

FEDERATION OF POST-SECONDARY EDUCATORS OF BC
MAY 13, 2026, ANNUAL GENERAL MEETING

UNION REPRESENTATION IN INVESTIGATIONS

PRESENTATION BY:

JESSICA BURKE (SHE/HER)
PARTNER
BLACK BURKE MAYOR LLP



ASHKON HASHEMI (HE/HIM)
AAPS SENIOR MEMBER SERVICES OFFICER
LABOUR RELATIONS



ASSOCIATION OF
ADMINISTRATIVE +
PROFESSIONAL
STAFF AT UBC

**THIS PRESENTATION IS PREPARED FOR THE PURPOSE OF EDUCATION AND INFORMATION. IT IS NOT
INTENDED TO CONSTITUTE, OR SUBSTITUTE FOR, LEGAL ADVICE.*

01

REPRESENTATION RIGHTS AND DISCIPLINE

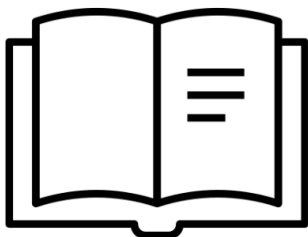
Discipline typically follows an investigation by the employer. Investigations usually (and should) include an interview.

A member's conduct during an interview or disciplinary meeting can be consequential

PRESENTATION OVERVIEW

- 01 Representation Rights
- 02 Preparing for the Investigation
- 03 Attending the Investigation Meeting(s)
- 04 Advocacy Considerations

REPRESENTATION RIGHTS



► From *Brown and Beatty* (7:2130): The expectation is that, with their experience, union representatives can improve the disciplinary process and make it more balanced by giving employees counsel and advice, and by directing the employer's attention to matters that it might otherwise fail to consider.

► The scope of representation rights are derived from the terms of the applicable collective agreement.

CASE EXAMPLE: CITY OF VANCOUVER FIRE AND RESCUE SERVICES V VANCOUVER FIREFIGHTERS' UNION, LOCAL 18, 2022 CANLII 91094 (BC LA) (THE "LOCAL 18 CASE")

The Arbitrator in the Local 18 Case made the following relevant findings:

When are Union representation rights triggered?

- Employees have a right to Union representation in meetings called for the express purpose of investigating that employee's conduct for disciplinary purposes or to issue discipline.
- Once that purpose is within the Employer's reasonable contemplation, the Union must be notified, and the employee has the right to seek representation.
- Employees also have the right to representation in meetings called for a different purpose if and when the purpose changes such that the meeting assumes a disciplinary component concerning the employee interviewed. At the moment a meeting becomes aimed at investigating an employee's conduct for a disciplinary purpose, the Employer is required to notify the Union so that the employee may seek Union representation.

THE LOCAL 18 CASE (CONTINUED)

Where a union is entitled to notice of a disciplinary meeting under a collective agreement, what does this entail?

- The effect of "notice" in these circumstances is to facilitate the union's representative role
- Notice should include, where known:
 - A general statement of the event(s) the employer is investigating;
 - When and where the event(s) happened; and,
 - Who was involved
- These categories of information comprise the essential elements sufficient for the union and employee to understand the matters the employer intends to address at the meeting
- It is open to a union representative to ask the employer if it can provide additional information at the meeting

THE LOCAL 18 CASE (CONTINUED)

What is the Union's role in investigation meetings?

- The role of a Union representative in a disciplinary meeting is to represent the Union and the employee, in a relationship of equals with the Employer, and that this includes:
 - Acting as an advocate, a spokesperson and as an advisor, in a similar capacity to a lawyer;
 - Giving advice and support;
 - Assisting the employee in explaining the circumstances surrounding the incident under investigation;
 - To argue on the employee's behalf that an employment offence did not occur, or if it did occur, to argue for a minimal level of discipline;
 - To act as a witness to the investigation; and
 - To gain a good understanding of the issues.
- While the Respondent to a complaint of harassment or bullying would have access to this level of robust representation, the result of the City's arguments at arbitration is that Complainants have less rights in this regard. Contrary to the Union's arguments at arbitration, it was held that the Employer may place limits on the Union's role in representing Complainants pursuing harassment / bullying complaints, so long as the limits are reasonable.



