October 29, 2025

Whistleblower Protection Denied for Employee Who Made Unsubstantiated Claims Against Employer

By: Thao Nguyen

Case Commented On: *Jazz Aviation LP v ALPA,* 2024 CanLII 99705 (CA LA)

In 2019, Jazz Aviation LP (Jazz) terminated the employment of a unionized employee who published repeated claims that the company was engaged in illegal conduct, including bribing union officials. While a labour arbitration determined there was no truth to these allegations, an issue arose during the arbitration hearing as to whether the employee was entitled to protection as a whistleblower.

Whistleblowing is defined as the disclosure by an employee of illegal, immoral, or illegitimate practices of their employer to authorities within the company with the power to effect action (see Sean C Doyle, "A Purposive Approach to Whistleblower Protection: A Comment on Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771 (2007) 44:4 Alta L Rev 903 at p 903). The Supreme Court of Canada (SCC) considers whistleblowing as "a matter of great public concern" (*Ferreira v. Richmond (City)*, 2007 BCCA 131 at para 58 (*Ferreira*) citing *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70 (*Merk*)); thus, the SCC warranted protection for whistleblowers in appropriate circumstances as whistleblowing can prevent wrongdoing by the employers and, in cases of state-owned organizations, avoid unnecessary costs to taxpayers (*Ferreira* at para 59 citing *Gartside v Outram* (1856), 26 L.J. Ch. 113).

In several cases, the SCC and other Canadian courts have affirmed that whistleblower laws create an exemption to the usual duty of loyalty and other contractual obligations an employee owes to the employer (*Merk,* para 14). In other words, whistleblower laws protect a whistleblowing employee from disciplinary actions imposed by the employer on that employee due to such disclosure. In Canada, whistleblower laws have been encoded in several federal and provincial statutes for public policy reasons (see e.g., *The Labour Standards Act*, RSS 1978, c L-1, s 74; *Labour Standards Code*, RSNS 1989, c 246, ss 28-30; and *Public Interest Disclosure (Whistleblower Protection) Act*, SA 2012, c. P-39.5).

Advancing a whistleblower defence, however, is not easy. This blog will discuss the facts and decision in *Jazz Aviation LP v ALPA,* 2024 CanLII 99705 (CA LA) (*Jazz Aviation*), a recent arbitral case, where the above-noted unionized employee was denied whistleblower protection. The analysis of this blog will review the common law test for establishing the whistleblower

defence, apply relevant case laws and statutory laws to the facts in *Jazz Aviation*, and provide further insight into the threshold required to establish the whistleblower defence. More specifically, even though the courts and the governments seek to protect whistleblowers, *Jazz Aviation* demonstrates that an employee is not protected by whistleblower laws if they do not provide sufficient evidence, abide by the internal procedures, and act in good faith to bring forward their concerns.

The Case

Facts

The employer in this case, Jazz, provides regional and charter airline services and is the primary operator of Air Canada Express flights, and is headquartered in Halifax, Nova Scotia (Chorus Aviation).

Jazz's pilots and crew members are unionized and represented by the Air Line Pilots Association (ALPA) which negotiates collective agreements and handles grievances on behalf of the unionized members. The Master Executive Council (MEC) is the council under ALPA that governs the union pilots (Air Line Pilots Association).

In May 2019, Jazz terminated the employment of Captain G. Kenny (the "Grievor") claiming just cause on the basis of the Grievor's on- and off-duty misconduct. The Grievor had been employed with Jazz for 29 years at the time of termination. The Grievor filed a grievance with ALPA for wrongful dismissal. After an unsuccessful mediation, the matter was referred to arbitration.

Jazz's decision to terminate the Grievor's employment followed Jazz's investigation into the Grievor's conduct. Jazz investigated the Grievor's mass email and private comments to his coworkers, in which the Grievor accused Jazz, its union, a few union officials, and Jazz's non-profit, Jazz Pilots for Kids (JPFK) of bribery to obtain favourable collective agreement and other union labour relations outcomes, as well as of embezzlement and money laundering.

