

Issues of confidentiality in the workplace

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Are all of my discussions with my HSA steward confidential?



While conversations between you and your steward may not normally be considered privileged, any information which is exchanged between you or collected by the steward *for the purposes of settlement negotiations* will be considered privileged and will not need to be disclosed in any future arbitration which may result.

Public policy encourages the parties to try and settle matters between themselves in order to reduce the costs of proceeding to arbitration.

Often, in preparing for arbitration, one party may request documents or information in the possession of the other party. Where the documents or perhaps notes of a conversation were prepared for the purposes of settlement or were prepared in contemplation of litigation, the party holding the documents may claim "privilege" and refuse to disclose them.

If the parties in any labour relations dispute had to worry about having to disclose any notes or documentation of discussion relating to efforts to settle a grievance before it got to arbitration, no one would ever want to try to settle the matter in an informal way. A significant number of our grievances settle before they reach arbitration or they may be settled in the course of the arbitration when the arbitrator mediates. All of the offers made by the parties in the course of the settlement negotiations are on a "without prejudice" basis so that they will not be used against the party if the matter does have to proceed to an arbitration.

Therefore, for example, if an employer says that they have justly terminated an employee with cause and that she is not entitled to any financial remuneration whatsoever, they may, in the course of negotiations, make an offer to the union which includes a cash settlement, letter of reference, cleaning up the employees record or any other number of options.

If the matter is not resolved informally between the parties and does proceed to arbitration, the union cannot then turn around and produce evidence to the arbitrator that the employer had offered to make a cash settlement to the employee holding this out as evidence of the fact that the employer recognizes that the employee has been wrongfully discharged. If this were the case, no employer would ever offer to settle before arbitration. Rather, any offers by either side are held to be confidential.

Also any conversations or documents arising in the course of preparing for arbitration may be considered to have "litigation privilege." These may include reports or notes of interviews with potential witnesses prepared to assist in the conduct of the case. The rationale for this privilege is that preparation of cases might be discouraged if unfavourable material had to be disclosed for use by the other side. Thus, rather than preparing thoroughly, a party to a labour relations dispute might be reluctant to pursue some avenues for fear of turning up damaging evidence, which they would then have to provide to the other side. Also, it would be unfair to allow one party in a dispute to take advantage of work done by the other side in preparation for the hearing.

Litigation privilege is not limited to material prepared by a lawyer. It can apply to documents prepared by other persons in anticipation of litigation. It clearly applies to documents prepared by stewards and union representatives. There are two tests that are applied to determine whether any conversations or documents may claim litigation privilege. Firstly, the material has to be prepared at a time when an arbitration was pending; or, if an arbitration was not yet pending, it could reasonably be contemplated as a possibility. Secondly, the material has to be prepared for the purposes of that arbitration.

In this context, where one party is demanding the documents of another party, the arbitrator will examine closely what was in the minds of the parties at the time when any conversations were held or any documents were prepared. There have been cases where it was found that notes taken by a steward were prepared for several different reasons but that the dominant purpose was in furtherance of the grievance, which of course would ultimately end up at arbitration.

As long as the conversations were held or the documents were prepared in contemplation of litigation (arbitration), the union can claim litigation privilege.

In this way, labour relations law tries to assist parties in working matters out informally between themselves and to save everyone the expense and inconvenience of having to proceed to a full hearing in every case.

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