

# Conducting Workplace Investigations

*Maria Zacharias*



- Ensure that your disciplinary decision will be upheld.
  - Need contemporaneous evidence of misconduct to defend a disciplinary decision. And, need to show due process.
- Avoid liability for bad faith conduct if terminating the employee.
  - Employers have an obligation of good faith and fair dealing in the manner of dismissal of an employee. Aggravated/punitive damages resulting from the manner of dismissal are available if they result from conduct that is unfair or in bad faith.
  - *Lyons v. Deputy Head (Correctional Service of Canada)*, LAX/2023-050: Employee, a correctional officer, terminated based on the allegation that she was moving drugs between inmates. The Employer based its investigation on this erroneous conclusion. She was awarded \$135,000 in aggravated damages due to mental distress. And, \$175,000 in punitive damages for denial of natural justice and the Employer advancing a false allegation.
- Avoid liability for failing to meet other legal obligations, including under the *Human Rights Code*.
  - For example, Employer may face liability for failing to provide a workplace free from harassment and discrimination.

When any disciplinary action is taken, the **onus of proof** is on the employer to defend the decision.

- Must have “just cause” to justify the penalty imposed.
- If bias is perceived, the decision will likely not be upheld.
- A third-party investigation will not satisfy the requirement.
  - *BC Public School Employers Assn. v. British Columbia Teachers' Federation*, [2022] B.C.C.A.A.A. No. 53: Grievor was a school teacher terminated for inappropriate sexual behaviour in relation to a student. Employer reported the matter to the police and did not conduct its own thorough or timely investigation, relying on the police investigation. The Arbitrator found in the Employer’s investigation “failure to critically assess and corroborate the story they were accepting as true.” Grievor awarded \$20,000 aggravated damages for mental distress.
    - *“To the extent the Employer relied on what the police told them about the case against the Grievor, they did so at their peril.”*

# Before Investigating...

- **Consider whether the employee needs to be removed from the worksite.**

- 11.9 Employee Investigations

- (a) The parties agree that in certain situations it may be in the best interest of both clients and employees that employees be reassigned or removed from all job sites during an investigation of conduct.

- In cases where an employee cannot be reassigned, then the employee will be considered to be on leave of absence ***without loss of pay*** until the Employer has determined there is a *prima facie* case for imposing discipline.

- **Advise the union.**

- 11.9 (c) The Employer will notify the union designate when an investigation of conduct has been initiated...

- An Investigator should be identified immediately, and creates the Investigation Plan.
  - Usually, this will be the employer's HR manager.
  - No perception of bias.
  - The Investigator must have expertise and experience with workplace investigations.
- In some cases, an external investigator is the best option.

An Investigation Plan is essential for an investigation with complexity. Especially where serious discipline is imposed, the disciplinary decision will attract scrutiny, and the employer will need to defend its **process**.

## Benefits:

- Demonstrates due process.
- Organizes the Investigator's tasks.
- Maximizes efficiency.
- Ensures steps are not missed.

## INVESTIGATION PLAN

Completed by: x  
Date: x  
Date of complaint: x

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### Background

*Employee Name:* [EMPLOYEE NAME]

*Position:* [e.g. Community Support Worker (permanent part time)]

*Job Duties:* [e.g. Provides support and guidance to adults with developmental disabilities in the community and day service setting. Assists in physical, emotional, social, vocational and recreational development in a manner that promotes dignity, independence and community inclusion.]

*Description of Allegation(s):* [e.g. On [DATE] at approximately [TIME] it was reported to us by 2 employees, Employee A and Employee B, that [EMPLOYEE NAME] was witnessed throwing a water bottle at the non-verbal client [NAME] she was supporting in the park.]

The alleged behaviour may constitute a breach of the following Employer Policies: \_\_\_, Article \_\_\_ of the Collective Agreement, etc.

*Initial Evidence Gathered:* [e.g. Employee A provided photographic evidence of alleged incident at park.]

### Issues

Does the evidence support (Article violation / Policy violation, etc.)...?

