The Grievance Arbitration Process

Learning Objectives

To understand…

- What a grievance is
- The various types of grievances
- The grievance procedure
- The duty of fair representation
- The standards of proof in arbitration
- The role of an arbitrator

Introduction

- Even the best negotiators cannot create a perfect collective agreement
  - The parties have different concerns that may not be addressed in the agreement
  - The agreement may simply be the most satisfactory settlement, not the ideal
  - Conditions in the workplace may change after the agreement has been signed
- How can the union and the employer settle disagreements about the interpretation, application, or administration of a collective agreement?
  - Strikes and lockouts are prohibited while a collective agreement is in effect
  - Canadian labour legislation provides for a process called **grievance arbitration**
    - The process is also referred to as **rights arbitration** (≠ interest arbitration)
    - Interest arbitration is used during the negotiation process and determines the terms and conditions of the collective agreement itself
    - Rights arbitration is concerned with the rights of the employer, the individual employees, and the union that arise from the interpretation, application, or administration of the collective agreement

Definition of a Grievance

- The term “grievance” is generally used to describe an allegation that one or more of the terms of the collective agreement have been violated
  - The Supreme Court of Canada has recently held that all employment and human rights statutes are automatically incorporated into agreements, and so a grievance can also be filed whenever it is claimed that such legislation has been violated
  - However, not every complaint arising in the workplace is a grievance
  - From the union’s perspective, a grievance occurs when the employer violates the collective agreement by either taking or failing to take a specific action
    - Example: if the collective agreement states that shift work schedules must be posted two weeks in advance, and the employer posts them only one week in advance, then there is potential for a grievance
  - It is far more common for the union to file grievances against the employer
    - The employer controls the day-to-day operations in the workplace
    - Most grievances filed by employers against unions are the result of union actions related to work stoppages during the term of a collective agreement

Types of Grievances

- Four general types of workplace grievances
  - **Individual grievances**: the action taken or not taken by the employer specifically affects an individual employee (discipline is a common cause)
    - Example: the employer suspends an employee for being late once, and the collective agreement says that suspension is the final disciplinary measure
  - **Group grievances**: the action taken or not taken by the employer affects a number of employees in the same manner
    - Example: the collective agreement outlines layoff criteria and the employer misapplies those criteria to the detriment of a particular group of employees
  - **Continuing grievances**: grievances involving an ongoing practice
    - Example: the employer refuses to consider seniority when scheduling shifts, and the collective agreement specifies seniority as a criterion
  - **Policy grievances**: the action of the employer affects all employees
    - Example: the employer interprets holiday pay provisions in a certain way (note that all employees have to receive holiday pay)

Timeliness of a Grievances

- A grievance commences when the affected individual or group of individuals know, or ***ought to reasonably know***, that an action (or lack of action) violates the collective agreement
  - This implies that the employer, the union, and the employees should be familiar with the collective agreement and aware of what might cause a grievance
  - It also implies that any parties affected by an alleged violation of the collective agreement have a responsibility to make their concerns known as soon as possible
- If the party filing a grievance fails to quickly report the alleged violation, there are two problems that may arise
  - The employer may dismiss the grievance on the basis that the practice has been ongoing and no previous complaint has been filed, which is an indication of the fact that the employees (and the union) have in effect accepted the practice
    - This is known as the principle of **past practice**, which is a form of **estoppel**
  - The eventual remedy granted may be affected (e.g., only applicable from the time when the complaint was made, not from the time when the practice began)

Steps in the Grievance Procedure

- Step One: **Filing the Grievance**
  - The person or party initiating the grievance is referred to as the **grievor**
  - The grievance is submitted orally or in writing, with or without the assistance of a shop steward, to the immediate supervisor or to the HR department
  - In most situations, the employee is expected to "grieve, then work"
    - Exception: the alleged violation puts the employee in a dangerous situation (e.g., if the supervisor orders the employee to ignore the safety rules in the collective agreement, the employee can file a grievance and refuse to work)
  - Most grievance procedures include time limits for each step (10 to 14 days)
    - The purpose of these time limits is to ensure that grievances are not ignored in the hope that the grievors will abandon their complaints
    - However, the time limits can be waived by mutual consent
    - If the matter is not resolved during the stated time limit, the grievance automatically proceeds to the next step

