**Reaching Out**

# Reaching Out – Twelfth Edition

**Date:** November 16, 2016

Dear Friends,

Even though the weather has been spring-like, we are pleased to provide our Fall 2016 edition of *Reaching Out*.

Njeri Damali Campbell of our Toronto office has written a follow up piece to an article she wrote for the November 2015 edition of *Reaching Out*. Njeri takes a deeper look at the first part of the three-part analysis used by the Human Rights Tribunal of Ontario to determine whether an employer has responded to a human rights claim with reasonable diligence.

Ryan Plener, an articling student in our Toronto office, examines the increasingly problematic issue of social media use and off-duty conduct by reviewing some recent decisions by arbitrators dealing with employees who have been terminated after using social media outside of the workplace.

On a related note, Ed O'Dwyer, also of our Toronto office, sets out some useful guidance for employers when operating social media platforms. As more and more employers interact with their customers or clients and the public at large using Twitter, Facebook or other social media platforms, they need to be aware of the potential risks associated with operating such sites.

Finally we provide a short summary of one of the first cases litigating the workplace violence provisions of the *Occupational Health and Safety Act*. The employer in this case was found to have taken appropriate steps to comply with its obligations. The decision underscores the importance of employers being aware of their obligations to protect employees from workplace violence and take necessary steps to protect their workers.

As always, we hope that you find this newsletter helpful and informative and we welcome any feedback or requests for future topics.

Michael S. Smyth

Editor

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## An Employer's Obligation: Ensuring Organizational Awareness of What Constitutes Harassment and Discrimination

By: Njeri Damali Campbell

In a previous *Reaching Out* article, we reviewed the three-part analysis used by the Human Rights Tribunal of Ontario

(Tribunal) to determine whether an employer has responded to a human rights claim with reasonable diligence. We now look at the first part of that analysis in more detail – the obligation of an employer to ensure sufficient awareness of discrimination and harassment in the workplace.

Recent Tribunal decisions dealing with the grounds of gender identity and gender expression provide guidance on what steps employers should take to meet this obligation, especially when dealing with sensitive topics.

## Building Organizational Awareness

Many employers try to build organizational awareness of the Ontario *Human Rights Code* (Code) through the development of policies and procedures. While this is a critical starting point, it is the *effectiveness* of this approach that will be scrutinized by the Tribunal in the face of a human rights application.

In *Laskowska v. Marineland of Canada Inc*.[1], the Tribunal stated that the key considerations of the requirement of organizational awareness are whether an employer can demonstrate:

- sufficient organizational awareness among employees, including management, of discrimination and harassment
- a suitable anti-discrimination or anti-harassment policy
- a complaint mechanism in place, and
- adequate training has been given to management and employees.

An organization that cannot demonstrate that it has taken basic steps to communicate to its employees that they have obligations under the Code will be unable to defend itself against claims of discrimination and/or harassment.

The following two decisions illustrate common gaps in organizational awareness related to transgender and gender non-conforming employees and service users.

(a) *Vanderputten v. Seydaco Packaging Corp.*

In the first decision, *Vanderputten v. Seydaco Packaging Corp*.[2], the applicant, a transgender woman, alleged that her employer failed to properly respond to her complaints of harassment based on her gender identity. During the course of her employment, the applicant transitioned from a man to a woman. While this transition was taking place, the applicant reported to her manager that her co-workers were making derogatory comments about her, particularly in relation to her use of bathrooms and change rooms. She was called derogatory names and her employer and co-workers failed to address her using the appropriate pronoun.

The employee made a complaint to her manager about the harassment. In finding that the employer did not respond appropriately to its employee's complaints, the Tribunal identified the following missteps:

- the employee was advised that she would be treated as a man (e.g. she would have to use the male change room despite the harassment she had experienced) until she provided proof of sex-reassignment surgery
- there was no investigation into the employee's concerns
- there were no discussions held with the employee about possible solutions to her complaints
- the employee was removed from a private women's washroom because of 'complaints' about her use of female facilities.

Interestingly, the employer had taken some steps to address the situation. It had called a staff meeting to find out who had posted a transphobic cartoon, and then required employees to sign a 'Code of Business and Conduct Ethics' that included the requirement that each employee should 'not discriminate against any other employee for racial, sexual or religious reasons.'

However, the Tribunal found these actions were not enough to meet the employer's Code obligations. Further, it found that the employer's inappropriate response to the complaint demonstrated a lack of organizational awareness of its responsibility to protect transgender and gender non-conforming employees from harassment.

While the Tribunal commented that grappling with understanding the needs of transgender employees may be a challenge for some employers, their obligation to ensure that their employees are treated appropriately remains. In this case, the Tribunal awarded the applicant $22,000 in damages for injury to her dignity, feelings, and self respect.