### Investigation Plan

1. Interview Employee A and Employee B about the above-noted allegations.
2. Interview Employee under investigation about the above noted-allegations.
3. Obtain any documentary evidence from interviewees.
4. Adjust investigation plan as becomes necessary as the investigation is conducted.
5. Draft an investigation report with findings and provide summary of the report to Employee under investigation.

- Identify complainant(s)
- Identify respondent(s)
- Identify allegation(s)
- Identify all known witnesses
- Identify and attach relevant policies and statutory obligations
- Identify evidence in possession / potential evidence not yet obtained
  - Examples: Logs, video, photos, etc.



- **Establish: Who? What? Where? When?**  
**How? Why?**
- Key method: interview complainant(s) and other witnesses.
  - Article 11.9(c) – Any employee who is interviewed in the course of an investigation will have the right to union representation at such an interview.
  - Consider actual and potential evidence presented by witnesses.
  - Maintain confidentiality.

- Always attempt to validate oral testimony with documentary evidence.
  - Don't just take the witness's word for fact – check logs, etc.
  - Always ask if there were other witnesses.
  - Ask for documentary evidence in advance.
- “Authenticate” documentary evidence by presenting it to the witness.

## Interview the Employee Under Investigation (the “Respondent”)

- Employees are not permitted to refuse to cooperate and expect to be immune from any adverse employment consequences. The “work now, grieve later” principle applies to investigatory interviews.

## TEMPLATE – INVESTIGATION INTERVIEW REQUEST

[TO BE RETYPED ON AGENCY STATIONERY]

[DATE]

[EMPLOYEE]

[ADDRESS, CITY, PROVINCE, POSTAL CODE]

Dear [EMPLOYEE]:

### ▲ Re: Investigation Interview Request

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This letter will serve to confirm that your attendance is requested at an investigation meeting scheduled for [DATE].

As discussed, [AGENCY] has received a formal complaint regarding your conduct and as a result has launched an investigation. The allegations include \_\_\_\_\_. At this meeting, you will have the opportunity to respond to the allegations. Please provide any relevant documentary evidence in your possession or control at the meeting.

In accordance with Article 11.6 (a), an employee shall have the right to have a steward present at any interview which might be the basis of disciplinary action. As such, we are providing you with an opportunity to do so. If you decide you do not wish union representation, please sign **the attached form** and return it to me before the beginning of our meeting.

Also as discussed, no retaliation will, or can, be taken against any employee for submitting a written complaint in good faith, or for participating in an investigation. It is our expectation that every employee should be able to report legitimate complaints, free of fear of repercussion. Any employee who retaliates against a complainant or a witness involved in an investigation will be subject to disciplinary action, up to and including dismissal.

## **Investigator:**

- Prepare questions in advance.
- In your prepared questionnaire, leave space for additional questions that arise.
- End with a “scoop” question.

## **Note-Taker:**

- Ensure that another manager is present to witness the interview and to take verbatim notes.
- Record the date, time, location, the note taker and all persons present at the interview.
- Don't editorialize.
- At the conclusion of the interview, read notes to witness or offer the witness the opportunity to review your notes and sign.

EXAMPLE INTERVIEW OF EMPLOYEE BEING INVESTIGATED

Investigatory Interview: *Name of Employee Being Investigated*

Date: \_\_\_\_\_

Time: \_\_\_\_\_

Location: \_\_\_\_\_

Present:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_
5. \_\_\_\_\_
6. \_\_\_\_\_

Reason for Investigation / Introductory Comments:

1. *Thank you for meeting with us today. This is an investigatory interview, and it may lead to a disciplinary response. No conclusions will be reached until the evidence is obtained and reviewed.*
  2. *We are here to speak to you about certain alleged behaviours/incidents in the workplace.*
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## Introductory Comments

- Introduce the witness to the investigative process.
- Explain that the interview is for fact-gathering purposes only.
- Explain the importance of the matter at issue. Emphasize that you are relying on the employee's honesty.