6

THE LOCAL 18 CASE (CONTINUED)

Can employees be disciplined for remaining silent at an investigation meeting pending arrival of their union representative, when they have a reasonably held belief that a disclosure may expose them to discipline?

- An employee questioned at a meeting held for non-disciplinary purposes who reasonably believes that answering certain questions will expose them to discipline, may invoke a qualified right to remain silent, until they can get the advice of a Union representative.
- An employee's decision to remain silent when accused of wrongful conduct by his/her employer does not form a proper basis for discipline, except that an employee cannot deceive or mislead their employer and they cannot knowingly allow their silence to damage the legitimate business interest of the employer; that would form just cause for discipline.

In my view, the relevant point to be taken from the above-noted authorities, is that an employee questioned at a meeting held for non-disciplinary purposes, and who arrives at reasonably held belief that a disclosure will expose them to discipline, may invoke a qualified right to remain silent, until such time as they can obtain the advice of a Union representative. Absent the presence of overriding harm to the Employer's legitimate interests, an employee's silence during this period, standing alone, will not constitute just and reasonable cause for discipline.

(para 62)



8

BENEFIT TO THE EMPLOYER

It is not just the Union and the employee who benefits from having a representative present, there are benefits to management as well.

Union representatives can:

- Facilitate due process
- Encourage employee to tell the truth
- Calm the employee
- Expedite the investigation
- Prevent confrontations
- Provide reasoning for the impugned conduct

UNION'S INVESTIGATION



- ▶ Ask the member their version
- ▶ Document
- ▶ Review appropriate policies
- ▶ Past similar issues
- ▶ Duty of Fair Representation

02

PREPARING FOR THE INVESTIGATION

Unions should adequately prepare their members for workplace investigations and should when appropriate also conduct their own investigation(s) of the alleged circumstances to avoid the risk of arbitrarily relying on an Employer's flawed investigation.

 10

PREPARING THE MEMBER FOR THE INVESTIGATION

” Tell the truth!



Personal knowledge



Answer only the question asked, you will have a chance later to add other details



Slow down



Wait to answer the question so the representative can process it



Own it - Closing statement

 12

WHO SHOULD BE THE REPRESENTATIVE AND HOW MANY?

Right
representative
(Union's
choice)

Multiple
representatives

Different
representatives

"Can I bring a
lawyer"

13

03

DURING THE INVESTIGATION MEETING(S)

- Take notes - Write answers and questions

- Control the pace of the meeting

- Ensure Collective Agreement compliance

- Support your member

- Prevent your member from having outbursts

- Caucus when needed

- Object where appropriate

- Do not obstruct - the Employer is entitled to get "the story"

- Ask your own questions

- Do not put your own credibility on the line

15

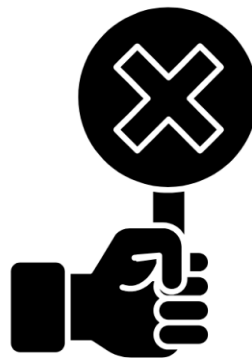
OUTSIDE INVESTIGATOR : DOES IT MAKE A DIFFERENCE?



- ▶ Agent of the employer.
- ▶ Not a neutral third party.
- ▶ Retained by the employer, paid by the employer, directed by the employer - for present purposes, they are the employer.