Steps in the Grievance Procedure

- Step Two: **Formal Complaint and Investigation**
  - A formal written grievance is submitted to the next level of management
    - Most unions have a grievance form that the grievor fills out with the assistance of a shop steward or grievance committee member
  - The union and employer start investigating the facts surrounding the grievance
    - The investigation usually involves interviewing the grievor, the immediate supervisor allegedly involved in the grievance, and any witnesses, as well as collecting any physical evidence (e.g., payroll records or work schedules)
  - Once the investigations are complete, the shop steward or the grievance committee meets with management (typically middle-level management)
    - Both sides present their evidence and position
    - A resolution is desirable at this point because it allows both parties to retain control of the issue and its solution (no interference from higher levels)
  - If the grievance is not resolved at this step within the specified time limit, it automatically advances to the next step

Steps in the Grievance Procedure

- Step Three: **Final Attempt Before Arbitration**
  - The union business agent, along with a local union executive member, meets with senior management representatives
    - Step-three grievances are usually considered important enough to be discussed as part of regularly scheduled labour-management meetings
    - As before, both sides present their evidence and position
    - After discussing the evidence, the parties attempt to reach a solution
  - This is the last opportunity for the union and management to resolve the issue and control the outcome of the grievance without input from a third party
    - Failure to reach a satisfactory settlement at this step within the specified time limit leads to the option of arbitration
  - The union must decide whether the grievance justifies proceeding to arbitration
    - If the union chooses not to proceed to arbitration and decides to abandon the grievance, it may be subject to a complaint from one or more of its members that it has abandoned its **duty of fair representation**

Duty of Fair Representation

- The duty of fair representation means that a union (as well as an employers' association) must not act toward its members in a manner that is:
  - **Arbitrary**: the union must not act in a way that is superficial, capricious, indifferent, or reckless with regard to the members' interests
    - Example: the union collects evidence that clearly indicates a violation of the collective agreement, but refuses to pursue the grievance
  - **Discriminatory**: the union must not be influenced by factors such as race, religion, gender, and/or age
    - Example: the union refuses to pursue a grievance only because the grievor is female and/or of Asian descent
  - **In bad faith**: the union's decisions must not be influenced by dishonesty, personal hostility, or revenge
    - This can be difficult to determine if there is a history of bad relationships between the union and the grievor (e.g., the grievor has previously filed several unsuccessful grievances on the same issue)

Duty of Fair Representation

- If a union member decides to file a complaint against a union for failing to fairly represent him or her, the procedure usually involves several steps
  - The union member submits a standardized form to the labour relations board
  - The board decides whether to accept or reject the complaint
  - If it accepts the complaint, the board begins an investigation, and if warranted, holds a hearing to determine whether the complaint is justified
    - Note, however, that the board will not investigate the actual grievance
  - If the board finds that the union did not fairly represent the member, a common remedy is for the board to order the union to proceed with arbitration

The Grievance Arbitration Process

- Arbitration is the only step in the grievance procedure where both the union and the employer can have a decision imposed on them by a third party
- Appointment of an arbitrator
  - The initial selection of a single arbitrator or an arbitration panel is left to the mutual agreement of the parties
    - Sometimes the parties may choose to appoint a tripartite arbitration board
    - In this case, each party chooses one member, and then both parties (or the initial two members) jointly choose a third member who will act as chair
  - This agreement is usually reached during the collective bargaining process
    - A collective agreement may contain a list of names of individuals who are acceptable to the parties as arbitrators during the term of the agreement
    - If the parties are unable to reach such an agreement, the arbitrator is usually appointed by the labour relations board on the request of the parties
  - Because of the importance of mutual agreement in this context, grievance arbitration is sometimes referred to as **consensual adjudication**