## Questions

- Establish the factual background (i.e. were you at work on this date?).
- Ask open-ended questions (i.e. tell us what you remember about the incident).
- Ask for specifics (who, what, when, where, why, how).
- Ask one clear question at a time.
- Ensure the answer responds to the question.
- Avoid leading questions, especially in areas of potential contention or key relevance.
- Review relevant documents with the witness (ex: documents, policies, etc.).
- Obtain independent evidence.

**Note:** Prepare questions in advance to ensure most important points are investigated. BUT – always improvise and explore different avenues of investigation as they arise.

## ***Example question:***

1) “We were informed by your coworker that you improperly administered the incorrect medication to a client under your care. Why did you do this?”

## Issues:

- Question assumes wrongdoing.
- Does not allow for meaningful response.
- Factual basis not established – no date or approximate timeframe.



## ***Better questions:***

- 1) We received a report of an incident that allegedly occurred on September 21, 2023. Were you at work on that day?
- 2) Do you recall anything out of the ordinary occurring on that date?
- 3) There is an allegation that on September 21, 2023, you improperly administered medication to a client under your care. Please describe, in detail, what occurred.
  - Follow up with questions eliciting more detail (**who, what, where, when, how, etc.**).
- 4) Did you report this incident to anyone?
- 5) Were there any witnesses to this incident?
- 6) Are you aware of *\*employer policy\** regarding medication errors?
- 7) Were you aware at the time of the incident that you violated this policy? If so, why did you do so?
- 8) Is there anything else you would like to share with us regarding this incident?

- Summarize the evidence
  - Identify facts in dispute and not in dispute.
- Consider perspectives and explanations.
- What facts are established by the evidence?
  - *CUPE v. Wood Buffalo*, 2017 CanLII 13744: Employer's failure to carry out a thorough and considered investigation or permit the employee to respond to the allegations indicated that the employer prejudged the matter without conducted the required analysis. The grievor was reinstated with full compensation.
- What most likely happened?
  - Set out your reasons for determining the most likely outcome. Analyze the evidence.
  - Assess **credibility**.

The union is entitled to receive an investigation summary:

## Article 11.9

(b) The Employer will make every effort to complete its investigation within 14 days. The Employer will provide the Union with a summary of the investigation report. This summary sheet is on a "without prejudice" basis and will not be referred to by either party in any third party proceedings.

Include:

- Background information;
- How investigation was conducted;
- Findings; and
- Conclusions.

## Privacy

- *Canadian Broadcasting Corporation v Canadian Media Guild*, 2021 CanLII 761:
  - Employer ordered to pay damages for violating privacy in the course of investigation.

## Human Rights

- When employer has reason to be aware of a potential protected characteristic under the *Human Rights Code*, this must be considered and investigated in the course of a disciplinary investigation. If not:
  - Discipline may not be upheld; and
  - Additional damages will likely be awarded.

## Final comments...

- Approach investigations on a case-by-case basis.
- Every case is unique.
- Consult your CSSEA contact early.

# Performance Management

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1. What is performance management
2. Factors influencing employee performance
3. Coaching and performance counselling
4. Conducting performance evaluations
5. Probationary period

# Performance Management Definition

*Performance management is an ongoing process of communication between a supervisor and an employee that occurs throughout the year, in support of accomplishing the strategic objectives of the organization.*

*Good performance management means not waiting for issues to arise, and instead takes a proactive approach.*

*The communication process includes clarifying expectations, setting objectives, identifying goals, providing feedback, and reviewing results.*



- Culpable Conduct
  - Employee is capable of carrying out expectations and chooses not to meet expectations
  - Respond with coaching or discipline, depending on the severity of the behaviour
- Non-culpable Conduct
  - Employee is not capable of meeting expectations
  - Not the fault of the employee
  - Respond with performance mgmt.
- Hybrid

## **Expectations and Feedback**

- Is the employee aware of job expectations and standards?
- Has the employee received feedback on how well she is performing?

