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Managing multiple claims and investigations in unionized workplaces

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Labour Spotlight Series

Grow | Protect | Operate | Finance

Speakers



Eleni Kassaris
Partner, Vancouver
D+1 604 629 4982
eleni.kassaris@dentons.com



Victoria Merritt
Associate, Vancouver
D+1 604 443 7139
victoria.merritt@dentons.com



Russell Groves
Partner, Toronto
D +1 416 863 4503
russell.groves@dentons.com

Multiple Proceedings

Practical Tips

Questions Employers Should Consider

- **Jurisdiction:** What issues does the decision-maker of a forum have jurisdiction to decide?
 - Decision-makers may have exclusive jurisdiction over specific issues
 - Some matters cannot proceed in multiple forums
- **Delay:** Which proceeding will resolve the matter most expeditiously? Is there a basis to push all issues to the “preferable procedure” from the employer’s perspective?
- **Defer:** Should a proceeding be deferred? Can one proceeding be stayed or suspended in favour of another?
 - Each forum may have a specific test to consider whether to grant a deferral or a stay of proceedings.
 - Resolution in one forum may likely result in the withdrawal or dismissal of another complaint either because the damages / remedies are fully determined or there has been a global settlement.

Scenario:

A British Columbia employee who raises a health and safety concern is later suspended for one week after several verbal and written warnings relating to lateness/absenteeism.

Employee submits a prohibited action complaint and a human rights complaint (saying he is late/misses work due to family commitments).

The union grieves the suspension.

What now?

Other Types of Proceedings

Criminal Proceedings

- All other proceedings likely will be stayed in abeyance pending determination of criminal charges
- If employer wants to push the grievance or other matter forward will need to show prejudice that outweighs prejudice to grievor.

Defamation

- Civil claims of defamation in the workplace can be made which can result in substantial damages awards.
- labour likely have jurisdiction to adjudicate

Workplace Investigations

Investigation Framework



A Note on Employer Policies



Applicable Legislation

- Occupational health & safety legislation: duty to investigate
- Federally regulated employers: *Canada Labour Code* and Bill C-65
- Applicable labour relations legislation
 - “Just and reasonable cause” required for discipline or dismissal
 - Unfair labour practices provisions

Collective Agreements

Key question: what are my obligations & timelines in relation to (a) investigations and (b) imposing discipline?

- Is the employee entitled to advanced notice of an investigation meeting?
- Does the employee/union have to be provided particulars of the allegations in advance?
- Does the employee have a right to union representation? At what stage(s)?
- Does the employee have to be notified of their right to union representation?
- Do witnesses have the right to union representation? Do they have to be notified of that right?

Collective Agreements

Key question: what are my obligations & timelines in relation to (a) investigations and (b) imposing discipline?

- What information must be disclosed to the union (before, during and after the investigation), and when?
- Are there any restrictions around evidence and documents that can be used at an arbitration?
- Is there a sunset clause regarding prior discipline?
- What will be disclosed during a grievance arbitration in relation to discipline imposed?

Additional Considerations

- Optics:
 - Internal vs external investigators
 - Unfair labour practice complaints
 - Nature of the relationship
- Acting promptly to investigate allegations & avoiding allegation or complaint accumulation

Additional Considerations

- Where allegations may lead to discipline, recommend having a union representative present.
- Documenting communications to employee and witnesses regarding right to union representation, and choice in relation to same.
- Managing union representatives in interviews and during the investigation.

Additional Considerations

- Providing particulars in advance: careful balance
- Confidentiality in union setting
- Privilege over investigation report?

Best Practices

Unionized context imposes an added layer of scrutiny & obligations, but the key principles and best practices for workplace investigations are the same.

- Timely
- Fair & balanced
- Conducted from the outset:
 - In accordance with employer policy, the CA and any applicable legislation.
 - With objectives, optics & possible outcomes in mind (which does not mean any prejudgment or predetermination).

Thank you



Eleni Kassaris
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Partner, Toronto
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