The Grievance Arbitration Process

- Arranging an arbitration hearing
  - The most common method of investigating the grievance is through a hearing
    - The arbitrator presides over the hearing much like a judge in a court case
  - Most hearings are held near the location of the employer in a neutral facility
    - Example: a hotel meeting room
    - It is important that the location be perceived as neutral
    - If the employer let the arbitrator use a room on the employer's premises, there might be concerns about undue influence on the arbitrator
  - The arbitrator can issue a **subpoena** to compel witnesses to testify at the hearing
  - The arbitrator can also request relevant documentation relating to the dispute

The Grievance Arbitration Process

- Costs of an arbitration hearing
  - Costs include:
    - Rental of hearing space
    - The arbitrator's fees and expenses
    - Recording and transcribing the proceedings
    - Any legal assistance the parties may choose to hire
  - The union and the employer pay their own costs for the hearing
    - These include legal fees, lost time and wages for the participants (such as the grievor and union or management representatives), and one-half of the arbitrator's fees and other costs associated with the hearing
    - The arbitrator's costs include a fee for conducting the hearing, a writing fee for the time spent rendering an award, and travel and per diem expenses
  - The average cost per side for a one-day hearing has been estimated at $15,000

The Grievance Arbitration Process

- Preliminary issues in an arbitration hearing
  - At the start of the hearing, the arbitrator confirms that both parties agree that he or she has jurisdiction under the collective agreement to hear the issue in dispute and to determine an award
    - The question of the arbitrator's jurisdiction and authority is crucial because the law only empowers the arbitrator to rule on whether an interpretation, application, or administration of the collective agreement is correct
    - The arbitrator is not empowered to change the collective agreement
  - Any objections concerning the timeliness of the grievance, or whether the issue in question constitutes a grievance, are also raised before the arbitrator
    - The law allows the arbitrator to hear the grievance regardless of any breaches of time limits or other procedural requirements in the collective agreement, if he or she believes that there are grounds for doing so

The Grievance Arbitration Process

- Procedural onus
  - "He who alleges must go first and prove"
    - Since it is usually the union that files a grievance, it is usually the union that proceeds first in the hearing and bears the onus of proving its allegation of a violation of the collective agreement
  - The major exception to this rule is a grievance arbitration that involves the discipline or discharge of an employee
    - In this case, the onus is on the employer to prove that the discipline or discharge was justifiable because the employer is best able to explain the reasoning behind its discipline or discharge decision

The Grievance Arbitration Process

- Standard of proof
  - The standard of proof usually used in arbitrations is the **balance of probabilities**
    - This is the standard used in most civil proceedings
    - The party alleging a violation of the collective agreement must prove that, "on balance", its version of the facts or events is true
    - The "balance of probabilities" standard is more liberal than the standard of "beyond a reasonable doubt", which is used in criminal proceedings
  - However, for certain offenses that lead to discipline or dismissal (e.g., theft of company property), the standard of **clear and cogent evidence** is used instead
    - This standard is stricter than the standard of "balance of probabilities", but not as strict as the standard of "beyond a reasonable doubt"
    - It requires that sufficient relevant evidence should be provided to convince the arbitrator that the grievance is or is not justified

The Grievance Arbitration Process

- Order of proceeding
  - The parties make their opening statements
  - The parties call their witnesses (the grievor, the supervisor, other employees, etc.)
    - The party calling a witness to the stand has the first opportunity to ask questions of the witness (this process is called **direct examination**)
    - When direct examination has concluded, the witness is cross-examined by the other party (this process is called **cross-examination**)
    - When cross-examination has concluded, the first party has a limited right to re-examine the witness (this process is called **re-examination**)
    - The arbitrator may also ask questions of the witness
    - The witness may be asked to present physical evidence (personnel records, memos, etc.), and the arbitrator can rule on the admissibility of evidence
  - The parties make their closing arguments (the first party has a limited right of reply that allows it to make a brief response to the second party's closing argument)
  - The arbitrator formally adjourns the hearing