## **Tools and Resources**

- Potential challenges: Equipment, policies, work environment, mentorship, inadequate staffing

## **Consequences and Incentives**

- Appropriate consequences for poor performance
- Incentives for good performance

## **Skills and Knowledge**

Training and experience

## **Capacity/Personal Traits**

Having ability to learn

Traits bring to the job (e.g., emotional intelligence, social skills, personality)

## **Motivations**

Attitude towards job – what is their work ethic?

# Performance Mgmt. Planning – Where to Start?

- Establishing performance standards
- Sources for rules and expectations:
  1. Employer Mission & Vision
  2. Employer Strategic Plan
  3. Employer Policies & Procedures
  4. Collective Agreement
    - a) Probation and trial periods (Art. 11.8 & Art. 24.5)
    - b) Performance evaluations (Art. 24.14)

## 5. Legislation

*a) Human Rights Code*

*b) Workers Compensation Act and  
Regulations*

*c) Child, Family and Community Service  
Act and Regulations*

## 6. Job descriptions

## 7. Logbooks/communication books

## 8. One-on-one discussions

On whom do you spend most of your time?

- High performers?
- Average performers?
- Poor performers?

## **Poor performers**

1. No ownership or accountability
2. Resentment
3. Work unevenly distributed
4. Overall performance of program/worksites declines
5. Issues spiral and snowball
6. Overall damage to team morale
7. Toxic workplace

## **Good performers**

1. Unappreciated
2. Low morale
3. Disengagement

Consequences: “slacking off” or resignation



# Planning a Performance Mgmt. Meeting

1. What is the purpose of the discussion?
  - a) Why are you meeting with the employee?
  - b) What do you hope to achieve?
2. What might be the root cause of the performance problem?
3. What reaction do you anticipate? What objections might be raised?
4. Provide as much notice as you can to your employee.
5. Meet with them at a convenient time and location.
6. Allow adequate time for a fulsome discussion.

## **Initiate**

- Establish purpose of the meeting

## **Clarify**

- Describe the performance or behaviour observed
- Ask the employee for their perspective
- Listen actively
- Establish a shared understanding of the employee's current performance or behaviour

# Performance Evaluation Meeting Format

<b>Develop</b>	<ul style="list-style-type: none"><li>• Together with the employee explore solutions to performance problems</li><li>• Brainstorm goals and opportunities for improved performance</li></ul>
<b>Agree</b>	<ul style="list-style-type: none"><li>• Agree on the steps both you and the employee will take</li><li>• Create goals</li></ul>
<b>Close</b>	<ul style="list-style-type: none"><li>• Express confidence in the employee</li><li>• Encourage the employee</li><li>• Set a follow-up date</li></ul>

<b>Expectations</b>	<b>Goals</b>
<ul style="list-style-type: none"><li>• Non-negotiable</li><li>• Apply to everyone</li><li>• Rooted in policy, JD, laws</li></ul>	<ul style="list-style-type: none"><li>• Built upon expectations</li><li>• Set for improved performance</li><li>• Set for enhanced performance or career development</li></ul>

- Used to identify or clarify expected behavior in the performance of job duties
- Outlines the employer's expectation in writing
- Specific to the conduct being discussed
- Provide evidence that you have had the discussion
- Non-disciplinary; not grievable; not caught by sunset clause

# Letter of Expectation vs. Discipline Letter

	<b>Letter of Expectation</b>	<b>Disciplinary Letter</b>
<b>Type</b>	Non-disciplinary	Disciplinary
<b>Purpose</b>	To counsel and communicate To identify or clarify expected behaviour in performance of job duties	To correct poor performance or undesirable behaviour Discipline is needed to achieve correction
<b>Intention and Tone</b>	Helpful and supportive – does not reference specifics – could be on any employee's file	Corrective – consequences of further misconduct identified
<b>Usage</b>	Not referenced as basis for increased discipline Only referenced to show that employee was aware of expectations	Referenced as basis for increased discipline Often the first step in progressive discipline for employee

1. Provide an opportunity for the employee to conduct a self-assessment
2. Review where performance met, exceeded or did not meet expectations
3. Summarize the learning and development needed and received
4. Review the goals and work priorities that were set and achieved by the employee
5. Provide the opportunity to recognize and if appropriate reward performance
6. Establishes a basis for future comparisons
7. Provides reference material for selection decisions

