Whose Business Is It Anyways? Arbitrator Finds Union Steward Attending Diving Course During Working Hours Was Conducting Union Business



Bottom Line

In *Ontario Power Generation v. Power Workers' Union*, an arbitrator held that taking a diving course during working hours was union business for a union steward who represented members of the employer's dive team. The arbitrator also concluded that the employer unreasonably delayed beginning the discipline process for over a year. Ultimately, the arbitrator overturned the union steward's 20-day suspension for time theft.

Background Facts

The employee was the Chief Steward representing members of the Power Workers' Union ("PWU") in Ontario Power Generation's ("OPG") Advanced Inspection and Maintenance Division ("AIM"). In this role, he represented members on the AIM Dive Team.

In July 2022, the employee asked his supervisor whether OPG would cover 75% of the costs of an introductory Open Water Diving Course, a prerequisite for the more specialized diving courses required to become a member of the AIM Dive Team. The collective agreement provided that OPG would reimburse 75% of external training costs if the training "create[d] the employee's capability for future jobs within the Company" as long as the training occurred outside working hours. The collective agreement also provided that OPG would reimburse 100% of external training costs if the training:

- "create[d] or maintaine[d] an employee's capability related to current job performance"; or
- "create[d] an employee's capability for a position identified in a succession, retraining or redeployment plan."

Management declined the request to cover any of the diving course costs. The employee then sought 100% reimbursement on the basis that the diving course would assist him in his current role as Chief Steward for members of the AIM Dive Team.

Without getting management's agreement on reimbursement, the employee proceeded to enrol in the diving course and attended the course from Friday, August 26, 2022 until Sunday, August 28, 2022. As he was on union release on Friday, August 26, 2022, he recorded his time as "union business" and was paid for that day. Shortly after, the employee submitted a claim for 100% reimbursement of the diving course costs. OPG denied the claim and the employee grieved (the "reimbursement grievance").

On November 9, 2022, during preparation for the reimbursement grievance, OPG discovered that the employee had inputted his time attending the dive course on Friday, August 26, 2022 as "union business". However, OPG did not notify the employee of its concerns that this was time theft until March 29, 2023 –at the mediation of the reimbursement grievance. Not until August 31, 2023 did OPG notify the employee of a disciplinary interview regarding the time theft allegation and other unrelated allegations. On November 20, 2023 – more than a year after discovering the alleged time theft – the Company suspended the employee for 20 days.

The Arbitral Decision

The PWU grieved the suspension, arguing that OPG did not have just cause for discipline because the diving course was "union business" relevant to the employee's representation of members of the AIM Dive Team. The PWU also raised concerns with OPG's delay in investigating the issue, stating that such delay prejudiced the employee. Finally, the PWU alleged that the discipline was in part motivated by the employee's union activity.

OPG maintained that the discipline was appropriate because the employee had falsely inputted his attendance at the diving course as "union business", showing a "fundamental lack of honesty and integrity" that went to the foundation of the employment relationship.

The arbitrator ultimately allowed the grievance, finding that the diving course was sufficiently connected to the employee's position as Chief Steward to be union business. Specifically, the technical and safety training provided during the diving course would assist him in representing AIM Dive Team members, especially about health and safety issues. The arbitrator found that there was no evidence that the employee took the course for personal reasons, and he did not try to cover up the fact that he attended the diving course during working hours. As a result, the arbitrator concluded that the employee had not engaged in time theft as alleged by OPG.

The arbitrator also agreed with the PWU, that had discipline been warranted, OPG's delay in investigating would have contributed to mitigating that discipline. By November 9, 2022, OPG was aware of a potential time theft issue but did not interview the employee until September 2023 and did not issue discipline until November 20, 2023, more than a year after discovering the issue. The arbitrator concluded that this delay was unreasonable, as OPG had not provided evidence that sufficiently explained the delay. Moreover, the arbitrator found that the delay had significantly prejudiced the employee because the passage of time likely impacted the recollection of key individuals, including the employee himself.

Takeaways

An employer should not discipline union stewards for time theft without carefully analyzing whether a steward's activities on company time can be found to be "union business". This decision affirms that many types of activities may be "union business" if there is a sufficient nexus to the steward's union duties.

If the employer concludes that a steward is abusing their right to conduct union business during working hours, the employer must act within a reasonable time in issuing discipline. If delay is unavoidable, employers should be prepared to provide concrete evidence explaining the delay. Because memories fade, an unreasonable delay in imposing discipline may result in an arbitrator setting aside the discipline entirely.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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