The Grievance Arbitration Process

- Creating the arbitration award
  - After the hearing is adjourned, the arbitrator retires to write the arbitration award
  - Some collective agreements prescribe time limits within which the arbitration award must be written
  - The award usually contains the following elements:
    - A summary of the evidence
    - The arbitrator's assessment of the evidence
    - The arbitrator's verdict (along with the reasons)
    - The arbitrator's prescribed remedy if the grievance is found to be legitimate
    - Any direction for the implementation of the remedy (e.g., a deadline)
  - When the award is completed, it is sent to the union and the employer
  - When the award is received, the grievance arbitration process formally concludes
  - Arbitration awards are designed to be final and binding

The Grievance Arbitration Process

- Creating the arbitration award (continued)
  - It is possible to appeal an arbitration award in civil court
  - Labour legislation restricts the use of this process to reinforce the fact that the arbitration award is the final resolution of the grievance
  - Appeals may be permitted if one or both of the parties can show that:
    - The arbitrator was biased in some fashion
    - The arbitrator did not follow the correct procedure in conducting the hearing
    - The arbitrator ruled on matters outside his or her jurisdiction or on matters not related to the issue he or she was asked to arbitrate
    - The arbitrator fundamentally misunderstood or misinterpreted the collective agreement language involved in the grievance
  - A successful appeal of an arbitrator's award is very rare
    - Most experienced arbitrators are careful not to put themselves in situations that might be later interpreted as grounds for an appeal of their award

Problems with the Traditional Grievance Arbitration Process

- Speed of the process
  - Although the intent of the grievance arbitration process is to resolve workplace issues in a timely manner, grievances can take up to one year to be resolved
    - This time is measured from the point when the grievance is initially filed to the point when an arbitration award is issued
- Formality and legality of the process
  - Although the grievance arbitration process was designed to be informal, its adversarial nature often leads to the involvement of lawyers
    - This provides consistency and rigour, but my intimidate witnesses and may negatively affect the labour-management relationship
- Cost effectiveness of the process
  - The involvement of lawyers increases the cost of the process
    - This may discourage the parties from pursuing valid grievances, or may encourage one party to use the process to financially damage the other party

Changes to the Union and the Employer

Learning Objectives

To understand…

- What successorship is
- The criteria used to assess whether successorship has occurred
- The process of decertification
- What happens to certifications and collective agreements when unions or companies merge
- Some of the ways that technological change and restructuring affect union-employer relationships

Introduction

- Certifications and collective agreements reflect the status of the union and the employer at the time when they were completed
  - A certification is considered to be in effect indefinitely
  - A collective agreement lasts for a predetermined period of time
- What happens if a change occurs after a certification begins or a collective agreement goes into effect?
  - What happens if workplace conditions change?
  - What happens if there is a change in the status of the parties named in the certification order or in the collective agreement?

Successorship

- In labour legislation, the term **successorship** relates to the status of a certification after some material change in a business or employer occurs
  - If a labour relations board determines that the past and present forms of the business are sufficiently similar, then successorship is declared to exist
  - In this case, the employer is bound by the terms of any certification or collective agreement – or any other formal relationships with a union – that existed in the earlier form of the business
- The question of successorship can arise in a number of different situations
  - A change in the location of the business (e.g., the employer moves the location of the business, expands the business to new locations, or closes existing locations)
  - The business is sold or transferred to a new owner
  - The purpose of the business changes or broadens (e.g., the business moves into new products or services that are not related to those of the original business)
  - The employer transfers work to other locations or to other workers or organizations through subcontracting

Successorship

- What happens when there is a change?
  - One of the parties can apply to the labour relations board to determine whether a **declaration of successorship** should be issued
  - If a declaration of successorship is issued, it has the effect of applying the existing certification or collective agreement to the new form of the business
    - Unless the board declares otherwise, the new employer is automatically bound by the existing certification or collective agreement
    - If different unions or collective agreements are involved, the declaration clarifies which employees are in the new bargaining unit, which union is their new bargaining agent, and which collective agreement is in force
  - A declaration of successorship can also apply to situations where the employer is involved in some union-related process that has not yet been completed
    - Examples: a certification campaign, a notice to commence collective bargaining, a case that is before the labour relations board, etc.
    - The purpose of this is to discourage the employer from attempting to avoid its obligations to the union by selling or changing the business

