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Wrongdoing at Work: Who Ya Gonna Call?

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Wrongdoing at work: who ya gonna call?(FEATURE on employment/labour law)(whistleblowing regulations)
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"There comes a time in the affairs of man when he must take the bull by the tail and face the situation."

--W. C. Fields (1880-1946) American entertainer Never Give a Sucker an Even Break

Conscience is thoroughly well-bred and soon leaves off talking to those who do not wish to hear it.

--Samuel Butler (1835-1902) writer

Introduction: The Conscientious Employee's Dilemma

We spend most of our awake hours at work in organizations. This gives us much time to do good things for our organizations and, vicariously, for society. Our many working hours also provide the opportunity to witness, or even participate in, wrongdoing.

Wrongdoing is a broad and subjective term. It may be a wrong committed by one individual against another, or organizational wrongdoing against an individual, against a competitor or against society. A broad definition of wrong-doing includes unethical or manifestly unfair behaviour, abuse of power, conflict of interest, serious waste of resources, violation of internal organizational rules or policies, or law-breaking. While there is no consensus on what in this list would be appropriate voluntary or mandatory whistleblowing, most agree that employees should be able (if not encouraged) to report illegality in the organization, and then such whistleblowing employees should be protected from retaliation.

If you observe, or are asked to engage in, what seems to be illegal activity in your workplace, what would you do? Some people might discuss it with their families and closest confidants at work. Many will eventually rationalize or ignore their misgivings because, as Gaston Pierre Marc said, "time wears away error and polishes truth." A small number will quietly start to look for another job.

Naive and idealistic employees might express their qualms about the illegal behaviour within and/or outside the organization. If they want to speak truth to power within the organization, they often will not know to whom it best to report. Internal integrity policies are not commonplace, but they may prescribe a contact person in the human resources or legal department to whom one should make these reports.

Increasingly, the wrongdoing can be reported anonymously over hotlines to a third party, on websites or in suggestion boxes. Despite assurances to the contrary,

anonymity can never be guaranteed. If the wrongful behaviour is something that few people would know, others will infer the whistleblower's identity. If the matter is investigated or prosecuted later, the whistleblower might be called as a witness to give evidence in court.

More commonly an organization has no policy on internal reporting of wrongdoing. The conscience-bound employee is left to decide what, if anything, to do.

Everyone of us would like to be the first to know, privately, when we are accused to have done something wrong. Although it may be the most wrenching option, reporting first internally, and directly to the wrongdoer, is ethical and fair. It is also potentially the most effective approach. The wrongdoer gets an opportunity to first learn about the wrongdoing. Don't we all want to know complaints against us before others are told about them? The alleged wrongdoer can correct mistaken perceptions, if any. If the allegations are correct, the wrongdoer is given an opportunity to correct the problem.

One can report the wrongdoing to lateral co-workers but they might not be able or willing to take effective action. If this does not work, the whistleblower might move "up the ladder" in the organization, by reporting the wrongdoing to one's supervisor. This is risky, especially if the supervisor or senior managers do not care about or do not believe the wrongdoing is occurring or if they are directing it. As George Orwell said, "during times of universal deceit, telling the truth becomes a revolutionary act." Nevertheless, supervisors can investigate, take corrective action, explain and clarify any misunderstandings. Don't we owe our employers that minimum loyalty?

While organizations say that they prefer internal reporting to protect themselves, they can easily and reflexively use it to punish the whistleblowing employee. Busy managers do not often want to hear about and deal with problems. They do not want to account to lower level employees. They prefer to receive and embellish upon good news messages.

Upton Sinclair said, "it is difficult to get one to understand something when one's salary depends upon not understanding it." Managers know that the full stories behind reports of wrongdoing are often complicated, intractable and embedded in messiness of interpersonal relationships. It is simply easier to characterize the malcontent whistleblower as the problem, or dismiss the complaint as unsubstantiated. Few managers in practice are willing to dig deep into the allegation, reasoning that it is not significant enough to justify the effort.

The options for the employee blowing the whistle outside of the organization are not much better. The most punctilious employee might report the wrongdoing to a regulator, the police or the media, assuming that one remains undetected (Aesop said it is easy to be brave from a safe distance). We expect decisive action to be taken when we report to regulators, police or media. Reporting to outside authorities is also a high stress and high risk recourse and usually one does not know precisely who to call.

This is a true story about Linda Merk, a Regina, Saskatchewan bookkeeper and office manager at a labour union. For a long time, she was asked by her two

bosses to put through expenses that she knew were fraudulent double payments. She even feared that she might herself get into legal trouble for putting through the paperwork. What would you do in her position? Her case, which was recently dealt with by the Supreme Court of Canada, is representative of a courageous common sense response to wrongdoing witnessed by employees. How did the law deal with her?

Linda Merk's Experience

In 2001, Merk reported her disquiet to her supervisors about the fraudulent expense claims. They did nothing. With others, she reported the fraud to the union president. The investigation that ensued was a mockery. The investigator viewed Merk as an insubordinate secretary. He pointed out that there was no clear, written policy that her bosses should not defraud the union.