# Collective Agreement and Performance Evaluation

(Article 24.14)

- Employee given a copy of evaluation
- Employee required to sign and indicate whether she agrees or disagrees with evaluation
- Employee may initiate a grievance if she disagrees with evaluation however she must sign the evaluation indicating she disagrees with it
- Unless there is an order from an arbitrator either amending or removing the evaluation the employer's version stays on the employee's file
- Nothing in the collective agreement that prohibits self evaluations (do all or none)



# Preparing for Performance Evaluation

- Review employee's job description. Does it reflect work currently performed by employee?
- Review documentation kept throughout year, both on accomplishments and items needing improvement
- Allow enough time before meeting to think and reflect on events of past year

# Writing Performance Evaluation

- Specify the review period on form
- Begin with an overall statement summarizing how well employee did in category
- Follow with specific examples to support rating (more examples for very high or very low ratings)
- End positively – encourage employee to continue good work, challenge them to a higher goal next period, and/or ask for performance improvement
- Develop an action plan

- Identify behavior or performance that's a problem and should be stopped, changed, or started
- Explain to employee why it's a problem and ensure employee understands why it cannot continue
- Describe expected behavior and set targets to meet end goal – what employee will do and by when
- Set check points or progress review times
- Conclude with written statement that improvement and continued performance at improved level is expected
- Both parties should agree to plan or work together to make it acceptable
- Employee should sign the action plan and receive a copy

- Managing performance during the probationary period is essential. Performance management does not start after probation and is perhaps more important during.
- The probationary period affords the employer an opportunity to assess the employee's suitability.
- If an employee does not perform well, they may fail to pass probation, resulting in a rejection and termination of employment.
- The test for rejection during probation is dissimilar to that of a cause dismissal.

# Test of Suitability

- The employee was clearly advised they must complete a probationary period.
- The employee was clearly advised of the performance expectations they would have to meet in order to satisfy the probationary review.
- The performance expectations were reasonable.
- The employee was advised of their performance shortcomings prior to the expiry of the probationary period and was shown how to improve.
- The employee was given a fair opportunity to demonstrate improvement.
- The employee was warned that a failure to improve performance would lead to their rejection from employment.
- Note: it is always best to keep written records of the above!

# Probationary Period Tips

1. Noting assessment dates and probationary period expiry date
2. Rejecting before end of probationary period
3. Serving one probation period only
4. Extending the probation period – absence due to illness, could not evaluate performance?
5. Document! Document! Document!



# Management Rights in a Unionized Workplace

*Mike Jackson*





# Common Workplace Settings

Employers experience challenges to their rights in many circumstances.

- Misconduct Investigations
- Collective Agreement Interpretation
- Labour Management Meetings
- Progressive Discipline
- Job Postings
- Safety

# Purpose

- Assist in understanding management's rights
- Provide a foundation for the source of management rights
- Recognize challenges to management rights
- Prevent erosion of management rights

# Where do management rights originate?

- Common Law - evolved over time in the employment relationship.  
Supervisor/Subordinate relationship
- Collective Agreement - Article 7, Employer's Rights

## Article 7 - Employer's Rights

“The Union acknowledges that the management and direction of employees in the bargaining unit is retained by the employer, except as this agreement otherwise specifies.”

- One sentence in the entire Collective Agreement
- It carries a lot of weight
- Collective Agreement represents limits to employers' rights (broadly)
- Managers encouraged to consider what is not contained in the Collective Agreement

# Limits to Employer's Right - Macro

- Legislation
- Collective Bargaining
- Government Ministries
- Government Agencies
- Arbitration Decisions
  
- **Examples:** Statutory holidays, paid sick time, vaccination/masking requirements, safety regulations (WSBC), human rights decisions, drug and alcohol testing, etc.

