

Managing multiple claims and investigations in unionized workplaces

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Labour Spotlight Series

Grow | Protect | Operate | Finance

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### **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.
  - o 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

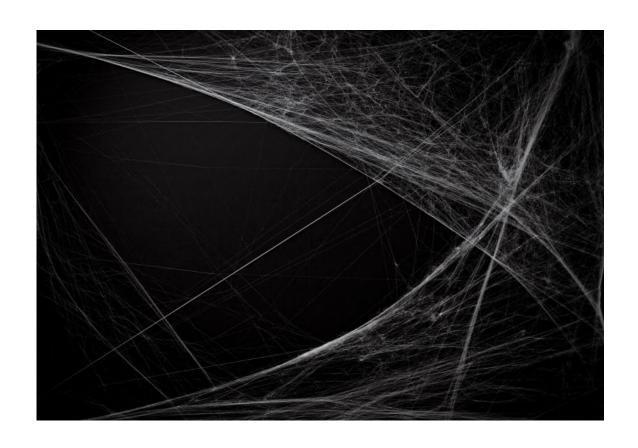


## **Investigation Framework**



# **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).

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# Thank you



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