The investigation was conducted in accordance with the Collective Agreement and Jazz's Code of Ethics and Business Conduct (Code). The investigation revealed that the Grievor's allegations were not "believable" and that the Grievor was not truthful in the investigation of the allegations. Furthermore, the allegations were unsubstantiated as the Grievor failed to provide any evidence. The investigation also concluded that these allegations represented "extremely serious acts of misconduct" (*Jazz Aviation* at p 16), which undermined the reputation of his coworkers and Jazz, disrupted the workplace, and violated his fiduciary duty as an employee. For purposes of the arbitration, Jazz maintained that there was a basis for discipline and that termination of employment was not excessive. Jazz did not accept that the Grievor was qualified as a whistleblower to receive whistleblower protection from employment disciplinary measures.

In the Grievor's submissions to the arbitrator, he stated he genuinely believed that the alleged misconduct of the involved individuals threatened the existence of Jazz and ALPA, so it was lawful for him to question and report the misconduct under Jazz's Code, Ontario and Nova Scotia securities legislation, the *Canada Labour Code,* RSC 1985, c L-2 (CLC) and the *Criminal Code of*

Canada, RSC 1985, c C-46 (CC). He argued he did not have to produce evidence, and his obligations only required him to report the misconduct. He did not provide any evidence to substantiate his allegations. The Grievor maintained that he always acted in good faith, and he was a whistleblower under the Code and the above-listed statutes.

ALPA also submitted will-says from four Jazz's pilots on behalf of the Grievor. One will-say mirrored the Grievor's concerns listed in the mass email about the alleged misconduct within Jazz and ALPA. It was ALPA's position that there was no cause for any disciplinary actions; it argued if there was cause for discipline, termination was excessive.

The Issues

1) Was there cause for discipline?
2) Was Jazz's disciplinary response excessive in the circumstances? If so, what alternative penalty should be substituted?

The Arbitrator's Decision

The arbitrator determined there was cause for discipline and dismissed the grievance.

Upon review of the submitted evidence, the arbitrator concluded the Grievor engaged in serious misconduct that justified termination and that Jazz was justified in disciplining the Grievor's off-duty conduct as it engaged Jazz's employees and Jazz's interests. The arbitrator accepted that the Grievor's conduct created a toxic workplace, thus risked compromising safety, which is critical to the operation of Jazz as an airline. For that reason, the arbitrator concluded these findings justified the "most serious disciplinary response" (*Jazz Aviation,* at p 45).

In addressing the Grievor's argument for whistleblower protection, the arbitrator stated the Grievor had an obligation to act reasonably and in good faith and that the Grievor, in bringing forward concerns without evidence, did not meet that obligation. The Grievor also was not protected under the Code, under securities acts, or the rules of the union. The arbitrator found that the Grievor's actions were not intended to search for openness, transparency, or accountability but was to "sow dissension" (*Jazz Aviation,* at p 42) against the MEC and to tarnish the reputation of Jazz and the union; therefore, the Grievor acted with "mal-intent" (*Jazz Aviation,* at p 44).

Commentary

Overview of the Whistleblower Defence

This case provides insight into the kinds of conduct that do not qualify as whistleblowing. The outcome of the case is in line with both common law and statutory requirements for whistleblower protection.

Case Law

The whistleblower defence is well-established under Canadian common law. In *Fraser v PSSRB,* 1985 CanLII 14 (SCC), [1985] 2 SCR 455 (*Fraser*), the SCC discussed the scope of whistleblower defence with respect to federal public employees. The SCC viewed the defence as a balance between the employee's public duty as a member of the Canadian democratic community and their duty as an employee of the government (*Fraser* at pp 457-458). Commenting on the general rule of the whistleblower defence, the SCC stated in *Fraser* that in some appropriate circumstances, an employee of the Government of Canada may "actively and publicly express opposition to the policies of a government" (at pp 457-458).