(b) *Lewis v. Sugar Daddys Nightclub*

Although set in the context of a night club, the second decision, *Lewis v. Sugar Daddys Nightclub*[3], illustrates the importance of ensuring that employees are aware of transgender and gender non-conforming individuals' right to use facilities that accord with their lived gender.

The applicant in this case identified as a transgender neutral questioning transgender male. He and some friends attended the night club one evening and were harassed and assaulted by night club bouncers while using the men's bathroom. A bouncer forced open the door of the bathroom stall and demanded that the applicant exit the bathroom. When the applicant did not immediately do so, the security guard dragged the applicant out of the club and into the street where he was taunted with transphobic and homophobic slurs and physically assaulted by three security guards.

Despite the lack of evidence that the security guards were employees of the respondent, the Tribunal found the nightclub liable for the bouncers' behaviour. It was abundantly clear that the respondent had failed to teach its staff members that people are allowed to use washroom facilities that match their lived gender identity. The fact that several of the bouncers stood by and watched while their colleague assaulted a patron demonstrated an organizational acceptance of that behaviour. Finally, the fact that the respondent did not attend the hearing of this application demonstrated that it was not alive to its legal obligations. The Tribunal awarded the applicant $15,000 as compensation for injury to dignity, feelings and self-respect.

### Lessons Learned

Policies, procedures and protocols aside, the behaviour of employees are significant indicators of an organization's awareness of its Code obligations. Ensure that your employees know their obligations to prevent harassment and discrimination in your organization

Moreover, social service organizations often provide services to the public and in some cases, those services may involve the use of change room or shower facilities. If your organization has change rooms, shower and/or washroom facilities frequented by patrons or the public, it is important to ensure that your employees are provided with specific instruction on how to respect the choices of transgender and gender non-conforming patrons and to respond to potential complaints by other service users.

## Social Media Use by Employees and Off-Duty Conduct

By: Ryan Plener, Articling Student

Labour arbitrators at one time were careful to draw clear lines between the working and private lives of employees, recognizing that most off-duty conduct falls beyond the reach of the employer. As one arbitrator stated: "In general the employer is not the custodian of the grievor's character or personal conduct…"[4].

This broad statement has been echoed in more recent decisions and has further developed to include the sentiment that employers typically have no jurisdiction over employee actions outside of office hours, unless it can be shown to impact the employer[5].

Notwithstanding that general view, the boundary between work and home life has become increasingly blurred with the advent of social media and electronic communication that has facilitated the rapid spread of off-duty employee expression.

## First Principles: The Test for Off-Duty Conduct

One of the earliest cases dealing with off-duty conduct was *Millhaven Fibres Ltd. v Oil, Chemical & Atomic Workers International Union, Local 9-670*[6]. In that case, the company's employees had been on strike from July to October of 1966. In August of that year, an employee who had crossed the picket line was subjected to harassment, and a window in his house was broken. Another employee was charged criminally and at the resulting trial he admitted to causing these events. The company terminated his employment and the union grieved

In making its decision, the arbitration board articulated a test which set out the circumstances when an employer can discipline an employee for off-duty conduct. Namely, an employer must demonstrate that the employee's conduct meets one or more of the following five criteria:

1. the conduct renders the employee unable to perform his duties satisfactorily
2. the conduct interferes with the efficient management of the operation or workforce
3. the conduct leads to a refusal or reluctance of other employees to work with him
4. the conduct harms the general reputation of the employer
5. the conduct is inconsistent with the *Criminal Code.*

Through evolution and addition, the *Millhaven* test now requires employers to demonstrate one or more of the above criteria through a causal connection. The employer must show a connection between the events that occurred when the employee was off-duty and the operation of the business. Ultimately, applying the test as enunciated in *Millhaven* requires a balancing act between the competing interests of both employer and employee. It has been held that interference with an employee's private affairs must be proportional to the employer's interests[7], but the application of this approach is more difficult than one might appreciate at first glance.

In recent years the *Millhaven* test has been applied to a broad range of off-duty conduct in which an employee takes part, including assault and sexual harassment[8], consumption of drugs and alcohol[9] and inappropriate conduct on social media. Damages to an employer's reputation through use of social media and electronic communication by an employee is becoming an important consideration for arbitrators assessing off-duty conduct.

## The Approach by Arbitrators on Use of Social Media

In *Chatham-Kent (Municipality) v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 127 (Clarke Grievance)*[10], it was the operational interest of the employer that justified the discipline imposed.

The grievor was a personal care giver at 'The Home for the Aged'. She was terminated from employment after her employer found that she had published resident information and pictures on her website (blog) without consent and had additionally made inappropriate comments about residents entrusted to her care, as well as fellow employees[11]. Of importance was the fact the grievor had signed a confidentiality agreement pertaining to resident information. The blog was discovered by another employee who, having signed the confidentiality agreement as well, recognized the potential conflict and reported it to management.

