

Supreme Court of Canada Decision on “Whistleblowers”

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You're the boss. An employee comes into your office to report unlawful acts supposedly conducted by your organization or its employees. What do you do?

What if you question this employee's credibility? What then?

Until relatively recently, these were not questions that most employers spent much time thinking about ahead of time. That is changing. Today, any organization would be well advised to have policies and procedures in place to deal with what have been called “whistleblowers” – employees who report suspected corporate misdeeds.

The law, both federally and provincially, is being extended to address whistleblowers and these extensions make it clear that an employer needs to be both prepared and cautious when dealing with whistleblowing situations.

The Criminal Code was, for example, recently amended to make it an offence for any employer or a person acting on behalf of an employer to punish, or to threaten to punish, an employee for reporting violations of the law believed to have been committed by their employer or fellow employees. It is also now an offence to punish or threaten to punish an employee to prevent an employee from reporting that kind of information to law enforcement.

Various provinces (although not yet Alberta) have added similar whistleblower protections to their employment legislation. Wrongful dismissal lawsuits are more and more often making reference to whistleblower issues.

And the Supreme Court of Canada has just weighed in to provide some guidance to employers and to employees as to how the Courts will view these issues in its recent decision: *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*.

The Court considered a provision of the Saskatchewan *Labour Standards Act* that makes it unlawful for an employer to discharge an employee for having made a report of unlawful activity to a “lawful authority.” In this case, a union local employee had alleged financial misdeeds to have been committed by her immediate supervisors, and was eventually fired. She made the report to the senior management of the Union, but not to the police.

There was no question that she had been fired as a result of having made the allegation. At issue was whether the protections given an employee by the *Labour Standards Act* when making a report to a “lawful authority” included making a report *within* the organization or was limited to a report made to an external law enforcement agency.

The Court concluded that the phrase did in fact include making a report within the organization, because to read it otherwise would encourage employees to

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report their concerns to the police before ever reporting them within the organization- something that would make no employment relations sense.

In reaching this conclusion the Court also said that in most cases, employees ought to attempt to resolve most matters internally, and report them "up the chain" before going outside. This decision, and others, suggests that Courts will not usually be sympathetic to an employee who elects to go outside their organization as a first step.

The Court noted that a workplace free of unlawful activity is a desirable thing, but that prosecution of wrongdoers is not the only, or even the preferred, method of achieving this. In saying this, the Court has placed an onus on employers to deal responsibly with reports of wrongdoing that they receive.

So, what should a policy on whistleblowing look like?

Policy specifics will vary as between organizations, but it should require training of managers and supervisors in how to handle allegations brought to them. It should also provide mechanisms for employees to report what they perceive as unethical or unlawful activity, and for independent and impartial investigation of such complaints when received.

Policy should also provide that for any disciplinary conversation, there should be someone else in the room to act as a witness, in order help avoid a later employee allegation that they were disciplined for whistleblowing rather than for something else.

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