

## LABOUR &amp; EMPLOYMENT

# How to handle post-dispute workplace tensions

When it comes to investigations into workplace disputes, lawyers should focus on not just the investigation, but also on the subsequent workplace dynamics.

Lawyers can advise their clients to take specific steps to reduce the risk of further conflict. While it is the employer's obligation to provide a safe and discrimination-free workplace, employees have a role in creating that type of environment as well.

Understandably, both employers and employees put a great deal of weight on an investigation into a workplace dispute. The investigation makes findings of fact about a specific issue involving a limited number of parties. The findings are not binding on others. A fair investigation fulfills the employer's obligation to inquire and usually provides a basis for action concerning those directly involved.

For an excellent example of what not to do in an investigation and the importance of clarifying the limits on confidentiality, see *Rees v. Canada* (RCMP), (2004 NLSCTD 138, (2005), 79 NLCA, leave to appeal to SCC refused), where the employer not only disclosed Rees' confidential statement about his supervisor's behaviour to the supervisor, but also required Rees to continue to



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work with the supervisor after having done so.

An investigation report addresses whether there has been a violation of a workplace standard. In setting remedies, employers must consider the facts found in the investigation, the employee's work history, the employer's human rights and discipline policies and any collective agreement requirements.

Even where there is no finding of a violation, information that comes out in the investigation may make it impossible for the parties to the conflict to continue to work together, or the employer

may have lost confidence.

The parties often receive limited information following an investigation. While the employer will have informed the parties of the findings, the veil of confidentiality means that not even the parties, let alone the witnesses, managers and co-workers who heard about the dispute know the whole story. What they do know, combined with their working relationship to each other, may set the tone for continued workplace unrest.

If employees do not understand and accept the outcome of an investigation, including the remedies, the dispute will continue to be a focal point of their working relationship and will increase the risks of new complaints, litigation and claims of reprisal.

What's a lawyer to do? Advise both employer and employee clients to engage in the following steps:

- Manage expectations and follow policies;
- Establish a return-to-work protocol and engage in restoration of contaminated workplaces.

The parties will have certain expectations about what the employer will do if the complaint is substantiated. If those expectations are not met, the complainant may choose to pursue external

remedies, such as a human rights complaint, and a disciplined or terminated employee may grieve or litigate.

Involving the parties, and their counsel or union representatives, in the development of remedies can help. This is counterintuitive to many employer's counsel, who believe that there must be limited sharing of the facts and that remedies are the employers' prerogative. While both may be correct, holding to those precepts in all cases may not be wise.

Experienced investigators know that the more the parties are engaged in the investigation process, the more they are likely to accept the findings. An employer can show how the outcome and proposed remedies are grounded in fact and in law, and are consistent with the employer's policies on respect in the workplace (anti-harassment, discrimination and bullying, code of conduct) and progressive discipline.

That discussion also opens the door to discussing a return-to-work protocol. There is so much emphasis on the findings that decision-makers often overlook that the parties will return to a workplace which may have been contaminated by the dispute. The complainant is often apprehensive about what to say. The

respondent is concerned about who knows what and what impact the investigation will have on his or her manager. Where one employee has complained about another's behaviour, no matter what the outcome, those employees will have trouble working together. So might those who work with them, especially if they heard one side of the story.

Coaching these employees and managers on what to do and say is essential. This can be done either by human resources or an external workplace coach.

Start with the parties to the complaint: do they accept the outcome, even if they don't agree with it? Is the employee who brought the original complaint on the lookout for retaliation? Is the original dispute still the reference point for their relationship?

The goal is to remove the residue of what remains after a workplace dispute has been legally resolved. Consider it a pre-emptive move. ■

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## Alternative tests less invasive

### Testing

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tion between effects of casual use and use by addicts to determine discrimination, another interesting aspect of *Kellogg* is the court's endorsement of expert evidence that alternative methods of detecting impairment would be "more reliable and individual" than traditional testing.

These alternative methods, called fitness for duty or impairment testing, have existed for a number of decades. There are many technologies to measure impairment. But regardless of the technology used, the purpose of impairment testing is to determine impaired functioning, not the presence or past use of drugs and alcohol. It also provides instantaneous feedback to employers regarding an employee's ability to work safely.

Although breathalyser tests also provide immediate feedback, unlike impairment testing, they

are limited to detecting impairment due to alcohol, and miss other sources of impairment such as drugs, fatigue, stress or illness.

While not yet judicially considered in Canada, impairment testing could be challenged on the basis that a failed test arises

“Impairment testing could be challenged...”

from grounds protected under human rights legislation, for example, family status, such as when a new parent repeatedly fails the test due to fatigue caused by sleep deprivation. Other concerns include a lack of correlation between test content and actual job tasks, and the failure of pre-shift testing to catch job-induced fatigue later in

a shift.

Nevertheless, impairment testing is a viable alternative or adjunct to drug and alcohol testing, particularly with regard to employees in safety-sensitive positions.

Current research indicates that it is more effective in identifying impaired employees. Unlike drug testing, it can also measure actual impairment and provide immediate results.

Impairment testing is likely to be less invasive and more respectful of employee privacy than drug or alcohol testing. ■

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## New Criminal Code provisions will likely see increased use

### Negligence

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Transpavé had invested in its safety systems subsequent to the accident. For instance, in 2006, Transpavé spent more than half a million dollars to bring its two plants up to Europe's safety level, which is higher than the one in force in North America. Following the accident, Transpavé undertook many measures to help ensure that such an accident did not reoccur.

While there are no hard-and-fast rules to play by to ensure organizations remain insulated from liability, they should incorporate all the best practices and industry standards into an occupational health and safety management system.

In *Transpavé*, the court appeared to be particularly influenced by the measures implemented after the employee's

death to prevent a recurrence. Implementing health and safety measures will help demonstrate to a court that all reasonable steps are being taken by the organization to ensure the workplace is safe.

Although it took four years for this first conviction and fine to be imposed under the amendments, employers, senior management and board members should not assume that the *Code* will not be used in the future to prosecute where there is a statutory breach.

Bill C-45 has made it easier to convict a corporation criminally based on the conduct of its employees, and it will likely be increasingly used in the future. ■

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