# Limits - Micro (day-to-day impacts)

- **Employees**

- Requests/demands (e.g., early vacation requests, apply for posting without qualifications)
- Grievances

- **Unions**

- Training for stewards and senior representatives
- Education for membership - provide interpretations that are the most favourable for employees

# Examples of Challenges to Employer Rights

## 1. Setting the Organizational Structure and Restructuring

The employer decides:

- What work is to be carried out
- How many positions and their F.T.E.
- When the program operates (days of week and schedule)
- Skills required/Job descriptions
- Challenges?

# Organizational Structure/ Restructuring (*continued*)

## Job Postings

When an existing position is vacated, the employer may choose to:

- Re-post the position as is
- Eliminate the position/Create a different one
- Increase/decrease the F.T.E.
- Change the schedule
- Add on-call/standby requirement
- Challenges?



## 2. On-Call / Standby

- The employer has the right to require employees to work on-call.
- Employees/Union tend to dislike on-call so resist this management right.
- Article 14.7, Standby Provisions: employees required to be on standby will be paid one dollar per hour for a minimum of four hours.
- Who requires? The employer.
- Challenges?

## 3. Investigation Meetings

Employers experience significant attempts to erode their rights when investigating misconduct and harassment.

### *Examples:*

- Leave the meeting before complete.
- Union argues questions are inappropriate.
- Threaten personal lawsuit against manager.
- Threaten humiliation to manager/employer in a grievance/arb.
- Refuse to meet/delay.

# Advice for Investigation Meetings

What can the employer do to combat these tactics?

- Hold meetings on scheduled work time and direct the worker to attend. Refusals = insubordination.
- If employee threatens to leave, advise they are directed to attend and leaving will be considered insubordination. They will be suspended without pay until the employer's questions have been answered.
- (Note: this advice specific to investigation meetings)
- The employer is entitled to complete answers, so follow up questions are very important.
- Courage is key. Overcome the intimidation tactics.

# Summary

- These are just three topics where management rights are eroded; there are many others.
- Don't let them take your rights - be courageous but be respectful.
- Remember Article 7 - If an issue is not contained in the Collective Agreement, the employer has the right to decide. Employees have the duty to work now, grieve later.
- Two of these topics have no language providing management rights (investigation, restructuring) and the third, minimal (standby).

## Summary (*continued*)

- Each of these topics has Collective Agreement language limiting your rights so employers need to be aware.
  - Steward present for investigation meetings.
  - How to post and select successful candidates when a position is posted.
  - How to pay employees who are placed on-call.
- Employers need to conduct themselves professionally and fairly with staff and are advised to consider when is the best time to exercise their rights.

# Case Study

## New Flyer v. N.A.A.T.G.U. (2011)

- The employer introduced CCTV cameras in new areas of the plant citing safety and security needs.
- Union grieved on the grounds of worker privacy and video was used for discipline too. No serious threat to safety nor evidence of significant theft problem.

### Arbitrator Findings

- Management's right to protect its interests balanced against employees' reasonable expectation of privacy.
- Only covert surveillance requires employer to exhaust all other means.
- Surveillance was not unduly intrusive - not monitored.
- Grievance dismissed. Video for discipline is a legitimate exercise of MR.



# Grievances - Article 9

*Joanna May*





# THE COMMONLY FIELDDED QUESTIONS

- 1. I received a grievance and I am not sure what to do?**
- 2. The union has filed the grievance late. Can they do that?**
- 3. The union filed the grievance right at step 2, 3, or straight to arbitration!?**
- 4. Can we settle the grievance before going to arbitration?**
- 5. What is a mediation?**
- 6. What is the difference between expedited arbitration and full arbitration?**
- 7. Who pays for the cost of mediation and arbitration?**
- 8. Can the employer file a grievance?**

# RESPONSES COMMONLY GIVEN

## 1. *I received a grievance and I am not sure what to do?*

Look to **Article 9.2 – 9.7** and familiarize yourself with the timelines.

Set the timelines in your Outlook Calendar!

If necessary, seek agreement from the Union to extend the timelines.

Send the Union some date & time options to meet within 10 days to examine the facts using the agreed to **“Shared Fact Sheet”**.

Provide your **official response** to the grievance within 14 days of receiving the grievance but not before meeting with the Union to examine the facts.