Successorship

- In assessing whether successorship exists, the labour relations board looks for evidence of continuity or control between the two forms of the business, and/or evidence of anti-union animus in the employer's actions
  - Because circumstances may vary considerably from case to case, there are no hard and fast rules to determine whether successorship has occurred
  - Anti-union employers can be quite creative, and so the labour relations board is often called upon to judge new situations
  - The existing legislation gives some guidance, but it is only a starting point
  - Many criteria used to determine successorship have developed through case law (i.e., decisions on previous cases that interpret and apply the wording of the law)
  - In successorship cases, as in cases of unfair labour practices by the employer, the onus is on the employer to prove legitimate business reasons for its actions

Successorship

- Federal legislation governing successorship
  - Any employer or trade union affected can apply for a declaration of successorship
  - Situations that may be considered successorship include sale, transfer, lease, or other disposition of a business
  - If successorship exists, the labour relations board can determine an appropriate bargaining unit as well as any other questions arising
- Quebec legislation governing successorship
  - Any interested party can apply for a declaration of successorship
  - Situations that may be considered successorship include alienation or operation by another in whole or in part of an undertaking, including judicial sale
  - If successorship exists, the labour relations board can rule on any matter arising, can determine applicability of legislation, can issue any order deemed necessary, and can settle any difficulty arising out of the application of the legislation

Successorship

- General guidelines underlying decisions on successorship cases
  - Evidence on **continuity**
    - Continuity refers to any connection between the two forms of the business
    - It could be demonstrated by financial records showing that two supposedly separate businesses are incorporated as a single entity, or by evidence that an allegedly new business is honouring discounts issued by an old one
    - Continuity is more important in the sale, lease, or transfer of a business
  - Evidence on **control**
    - Control refers to how much direction the management or owners of the previous business give to the new business
    - It could be demonstrated in a situation where the owner of a unionized business establishes a non-unionized business with separate management, but gives directions to the management of the new business
    - Control is more important when a new business is established, or some of the operations of an existing business are assigned elsewhere
  - Note that it is not necessary to prove both continuity and control

Successorship

- Other criteria considered when determining questions of successorship
  - Direct contact (between the owners/managers of the previous business and the owners/managers of the successor business)
  - Transfer of assets
  - Identification (e.g., transfer of a logo or trademark)
  - Transfer of customer lists
  - Transfer of accounts receivable, existing contracts, and/or inventory
  - Pledges by the successor to maintain the good name of the predecessor, or pledges by the predecessor not to compete with the successor
  - Whether the same employees perform the same work
  - Whether there was a hiatus in business between the two companies
  - Whether the customers of the predecessor business are now serviced by the successor business
  - The key person doctrine (successorship may exist if the successor business includes essential individuals from the previous business)

Decertification

- During the term of a certification or collective agreement, union members may decide that they no longer want to be represented by the certified union
  - They may be dissatisfied with the union or may no longer wish to have a union
  - In order for any change to be made to the designated bargaining agent, the existing certification must be nullified
  - The process used to cancel the certification is called **decertification**
  - Decertification provides a way for members to hold their unions accountable
- Specific timelines restrict when decertification applications can be made
  - In the federal jurisdiction and Quebec, the timelines are the same as for certification in a previously unionized workplace

Decertification

- Decertification criteria mentioned in the labour codes
  - ***Federal***: a majority of employees in the unit must support the application; a vote may be held if the board deems it appropriate; if no collective agreement exists, the board must be satisfied that reasonable effort was made to obtain one
  - ***Quebec***: the labour relations board may cancel the certification if the association has ceased to exist or if it no longer comprises an absolute majority of employees in the bargaining unit
- Other conditions stipulated in the labour codes
  - ***Federal***: if certification was obtained by fraud, an application can be made at any time by a concerned employee, employer, or union
  - ***Quebec***: an association may be dissolved if it is proven that the association is dominated or financed by the employer or its representative; the association has the opportunity to be heard and to attempt to prove that it is blameless