Merk was mindful of novelist Aldous Huxley's observation, "facts do not cease to exist because they are ignored." Having gone to the top of her organization to report illegal behaviour, and getting no effective response, Merk then threatened to go to the police. She was fired from her job before she actually met with the police.

Merk pointed to section 74 of Saskatchewan's Labour Standards Act which read:

74(1) No employer shall discharge or threaten to discharge or in any manner discriminate against an employee because the employee has:

(a) reported or proposed to report to a lawful authority any activity that is or is likely to result in an offence pursuant to an Act or an Act of the Parliament of Canada ...

This retaliatory discharge was a regulatory offence for which the maximum penalty was a $2000 fine against the employer. Merk would not get her job back with a successful prosecution, but the employer could be fined up to $2000.

There are several regulatory statutes of this kind in each jurisdiction in Canada. They make it illegal for employers to punish employees in any way who report violations of human rights, occupational health and safety, privacy, employment, environmental and advertising laws. Variably, these statutes specifically make it illegal for employers to retaliate in any way against employees who refuse to break the law, who report concerns and breaches to regulators, who co-operate in an investigation or who give evidence in court against the employer. However, while the employer's retaliation is stated to be illegal, this legislation does not always construct retaliation as an offence. There are usually no penalty sections for the retaliation, and prosecutions are extremely rare.

After Merk was dismissed, the government prosecutor did not agree to take the case forward against the union employer after the retaliatory firing. Merk launched her own private prosecution to enforce the provincial legislation against her employer.

Need to Report Wrongdoing to a "Lawful Authority"

Merk had only gone to her bosses and the union president before she was fired. Had she made her complaints to a "lawful authority" as described in the legislation? At the first hearing, Merk lost. Her case was dismissed. An appeal to the Court of Queen's Bench led to a conviction against the employer. In a further appeal to the Saskatchewan Court of Appeal in 2003, Merk lost again in a 2-1 decision.

Employees such as Merk, observing illegal conduct, could only establish illegal retaliation under s. 74 of the Act if she reported the activity to someone who had the authority over that activity--in this case, the police or an appropriate government regulator. Taking the report to the boss or senior management will not bring legal protection from retaliation.

It is foreseeable that employees might report illegal activity to the wrong government official, or the wrong level of government. One might report too far down, unaware of actual authority. One could be dismissed for this because the legislation would offer no protection to the employee.

This "lawful authority" language is unique to this Saskatchewan legislation, although every statute has a variant of it. Would average employees, who witness criminal activity, know the law and law enforcement system well enough to navigate the maze to the desks of the few individuals actually charged with enforcing the specific law? If whistleblowers do not perceive that the law will protect them for reporting offences, they will not take the risk. A valuable source of citizen leads in law enforcement will diminish.

Merk is the first case to reach the Supreme Court of Canada on the interpretation and application of this regulatory legislation that is designed to protect employee whistleblowers who report illegality in the workplace.

The Supreme Court of Canada Decision

At the end of 2005, the Supreme Court of Canada rendered its decision in Merk. The 6-1 Court reversed the Saskatchewan Court of Appeal and restored the conviction against the employer union. Mr. Justice Binnie, for the majority, noted that the narrow interpretation of "lawful authority" in the legislation:

"... would discourage the internal resolution of alleged misconduct by withholding whistleblower protection unless and until the employee goes 'outside' to the enforcement authorities of the state.... protection should be extended to employees who first blow the whistle to the boss or other persons inside the employer organization who have the 'lawful authority' to deal with the problem. If the problem is not resolved internally, then employees can go 'outside' to the police or another enforcement agency, but in order to obtain the protection of s. 74, it is not necessary that they do so.

... there may well be circumstances where an employee is fully justified in not seeking an internal remedy but in going directly to the police, as where (for example) it is feared that the employer may destroy evidence. Whether or not an employee is justified in bypassing internal remedies will depend on the circumstances.... a suitable 'lawful authority' may be found inside as well as

outside the employer organization, and if an employee chooses to go the inside route and suffers retaliation, the protection of s. 74 is still available."

Conclusion

It is said that "sometimes even to live is an act of courage." Certainly, for an employee to blow the whistle on illegality is an act of courage today and in whistleblowing, as in war, there are no unwounded soldiers. Many conscientious and scrupulous employees know that sometimes to remain silent, to acquiesce, is to lie. Albert Einstein said that "unthinking respect for authority is the greatest enemy of truth."

Merk did what most employers would want done. She acted reasonably and in the best interests of her employer. Until the recent Supreme Court of Canada decision which vindicated Linda Merk, Canadian law had encouraged reporting only to outside officials. This was not in the best interests of the organization.

The Merk decision sends a message to would-be workplace whistleblowers that this regulatory protection across Canada will receive broad and liberal interpretation to encourage and protect them in practice. Employers are now deterred from exacting revenge on those who honestly report illegal activities. The Supreme Court of Canada has sent the signal that all similar legislation across Canada will receive the interpretation that favours the bona fide whistleblower.

This result is what legislators must have had in mind. The Supreme Court of Canada has intervened to give practical effect to the legislation. It is no longer a chancy issue of "who 'ya gonna call." Canadian whistleblowers will receive a measure of protection from the time they first report the wrongdoing inside the organization to someone in authority to address the concern.

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