The Whistleblower Defence
to Employment Dismissal

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"We must not confuse dissent with disloyalty." —Edward R. Murrow, journalist (1908-1965)

Introduction

Most of us will have at least one occasion in our lives to personally confront significant wrongdoing or some conflict with our values at work. We must face the dilemma of what, if anything, we ought to do about it.

There are three choices. We can quit the job and look for another (exit). This brings some uncertainty as to what comes next, and we might lament our having to quit when the wrongdoing was not our creation. We can ignore what bothers us and stay in the job hoping that things resolve and improve (loyalty). Second-guessing ourselves, we may not be sure of the problem. We like the work and the principle might not matter so much in the end. We might believe, after all, that remaining in place gives us the best chance of bringing about improvement.

The third choice is to speak up inside, and even outside, the employer's organization (voice). In our enlightened era, characterized by the freedoms of expression and conscience, this choice seems the most principled and ethical.

Nevertheless, as Herodotus, the 5th century BC Greek historian, observed, "great deeds are usually wrought at great risks." Dissenting and blowing the whistle on wrongdoing renders us vulnerable to a full range of retaliation and discipline including, ultimately, dismissal.

This article describes the conditions under which employees in Canada may be legally insubordinate and disloyal — immune from discipline for blowing the whistle on wrongdoing at work. To make these conclusions, we have reviewed more than two dozen decisions from the courts and labour arbitrators over the last two decades. This is not a static topic of employment law. The trend in Canadian legislation and judicial decisions, if anything, continues to offer more protection from discipline to employees who exercise the *voice* option.

Employee Duty of Loyalty and Fidelity

A half century ago, an English jurist described the employee's legal duty of loyalty to the employer in the following terms: "(an employee) is expected to give, and with very few exceptions does give in full measure the qualities of loyalty and discretion. He is not to obtrude his opinion unless it is invited, but when it is needed he must give it with complete honesty and candour. If it is not accepted, and a policy is adopted contrary to his advice, he must and invariably does, do his best to carry it into effect, however much he may privately dislike it. If it miscarries, he must resist the human temptation to say, "I told you so;" it is still his duty, which again he invariably performs to save his (employer) from disaster, even if he thinks that disaster is deserved."

Today, the duty of loyalty and fidelity on employees to act in the employer's best interests is likely less supine. An employee must not compete with the employer and must not disclose the employer's confidential or other proprietary information to third parties. Reporting unsettling details *up the ladder* in the organization and outside the organization to regulators or the media risks breaching one's common law duty of loyalty and fidelity. Increasingly, however, Canadian legislatures, judges, and arbitrators recognize that higher social interests (such as legality and safety) beyond those private interests of the employer may be at stake. In such cases, the whistleblowing employee is protected from the employer's private discipline, and indeed may be encouraged to make the disclosure.

The Whistleblower Defence

In *Fraser v. Public Service Staff Relations Board*, the Supreme Court of Canada said "federal public servants should be loyal to their employer" except that where health, security, or life are endangered, criticism may be "actively and publicly expressed," although not "sustained and highly visible" against the government. Building upon *Fraser* and *Haydon v. Canada*, arbitrators have crafted nine factors to consider in cases where public criticism by an employee was disciplined by the employer.

- Employee dissent, if properly motivated and expressed, can be beneficial to the public and even to the employer … Employees who learn of wrongdoing and seek

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to correct it … are performing a valuable public service and the law should protect their employment.

- Employees owe a duty of loyalty and fidelity to their employers, but this is not an absolute duty … The duty is not designed to protect an employer where it has committed an act of illegality or significant wrongdoing.
- An employee's duty of loyalty extends to the employer as a corporate entity, not to the particular individual who may be managing the organization.
- An employee's public criticism of her or his employer must ordinarily be the last remaining reasonable step left, not the first.
- The employee must be motivated by legitimate good faith and substantial concern to protect the public and others.
- Protection for the employee is extended only if the information is substantially correct.
- The employer must ensure that its policy on the securing of confidential employment information has been clearly brought to the attention of the employee … the policy must have been consistently applied.
- The whistleblowing protection is not offered to petty dissidents, those employees who argue with their employers on matters of every-day business judgments, or who simply slander their workplace without a substantial foundation to their criticisms.
- Each case must be determined in light of its particular facts.

Balancing the duty of loyalty and fidelity owed to the employer and the whistleblower defence arising from the freedoms of expression and conscience and higher social interests will take into account many variables. These include the content and accuracy of the criticism, confidentiality expected and secured by the employer, manner of disclosure, employer illegality or substantive wrongdoing, impact of the criticism on the employer's reputation and ability to do business, public interest in the disclosure, employee's personal interest and position, and any alternative remedial routes available to the employee.

