers" and litigate the "winners."

If the grievance procedure is not effectively used, a company will likely make these assessments at arbitration or when its lawyer prepares the case prior to arbitration. At that point, the company will have spent a significant amount of money and time preparing for the arbitration, which is often far more than the cost of settlement in the grievance procedure.

Settling winners in the grievance procedure could cause a company to be seen as a pushover among employees and union officials, leading to the filing of many grievances. However, a rational approach, where a company corrects its mistakes and defends its actions when it is right, will strengthen a company's credibility with employees and the union and, over time, reduce the degree of conflict in the workplace.

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