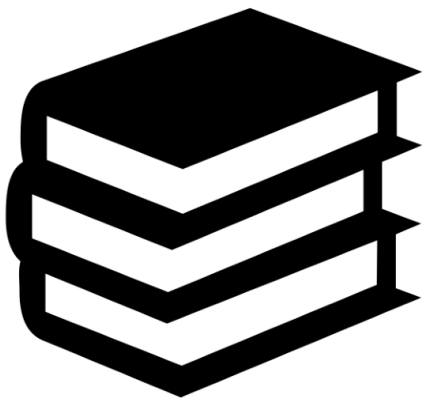
OBJECTIONS

- ▶ Questions that are leading or assume an answer
- ▶ Questions that are vague/double-barreled/confusing
- ▶ Questions that ask the member to speculate
- ▶ Questions that misstate the evidence
- ▶ Questions about communications between the member and Union



PROCEDURAL FAIRNESS

1. Presumption of innocence
2. Right to notice of the nature of the issue to be decided
 - what are you accused of?
3. Right to know your accuser
 - who said you did the thing you are accused of?
4. Disclosure
 - what evidence is relied upon?
5. Opportunity to make full answer and defense
 - present your own answers and defence
6. Opportunity to respond
7. Employer duty to consider ALL of the evidence, not just the evidence that supports its theory
8. Right to decision-maker who is free from bias
9. Right to be free from delay that causes prejudice
10. Reasons, ideally written for decisions made



KEY PRINCIPLES FROM CASELAW ON DISCIPLINE

04

ADVOCACY CONSIDERATIONS WHERE REPRESENTATION RIGHTS ARE CONTRAVENED

Employer's overall
conduct with respect
to due process

Reasons for Employer's
conduct (e.g. mere
inconvenience vs.
perishable property)

Force of Collective
Agreement language

Degree of misconduct

Prejudice to the
Grievor

What happened in the
meeting, e.g.
inappropriate
questioning; ridiculous
lie; no questioning

Representation is an
institutional Union
right, so consider
impact on Union as
well

18

FRAMEWORK FOR DECISIONS TO PLACE EMPLOYEES ON ADMINISTRATIVE SUSPENSION PENDING INVESTIGATION

From *Ontario Jockey Club v Service Employees International Union, Local 528 (Suspension Grievance)*, [1977] OLAA No 4:

- The issue is not whether the grievor is guilty or not guilty, but whether the presence of the grievor in the workplace gives rise to a serious and immediate risk.
- The simple fact that an allegation has been raised does not satisfy the onus of establishing that there is a risk. The employer must also establish that the nature of the allegation is such that it would potentially harm the employer's reputation, product, other employees, customers or would render the employee unable to properly perform their duties.
 - With respect to assessing potential harm to an employer's reputation, "the public's perception is to be judged not on the standard of sensationalism and superficial over-reaction, but on tested and relevant information; what 'a fair-minded and well-informed member of the public ... may think'" (*Toronto District School Board and CUPE, Local 4400 (XY)*, Re, 2013 CarswellOnt 8216 (Gray)).

20

Framework for decisions to place employees on administrative suspension pending investigation

From *Ontario Jockey Club v Service Employees International Union, Local 528 (Suspension Grievance)*, [1977] OLAA No 4:

- The employer must investigate the allegation in an attempt to assess the risk of continued employment.
- The employer must take reasonable steps to ascertain whether the risk of continued employment might be mitigated (e.g. through reassignment of duties).
- There is a continued onus on the employer to consider reinstatement of the employee when new facts or circumstances come to light. These matters are to be evaluated in light of the reasonable risk to the employer's interests.

21

AGGRAVATING AND MITIGATING FACTORS FROM *WILLIAM SCOTT* (RE: PART 2 OF THE TEST)