Decertification

- The decertification process is similar in structure to certification
  - An application must be made to the labour relations board showing sufficient level of support for decertification among bargaining unit members
    - In the federal jurisdiction and Quebec, the minimum level of support required for a decertification application is higher than in the case of a certification application (50% + 1 vs. 35%)
    - The board conducts the same process of verification of support as it would for a certification application (the process is somewhat easier, though, since the bargaining unit is already defined)
  - In the federal jurisdiction and Quebec, a decertification vote is ***not*** required
    - If held, it is a secret-ballot, yes/no vote conducted by the board
    - The vote is successful if the majority (50% + 1) of bargaining unit members indicate that they do not want to be represented by the union
  - Following a successful decertification vote, the board issues a decertification order, and the union ceases to legally represent the employees

Union Mergers

- The merging of existing unions is a relatively recent trend in Canada
  - Mergers help unions maintain their existence or increase their bargaining power
  - Mergers are also a response to the general trend toward larger organizations (larger unions may be needed to match larger employers)
  - Union mergers may also be forced by company mergers
- Union mergers have different effects on existing certifications
  - If two unions decide to merge, they apply to the labour relations board for a change in their existing certification orders (usually, a vote is not needed)
  - If a business merger results in two unions representing the employees of a single company, and no union merger is possible, the employees are usually asked to select one of them in a vote
    - The vote determines which union will represent the employees
    - The agreement negotiated by that union will be in effect until it expires

Technological Change

- Technological change may create new situations that are not adequately addressed by existing collective agreements
  - Technological change encompasses any change in the tools used to perform a job that leads to a change in the way the job itself is done
- Four ways to address technological change
  - If an existing agreement is close to its expiry date, the effects of technological change may be addressed during the forthcoming bargaining process
  - Some jurisdictions (including the federal, but not Quebec) have legislation that specifically deals with technological change (see next slide)
  - Some jurisdictions (including the federal and Quebec) have legislation that provides for the inclusion of a **reopener clause** in collective agreements, which allows for the renegotiation of parts of an agreement while it is still in effect
  - In jurisdictions with no legislation, the employer can introduce changes by virtue of the management rights clause (unless the agreement imposes limitations)

Technological Change

- Technological change legislation in the federal jurisdiction
  - Employers must give at least 120 days' written notice of proposed change
  - The notice must include:
    - The nature of the change
    - The proposed date of the change
    - The approximate number and type of employees affected
    - The effect that the change is likely to have
  - After the notice is issued, the union applies to the board for an order permitting the commencement of collective bargaining to revise or replace terms in the existing collective agreement
  - The change may not take place until the board rejects the union's request or the collective agreement has been revised

Workplace Restructuring

- Changing economic conditions may lead to another type of change during the life of a collective agreement: workplace restructuring
  - Workplace restructuring includes:
    - Downsizing in the workforce
    - Work being partially or completely shifted to other locations or companies
    - Changes in working conditions or work redesign
  - Most collective agreements have language in place to deal with layoffs
- The union's role in workplace restructuring
  - The doctrine of **management rights** holds that the employer has the unchallenged right to decide on whatever workplace changes it deems appropriate – unless the collective agreement specifically states that the union must be consulted
  - The doctrine of **implied obligations** suggests that the union and the employer share the responsibility for the regulation and administration of the workplace, which implies that the union should be involved in workplace restructuring

Workplace Restructuring

- The union's role in workplace restructuring (continued)
  - It is unclear whether the employer is legally compelled to include the union in the planning and/or implementation of restructuring efforts
  - However, the employer must ensure that restructuring does not undermine or bypass the union’s legal role as representative of the bargaining unit members
    - Requesting input from employees may be seen as bypassing the union
    - Changes need to be driven by legitimate business reasons
    - Changes should not contravene the existing collective agreement