Contours of the Whistleblower Defence

According to these legal decisions on employer discipline, a would-be whistleblower should exhaust internal recourses, resist the temptation to disclose to the media, evaluate the importance of the disclosure, and make the disclosure objectively and impersonally.

Exhaust Internal Remedies

If the employer has a whistleblowing policy, it should be followed unless there is a good reason to depart from it. Such a policy is a part of employer prerogative to determine

procedures to be followed in the organization.

The duty of loyalty generally imposes upon the employee the duty of first notification to the employer. This concept, from administrative law, is not only courteous and respectful but also allows misunderstandings to be clarified and early curative action to be taken in a practical sense. Reporting outside the organization first — such as to government regulators or the media — rarely holds the promise of effective redress as reporting directly to the wrongdoing organization.

The Supreme Court of Canada recently stated that internal resolution is most compatible with the employee duty of loyalty. Internal disclosure is also in the best interests of the public because it "reduces the necessity for and the expense of public oversight and investigation and may ultimately deter malfeasance."

Another less acknowledged reason to require the first report to be internal is to extract the good faith and pure motives of the conscience-bound employee. Managers claim that anonymous reports to third parties are hard to substantiate and assess for credibility. The chance of mischief-making is reduced dramatically by a policy that calls on the whistleblower to first complain to the assumed wrongdoer directly.

On the other hand, letting the cat out of the bag is a whole lot easier than putting it back in. The best employees must whisper unpleasant truths in the employer's ear. While these are the workers the employer can least afford to lose, it is easy, if not natural, to punish the bearer of bad news. Samuel Goldwyn is famously quoted as saying, "I don't want any yes men around me. I want everybody to tell me the truth even if it costs them their jobs." Few employees are willing to risk red-shirting their careers through long-term payback.

Judges and arbitrators recognize some circumstances in which the whistleblower may be excused from reporting internally first: imminent danger or other immediacy, cover-up and destruction of evidence by the wrongdoer, likelihood of swift retaliation, and futility based on previous experience or a culture of corruption. A manager cannot always be expected to objectively adjudicate or resolve a problem in which one is accused of creating. The predicament has been described thus: "First, you file a grievance with the head of your agency. But my grievance is with the head of my agency. What is she going to say? 'What, a grievance against me? Let me think about this for a minute. Oh no, I turn it down.'"

Regardless of where the first report is made, if remedial progress is not made, the whistleblower should report up the ladder of the organization. Employment superiors are usually better positioned to evaluate the concern. In one case, a policy was created by "management who know and understand the big picture." The right of the employer to use "lawful means to achieve lawful ends" will be favoured over the employee's free expression.

In the 25 cases surveyed, every successful employee had at least attempted internal resolution and had waited a reasonable amount of time for employer action.

Disclosure to the Media

Where internal whistleblowing has not been effective, the decision to *go outside*

should still be carefully weighed due to its prospect for injury to the employer. Reporting to regulators may be in the public interest and often specifically protected by legislation. It also demonstrates an intention to fix the problem versus to merely embarrass the employer.

Reporting to the media, however, is particularly problematic. It may present presumptive cause for summary dismissal, because, "if every staff person is given the right to go to the media with every concern they may have without even going through internal channels then there will be chaos." Disclosure to the media should be carefully evaluated against the prospect of effective action.

Employers do not want to be persecuted in public. Reports to media at most shine the spotlight on the employer in a disarming, accusatorial way, usually only for a short time. "An organization's reputation is vital to the success of its operation." Disclosure to the media may lead to criticism being both "highly visible and sustained," contrary to the protection envisioned in *Fraser*.

Once the media are involved, the whistleblower loses a large degree of control over the way in which the situation is presented to the public. A publicly conducted whistleblowing incident has "the effect of entrenching both the whistleblower and the employer into public positions very quickly; retreat in such circumstances to a mutually acceptable compromise will often be impossible."

Employees have a legal duty to use outlets which offer more privacy to the employer. The whistleblower should reflect upon which external agencies would be the most appropriate to contact.

Of the 15 cases that involved disclosure to the media, only one whistleblower defence was upheld (*Haydon*). In two other cases, where disclosure to the media had taken place, the whistleblowing employees' suspensions were overturned on extenuating circumstances unrelated to the whistleblowing defence. In the other twelve cases, the employees' dismissals were upheld.

A higher burden of proof is set upon the employee who disclosed to the media to demonstrate that was reasonable. The Judge in *Grahn v. Canada (Treasury Board)* said, "the fact remains, however, that having chosen the drastic course of publicly accusing his superiors of illegalities, it was up to the applicant of prove his allegations if he wished to avoid the otherwise natural consequences of his actions."