Formal Response: **“No Violation of the Collective Agreement. Grievance denied.”**

# RESPONSES COMMONLY GIVEN

## ***2. The union has filed the grievance, or referred a grievance to arbitration outside of the timelines. Can they do that?***

Yes. They can.

The Employer should note within the official grievance response that the grievance is being filed beyond the timelines of the collective agreement.

*Ex. "Grievance denied. No breach of the collective agreement. Additionally, the grievance has been filed outside of the time lines indicated within the collective agreement."*

Notify CSSEA if a grievance is filed, or referred to arbitration outside of the timelines within the collective agreement.

CSSEA will help determine if the Employer has been prejudiced by missed timelines, and determine whether or not a preliminary objection or timeline argument should be made.

# RESPONSES COMMONLY GIVEN

## ***3. Can the union file a grievance right at step 2, 3, or straight to arbitration?***

Yes. They can.

**Article 9.11, “Dismissal or Suspension Grievance”:**

*(a) In the case of a dispute arising from an employee’s dismissal, **the grievance may be filed directly at arbitration** within 30 days of the date on which the dismissal occurred, or within 30 days of the employee receiving notice of dismissal.*

*(b) In the case of a dispute arising from an employee’s suspension, **the grievance may commence at Step 2 or 3 of the grievance** procedure within 30 days of the date on which the suspension occurred, or within 30 days of the employee receiving notice of suspension.*

## ***4. Can we settle the grievance before going to arbitration?***

Yes. We can.

There is time to settle a grievance even after referred to arbitration and in fact it is encouraged by the arbitrators.

Once a grievance has been referred to arbitration, your CSSEA Consultant has conduct of the file and the Union should correspond directly with CSSEA.

Following consultation with the employer, CSSEA may put forward a settlement offer to see if there is appetite for the union and the Grievor to settle prior to arbitration.

CSSEA will continue in discussions with the union representatives and/or counsel communicating the employers position while parties try and reach a resolve.

If all efforts fail, the file will continue on to arbitration.

## *5. What is a mediation?*

Mediation is a less formal process than arbitration.

When agreeable by both parties, a mediator will be appointed to hear opening statements from both the employer and the union and will work with the parties to help settle a dispute prior to going to arbitration.

If a file has already been referred to arbitration the parties can still agree to a mediation date before then to attempt to settle the file.

When a file can be settled in mediation the employer is paying for “**certainty of outcome**” opposed to leaving the final and binding decision up to the arbitrator at arbitration.

## *6. What is the difference between expedited arbitration and full arbitration?*

Under **Article 10.9** grievances can be referred to Expedited Arbitration.

The Arbitrator will hear the grievance and will aim to render a decision within 2 business days of the hearing.

The process is more informal than a full arbitration, and several files can be heard over the course of one day.

X-Arb is quicker, less onerous and stressful, only 1 witness is called and there are no cross examinations.

There are cost savings as the cost of the day is split amongst potentially multiple employers and the union.

All settlements of expedited arbitration cases prior to hearing will be without prejudice.

## ***7. What is the difference between expedited arbitration and full arbitration?***

Under **Article 10.2**, where a party has requested that a grievance be referred to arbitration, an arbitrator will be selected from an agreed upon list under Appendix B.

The arbitrator will hear and determine the difference or allegation and make every effort to render a decision within 30 days.

The process is more formal than an expedited arbitration. Depending on the file it may be heard over several days.

The cost of full arbitration is greater as it is split amongst the sole employer and the union.

Decisions from full arbitrations will be made public and can be relied on for future files.



## ***8. Who pays for the cost of mediation and arbitration?***

Under **Article 10.6**, “Expense of the Arbitrator”, *“Each party will pay one half of the fees and expenses of the Arbitrator.”*

Under **Article 10.9(h)**, “Expedited Arbitration”, *“The parties will equally share the cost of fees and expenses of the Arbitrator and hearing rooms.”*

When considering settlement offers, employers should consider the cost of the upcoming mediation and/or arbitration dates and costs.

