Case In Point

Arbitrator Uses Proportionality Approach in Determining Discipline of Multiple Employees

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A recent arbitration decision provides useful insight for employers about the nuance that an arbitrator may apply to review a penalty decision and as well serves as a reminder that employers ought to be careful to consider all factors when imposing discipline, especially when there are multiple employees involved.

In Bell Technical Solutions v. Communications, Energy and Paperworkers Union of Canada, three employees employed by Bell Technical Solutions ("BTS") as technicians posted disparaging comments about their employer and/or a supervisor of the employer, Mr. B, on Facebook. Two of the employees, referred to as Mr. A and Mr. S, were regular part-time employees. The third employee, Mr. W, was a temporary part-time employee. At the time that the discipline was imposed, Mr. A had 9.5 years service and was 41 years old, Mr. S had 7.5 years service and was also 41 years old, and Mr. W had 18 months service and was 20 years old.

All three of the employees were warned to stop posting the disparaging Facebook comments, but failed to do so. Mr. A and Mr. W, who were very unapologetic and defiant in the initial discipline meetings, were ultimately terminated. Mr. S was more reasonable in the discipline meeting, and as a result, BTS chose to suspend him for five days. All of the employees grieved.

In determining the appropriateness of the penalties, Arbitrator Chauvin made the following observations:

- It is well-established that inappropriate Facebook postings can result in discipline or discharge, depending on the severity of the postings. The nature and frequency of the comments must be carefully considered to determine how insolent, insulting, insubordinate and/or damaging they are to the individual(s) or the company.
- When determining the appropriate disciplinary measure, an employer should consider whether the individual was uncooperative, defiant, and/or dishonest during its investigation and whether the individual admitted to engaging in misconduct, accepted responsibility, showed remorse and/or offered a genuine apology.
- Provocation, which could include inappropriate behaviour by a manager, can be considered as a significant mitigating factor.

Arbitrator Chauvin noted that the postings of Mr. S were less offensive and frequent than those of Mr. A and Mr. W, and related solely to the supervisor Mr. B, who could sometimes become upset or yell at work. Nonetheless, the Arbitrator found the Facebook postings were serious, Mr. S was insolent to his supervisor and he failed to stop posting when he was first asked to do so. The five-day suspension was upheld.

In contrast, Arbitrator Chauvin concluded that Mr. W's postings were very disparaging of BTS and Mr. B, they were made over a prolonged period of time, and were premeditated and deliberate. Despite two requests to stop making the postings, Mr. W refused. He lacked remorse, did not acknowledge any wrongdoing and did not provide a sincere apology. The Arbitrator found that there was no provocation in the situation and in light of Mr. W's short-service and temporary, part-time position, the termination was upheld.

Finally, Arbitrator Chauvin concluded that Mr. A's misconduct was also very serious but unlike Mr. W, Mr. A did not make any postings which were derogatory to or ridiculed BTS. Here, provocation was a factor as Mr. B had acted inappropriately with Mr. A and Mr. A's length of service was much longer than Mr. W's. Taking into account all of these factors, a one-year disciplinary suspension without pay was imposed and Mr. W was reinstated.

As can be seen from the above, this decision illustrates that when an arbitrator is assessing a disciplinary penalty, the proportionality of the penalty will be considered along with whether provocation was a factor, and, at least to some degree, the employee's response during the investigation. During an employer's investigation it is critical that all allegations are presented to an employee in detail (rather than, for example, letting a Facebook comment speak for itself) as the employee's response will be relevant to the determination of whether the penalty is reasonable. Here, the fact the employees did not show remorse or apologize when confronted by the employer was significant to the Arbitrator's decision in regard to the appropriate penalty. Provocation will also be a relevant factor and should be considered by employers when determining the appropriate disciplinary response.