Importance of the Disclosure

"Petty dissidents" and those who criticize without "substantial concern for others" will suffer less protection from employer discipline. The threshold of reportable wrongdoing is a major practical issue which may hinder the development of the law: what to do about mere troublemakers? The less serious the wrong, the less compelling and justifiable will be the disclosure. In legislation protecting whistleblowers, the wrongdoing that gives rise to protection from retaliation is specifically defined.

For example, in section 425.1 of the *Criminal Code*, reportable wrongdoing is limited to "an offence contrary to any federal or provincial Act or regulation." Section 8 of the federal *Public Servants Disclosure Protection Act* reads:

> "This Act applies in respect of the following wrongdoings in or relating to the public sector:
> (a) a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act …;
> (b) a misuse of public funds or a public asset;
> (c) a gross mismanagement in the public sector;
> (d) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of a public servant;
> (e) a serious breach of a code of conduct established under section 5 or 6; and
> (f) knowingly directing or counselling a person to commit a wrongdoing."

Other legislation restricts reportable wrongdoing to contraventions of those individual statutes. A private employer's right to realize the legitimate aims of business in an unfettered manner would have to be overcome by the severity of its illegal actions or wrongdoings.

The urgency of the disclosure will also be assessed. In *Read*, the Court found risk to Canadian security resulting from wrongdoing at the Hong Kong mission, but it concluded that the risk was too remote to justify the actions of the whistleblower. The *procedural irregularities* at the Immigration Appeal Board publicly disclosed by Forgie were not alarming.

The whistleblower must distinguish between an occasional mistake and a matter warranting public debate. One grievor wrote a newspaper protesting use of a category of nurses as a danger to the lives of patients. The arbitrator noted the two incidents cited were caused by understandable human error rather than deliberate wrongdoing: "Making a mistake does not mean a professional is incompetent but that they are human … When an employee makes a mistake it does not mean they should be subjected to a public flogging for the mistake. There are internal mechanisms, professional ways of dealing with mistakes."

Maintaining Disclosure Objectivity

A disclosure is only protected if properly motivated and expressed. Excessive criticism will supply grounds for dismissal. *Fraser* said any "vitriolic and vituperative"comment "goes much too far."

A whistleblower should gather evidence for the claims that will stand up in regulatory hearings or court to defend against discipline. This is a high standard to ask of whistleblowers who are not lawyers or investigators, but the law appears to favour the employer by placing this onus on the reporter.

Employer wrongdoing can render the whistleblower exasperated and emotional. Yet their conduct and disclosures will be objectively assessed in the context of any subsequent employment discipline. Stencell, Read, and Forgie all made truthful disclosures but all three had failed to maintain their objectivity and levelled general attacks at management.

Stencell combined a personal matter, a human rights complaint regarding pay during parental leave, with allegations of fraud and mismanagement. His disclosure containing

"professional issues so intimately tied up with his personal issue … dilute[d] the force of his claim." In all three cases, the employment relationship was so poisoned by the comments that reinstatement was impractical.

The more an employee is motivated by good faith and substantial concern the greater the likelihood of immunity from discipline. Eighty percent of the whistleblowers examined were found to have exceeded the bounds of reasonable comment and appropriate criticism. The others had only asserted facts, not opinions, to substantiate their accusations, which in turn enhanced their credibility. They enjoyed the benefit of the whistleblower defence to employer disciplinary retaliation.

Conclusion

Mark Twain is credited with saying, "in our country we have those three unspeakably precious things: freedom of speech, freedom of conscience and the prudence never to practice either of them." Another well known author, George Orwell (1903-1950), opined: "during times of universal deceit, telling the truth becomes a revolutionary act."

Canadian law burdens the employee whistleblower to exhaust internal recourses, shun media outlets while discerning the most effective external agency, reflect on the gravity of the wrongdoing, marshal evidence of it, and remain objective in what is likely a period of significant stress. It places a momentous burden on these individuals to safeguard their jobs. Whistleblowing is risky business.

The average employee contemplating blowing the whistle on some wrongdoing will have to proceed with care that is not realistic in the workplace. Ultimately, successfully asserting the whistleblower defence is far from a certain thing. At the present state of development of the common law, a whistleblower in Canada assumes a major risk to suffer discipline at the hands of a retaliating employer. The above admonitions of Mark Twain and George Orwell, though expressed a century ago, are applicable today in the context of whistleblowing.

The law protects the employer's interests in its reputation and in its information property from employee disclosures of wrongdoing to the point that the public interest in such reports is scarcely detectable. We have seen that, regardless of the wrongdoing, an emotional or thoughtless remark could taint the disclosure and invalidate the whistleblower defence.

With these legal standards, there is essentially and practically minimal legal protection for whistleblowers. Loyalty has triumphed over employee conscience and expression and over the public interest. The law must strive to achieve a better balance between the employer interest on one hand and the employee and public interest on the other.

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