# RESPONSES COMMONLY GIVEN

## ***9. Can the Employer file a grievance?***

Yes. They can.

*Under **Article 9.15**, “Management Grievance”, “The Employer can initiate a grievance at Step 3 of the grievance procedure by the Employer or designate presenting the grievance to the President of the Union or designate. Time limits and processes are identical to a union grievance.”*

## The Issue:

On June 17, 2019 the employer terminated the employment for the Grievor.

- The collective agreement provides that grievances concerning discharge shall be submitted at Step 2 of the grievance procedure.
- The collective agreement requires the Employer to respond in writing to the grievance.
- On September 3, 2019 the General manager provided the Employer's written response by placing it in the Union's mailbox at the plant.
- If the matter is not resolved at step 3, the grievance may be referred to arbitration by the Union which shall notify the Employer of its intent to seek arbitration by written notice, within thirty (30) calendar days of "completion of Step 3".
- The Union did not become aware of the response in the mailbox until October 17, 2019.

## The Issue:

On June 17, 2019 the employer terminated the employment for the Grievor.

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## The Issue Continued:

- Following the discovery of the Employer's response on October 17, 2019 there were certain discussions between the Employer and the Union.
- Ultimately on November 27, 2019 the Union submitted a written letter to the Employer indicating that it was referring the matter to arbitration.
- The Employer objected to the arbitrability of the grievance on the basis that the Union did not refer the matter to arbitration within 30 calendar days of completion of step 3 which took place when the Employer placed its response in the Union's mailbox at the plant.
- The Union argued that Step 3 was not completed until at least October 17, 2019 when the Union discovered the Employer's letter.
- The parties agreed that the Employer's preliminary objection based on timelines would be heard in advance of any consideration of the merits of the grievance.

## Summary of Arguments Advanced by the Employer:

- The 30 day time limit to refer the matter to arbitration is mandatory and not merely directory.
- There was no agreement by the Employer to extend the time limits for referring the matter to Arbitration. Nor did the Employer waive any timelines.
- Employer correspondence to the Union, including grievance responses, are regularly placed in the Union mailbox.
- The fact that the Union failed to review its mailbox for a period of more than 6 weeks is of no consequence.
- The Union did not notify the Employer of its intent to seek arbitration until nearly 3 months after the letter was placed in the Union's mailbox.

## Summary of Arguments Advanced by the Union:

- The Union does not regularly check its mailbox. When the Unit Chair is away from work, the Union's mailbox may not be checked for more than two weeks.
- The Union did not deliberately fail to press the Grievor's rights.
- There was no reasonable basis for the Employer to believe that the matter had been resolved.
- There is no evidence of any detrimental reliance or prejudice to the Employer. The length of delay was minimal.
- The delay took place during the grievance process rather than at the outset of the dispute.
- The nature of the grievance involves a termination which is obviously a very serious matter. The Grievor should not be prejudiced by these events.

## The Arbitrators Summary:

- I consider that the factor of the nature of the grievance weighs strongly towards granting the extension.
- I consider the length of the delay to be neutral.
- I consider the reasons for the delay to weigh somewhat against granting the extension.
- The fact that the Grievor was not at fault for the delay weighs somewhat in favour of granting the extension.
- The fact that the delay took place part way through the process weighs in favour of the extension since the Employer would not have been prejudiced in its defense of the grievance.
- The factor of whether the Employer would have reasonably concluded the grievance to be abandoned is somewhat neutral.
- The language of the Collective Agreement weighs somewhat in favour of not granting the delay.



## The Arbitrators Conclusion:

- I find that the Union missed the time limit and that the time limit is mandatory.
- Normally this would mean that the grievance is non-arbitrable. However, I exercise my authority under the *Labour Relations Code* to extend the timelines for referring the matter to arbitration.
- As a result I dismiss the Employer's preliminary objection and direct that the hearing on the merits of the grievance proceed.
- Given the Union's delay in referring the matter to arbitration, any order of compensation that is made in the event that the grievance succeeds shall not include the 1 month 10 day period of delay.

QUESTIONS??