Merk, another leading SCC case on whistleblower protection after *Fraser*, redefined and expanded the scope of the whistleblower defence to employees in both the private and public sectors (at para 14). *Merk* defined whistleblower laws as providing immunity for an employee against employer retaliation to assist the government in preventing or stopping unlawful conduct of the employer (at para 14), thus, creating an exception to the usual duty of loyalty owed by the employees to their employer. In *Merk*, the SCC briefly discussed the 'up the ladder' approach—the idea that employees should first attempt to report misconduct internally, to supervisors or others within the organization who have the authority to address the issue, before going public or reporting externally to law enforcement or regulatory bodies (at para 16).

In a more recent trial-level case*, Mulligan v. Ontario Civilian Police Commission,* 2020 ONSC 2031 (*Mulligan*), the Ontario Supreme Court summarized the discussions in *Fraser* to establish four criteria for an employee to qualify as a whistleblower with the *Merk* 'up the ladder' approach embedded in the third criterion:

1. The concerns must be significant, for example, jeopardizing life, health or safety;
2. The issue must be more than a difference of opinion;
3. The practitioner must have taken all reasonable steps to address the matter internally before "going public"; and
4. The concerns must be accurate. (at para 52)

If the *Mulligan* whistleblower test is hypothetically applied to the facts in *Jazz Aviation*, the findings of the arbitrator and the prior internal investigation would support that the Grievor's action did not meet this test.

First, the Grievor's concerns are significant and could have met the first criteria of the test; these issues of union bribery, money laundering, or collusion between union members and Jazz's management team could impact the livelihood of Jazz's unionized pilots and their families.

However, as the Grievor failed to provide any evidence to support his claims and there existed no evidence to substantiate the concerns, he would most likely fail to meet the second and fourth criteria of the *Mulligan* test.

Regarding the more significant 'up the ladder' requirement in the third criterion of the test, the Grievor was found to have not taken all reasonable steps to address the matter internally before raising the concerns publicly. Such a failure to attempt an internal resolution was the deciding

factor in *Mulligan* and that failure was "fatal to the 'whistleblower' defence" (at para 50). *Mulligan* provides a narrow exception for this requirement where the issues raised are so "pressing and urgent" and "the chain of command was so obviously dysfunctional or corrupt that going public first is the only option" (at para 57).

Here, the arbitrator quoted the will-say from the Grievor's pilot colleague which stated that despite advice from his colleague, the Grievor did not follow an internal investigation process under the Code to bring up his concerns. Instead, he chose to bring forward these concerns via unauthorised channels such as mass email and private conversations with his colleagues. There was no evidence to support that the internal chain of command was corrupt or dysfunctional, rather the Grievor refused to go "up the chain of command" (*Jazz Aviation,* at p 44). He instead used mass emails and private conversations with his colleagues to spread his unsubstantiated concerns (*Jazz Aviation,* at pp 6-8, 9 and 11) because he did not trust the process (*Jazz Aviation,* at p 44). For that reason, following the rationale in *Mulligan*, the Grievor's failure to take all reasonable steps to address the matter internally was likely fatal to his whistleblower defence.

Additionally, even though good faith was not mentioned in the *Mulligan* test, the whistleblower defence impliedly requires good faith (see Siavash Vatanchi, "Whistleblowing in Canada: A Call for Enhanced Private Sector Protection" (2019) 9:1 West J Leg Stud at p 2 (Whistleblowing in Canada). Here, the Grievor was not found to have acted in good faith because of the manner the allegations were raised.

Statutory Laws

Besides common law, the Grievor also sought whistleblower protection from statutory laws including the CLC, the Nova Scotia *Securities Act*, RSNS 1989, c 418, the Ontario *Securities Act,* RSO 1990, c S.5, and the CC. These statutory provisions were not considered by the arbitrator in the decision.