1. How serious is the offence of the employee which precipitated the discipline (for example, the contrast between theft and lateness)? (Consider company policy and training, e.g. safety.)
2. Was the employee's conduct premeditated, or repetitive; or instead, was it a momentary and emotional aberration?
3. Does the employee have a record of long service with the employer in which they proved an able worker and enjoyed a relatively free disciplinary history?
4. Has the employer attempted earlier and more moderate forms of corrective discipline of this employee which did not prove successful in solving the problem (for example, of persistent lateness or absenteeism)?
5. Is the discipline of this individual employee in accord with the consistent policies of the employer or does it appear to single out this person for arbitrary and harsh treatment?
6. Did the employee participate in the investigation in a candid and forthcoming manner?
7. Is the contemplated discipline progressive (corrective) or is it punitive?
8. Does the employee take responsibility and express remorse and insight with respect to misconduct?
9. Is there a medical condition causing or contributing to the conduct in question?
10. Did the employee misunderstand what was expected of them (accidental / negligent dereliction of duty vs. deliberate)?
11. Whether certain (wage loss penalties) would impose a special economic hardship for the employee in light of their particular circumstances - e.g. if they are the sole breadwinner / have particular financial burdens.

23

TEST FOR DETERMINING WHETHER DISCIPLINE IS EXCESSIVE

The following test derives from *Wm. Scott & Company Ltd. and Canadian Food and Allied Workers Union, Local P-162*, 1976 CarswellBC 518 (“*William Scott*”):

- 1) Has the employee given just and reasonable cause for some form of discipline by the employer?
- 2) If so, was the measure of discipline an excessive response in all of the circumstances of the case? (i.e. considering relevant aggravating and mitigating factors)
- 3) If the measure of discipline is deemed excessive, what alternative measure should be substituted as just and equitable?

 22

TEST FOR DETERMINING WHETHER EMPLOYER POLICY RESULTING IN DISCIPLINE IS ENFORCEABLE

Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd., 965 CarswellOnt 618 (“*KVP*”)

“KVP Test” - Set of criteria to assess whether unilaterally imposed employer rule or policy is valid and reliance on it is legitimate:

1. The rule must not be inconsistent with the Collective Agreement;
2. The rule must not be unreasonable;*
3. The rule must be clear and unequivocal;
4. The rule must be brought to the attention of the affected employees before the Employer can act on it;
5. The affected employees must be advised that a breach of the rule could result in discipline; and
6. The rule must have been consistently enforced by the company from the time of its introduction.

* Reasonable = balancing of interests; not arbitrary / discriminatory

 24

TEST FOR DETERMINING WHETHER OFF-DUTY CONDUCT IS DISCIPLINABLE (CONTINUED)

Millhaven Fibres Ltd. & Oil, Chemical and Atomic Workers Int'l Union, Local 9-670 (Mattis Grievance), [1967] OLAA No. 4, factors in determining whether Employer can discipline for off-duty conduct:

1. the conduct of the grievor harms the employer's reputation or product;
2. the grievor's behaviour renders the employee unable to perform his duties satisfactorily;
3. the grievor's behaviour leads to refusal, reluctance or inability of the other employees to work with him;
4. the grievor has been guilty of a serious breach of the Criminal Code, and thus rendering his conduct injurious to the general reputation of the Company and its employees; or
5. places difficulty in the way of the Company properly carrying out its function of efficiently managing its Works and efficiently directing its working forces.

"The public's perception is to be judged not on the standard of sensationalism and superficial over-reaction, but on tested and relevant information; [and] what a fair-minded and well-informed member of the public ... may think of the off-duty misconduct" (*Re British Columbia (Workers Compensation Board) and C.E.U. (Campbell) (1997)*, 64 LAC (4th)401 (Glass), at p. 414.

THANK YOU

JESSICA BURKE, PARTNER
BLACK BURKE MAYOR LLP
LABOUR & EMPLOYMENT LAWYERS

EMAIL:
JBURKE@BLACKBURKEMAYOR.COM

PHONE:
(604) 632-3396



ASHKON HASHEMI, SENIOR MEMBER
SERVICES OFFICER, LABOUR RELATIONS
ASSOCIATION OF ADMINISTRATIVE +
PROFESSIONAL STAFF AT UBC

EMAIL:
ASHKON.HASHEMI@UBC.CA

PHONE:
(604) 822-8972



ASSOCIATION OF
ADMINISTRATIVE +
PROFESSIONAL
STAFF AT UBC