S 246(1) of the CLC allows any employee to make a complaint in writing to the Canada Industrial Relations Board (CIRB) if they believe that their employer has taken reprisal against them because the employee has made a complaint under CLC's Part III governing Standard Hours, Wage, Vacation and Holidays. This provision could have potentially applied to the Grievor's concerns in terms of conditions of work. However, there is no evidence in this case that a complaint was made to the CIRB as required, meaning the Grievor could not have taken advantage of the CIRB process.

Next, the Ontario *Securities Act* (see s 121.6) also protects employees from reprisals when the employees made a disclosure to the Commission or a law enforcement agency about an act of the employer that the employee reasonably believes to violate Ontario securities laws. Similar provisions can be found in the Nova Scotia *Securities Act* (s 148A) and Alberta's *Securities Act*, RSA 2000, c S-4 (s 57). Given that Canada does not have a federal securities act to govern Jazz's securities activities, and assuming that the Grievor's allegations concerned Jazz's securities activities, the language of the provisions in securities legislation still requires reasonable belief and good faith from the Grievor when making a disclosure to the Commissions, law enforcement agencies, and any self-regulatory bodies. The facts from the case do not support that the Grievor

would have met those requirements to receive the protection provided by these securities whistleblower provisions.

Lastly, s 425.1 of the Canadian *Criminal Code,* RSC 1985, c C-46 (CC) prohibits employers from retaliating against employees who report employers' wrongdoing to law enforcement or public bodies. Although this provision offers broad protection for both public and private sector employees, it is deemed a protection of last resort to lessen the burden on the court system and, as discussed above, the SCC emphasized the need to go 'up the ladder' within the organization to balance the employee's duty owed to the employer and the public (Siavash Vatanchi, 2019 CanLIIDocs 7 at pp 6-7). Here, as the Grievor did not follow any internal reporting procedures or report directly to law enforcement officials as required by section 425.1 of the CC, he would likely not be protected by such provision.

Besides the statutes cited by the Grievor, Canada also has enacted federal and provincial whistleblower statutes. The federal *Public Servants Disclosure Protection Act*, SC 2005, c 46 applicable to public servants working for public organizations provides protection against disclosures that fall into the category of "protected disclosure" (see s 2(1)). Similarly, provincial public employees that have made protected disclosure are protected from reprisal (see *Public Interest Disclosure (Whistleblower Protection) Act*). Such protection is limited to public servants or employees working for the governments only, meaning the Grievor would not have been protected by this type of legislation.

In summary, none of the statutes that the Grievor cited as providing him whistleblower protection would have applied to his circumstances. Even if they applied, the Grievor would most likely not have met the requirements to qualify as a whistleblower under any of them.

Conclusion

Canadian common law and statutory laws provide protection for any qualified whistleblower employees from reprisals by employers. However, to receive such protection, an employee must act reasonably and in good faith to balance the duty of loyalty they owe to the employer with the potential public good as well as meeting the requirements stated in the jurisprudence and legislation.

Jazz Aviation serves as a good example for unionized employees and unions to understand whistleblower protection and what constitutes appropriate whistleblower defence in protecting vulnerable employees in cases of reasonable concerns of activities happening within the organization. This case is also a reminder for employers to review their codes of conduct and internal procedures for resolving disputes and complaints to ensure that employees have proper internal mechanisms to report wrongdoings and clear guidelines to prevent unfounded allegations against the organization in anticipation of an employee's claim of whistleblower defence.

The author wishes to thank Dylan Snowdon for comments on an earlier draft.

This post may be cited as: Thao Nguyen, “Whistleblower Protection Denied for Employee Who Made Unsubstantiated Claims Against Employer” (29 October 2025), online: ABlawg, http://ablawg.ca/wp-content/uploads/2025/10/ Blog_TN_Whistleblower.pdf