Specifically in relation to the second prong of the *Millhaven* criteria, Arbitrator Williamson commented:

…It is found that the grievor was insubordinate to management in her blog writing in retroactively contesting and challenging the directives she had been given and the decisions that had been made by management, that could be seen to undercut the authority embodied in management to run the premises and direct the work force, and that all of this was set out in a blog

accessible to the general public. [The grievor's] conduct in this regard is worthy of discipline.[12]

The Arbitrator briefly discussed the grievor's evidence and the union's argument that she was not 'tech savvy' and therefore did not know her blog would be public. However, the Arbitrator decided that she should have reasonably known that a blog is more than an outlet for communicating with specific individuals. More importantly, evidence was adduced that described the process of setting up her blog whereby there were additional settings that could have been utilized to make the blog private. Taking these factors into account, as well as the fact that confidentiality was severely breached, the Arbitrator upheld the discharge and dismissed the grievance.

This case continues the trend whereby arbitrators first look to see if there is a sufficient nexus between the impugned expression and potential harm to the employer. If so, the arbitrator then looks to the actual effect of the expression. In this particular case, the employee's blog was found to interfere with the efficient management and operation of the workforce. Arbitrator Williamson also commented on the impact of this blog with respect to colleague relationships and how it could have an extremely negative affect. Additionally, the Arbitrator commented on the potential reputational damage that the employer could suffer if the grievor was allowed to return.

Similar interests were at play in *Credit Valley Hospital v CUPE Local 3252*[13], where an adolescent outpatient had jumped to his death from one of the multilevel parking garages. The grievor, a part-time Environmental Service Representative, was assigned to assist with the clean up at the scene. The grievor took two pictures of the scene with his cell phone and then posted them on his Facebook page, with a caption under each picture. The first caption read 'Mother pleads with kid not to jump off PRCC side of the parking lot but did anyways poor thing.' Under the second picture the grievor posted a caption of 'This is what I have to clean up'[14]. One day later, he deleted the posted pictures. The pictures, however, were brought to the hospital's attention and an investigation followed. The grievor admitted that he took one of the pictures of the scene; however he denied posting it on Facebook. After completing its investigation, the hospital concluded that the grievor posted two pictures and comments regarding the incident, that he violated its Code of Conduct and that he breached the confidentiality of patient, employee and corporate information. The hospital terminated the grievor's employment.

Arbitrator Levinson found that the employer's Confidentiality and Code of Conduct policies clearly set out the "critical significance of the well-known, the well-understood and the all-encompassing notion of the confidentiality of patient information." The Arbitrator concluded that, similar to the case in *Chatham-Kent*, the grievor had not only broken his confidentiality agreement with the hospital, his behaviour had the effect of undermining management's ability to effectively control the workforce. He commented how reinstating the grievor could have the further effect of limiting the hospital's ability to enforce its Confidentiality Policy. The discharge was upheld. The employer's interest in protecting the confidentiality of its patient information clearly out weighed the employee's freedom of expression in this case.

## Going Forward…

A number of factors seem to be present in cases upholding termination. Some include, but are not limited to: the existence of a confidentiality agreement, policies in place governing employee conduct and conduct aimed at co-workers or management. Not surprisingly, the more inappropriate the commentary used in the information disseminated by the employee, the more severe the discipline. It should be noted that arbitrators may view the fact an employer does not have a social media policy as a mitigating factor in determining the disciplinary response. Without a proper policy in place, with corresponding instruction and training for employees, arbitrators are more likely to be lenient than in cases where policies are in place and employees have been made aware of the employer's expectations.

As social media becomes more entrenched in the lives of employees, employers must be cognizant of the challenges that it provides. This is true in situations involving confidential information as well as disparaging remarks made against the employer and co-workers. To help minimize risks down the road, employers should be proactive by adopting a social media policy, engaging in dialogue with employees and ensuring employees understand what is expected of them.

## Use of Social Media by Employers

By: Ed O'Dwyer

The use of social media platforms such as Facebook and Twitter has become a common part of our day-to-day lives and the use (or misuse) of social media has become a hot button issue in contemporary workplace law.

Traditionally, cases involving social media and the workplace have tended to focus on the use of social media in the context of off-duty posts made by employees to, for example, Facebook and Twitter. However, many employers also use social media to interact with their customers and the public at large. For those employers (especially public sector employers) a social media account is a necessary and beneficial component of any communication and customer engagement strategy. Indeed, most members of the public expect large organizations to utilize social media and to be accessible through social media.

While using social media can provide real benefits to employers engaging with the public, it can often attract offensive, harassing, discriminatory comments or conduct by the public. This conduct can end up being directed toward employees, especially those employees who interact with the public directly.

Under the Ontario *Human Rights Code*, employers and service providers have a general obligation to provide services and a workplace free of harassment and discrimination. Importantly, social media sites operated by an employer can be considered to constitute part of the workplace for determining whether a collective agreement, the *Human Rights Code* or employer policies have been contravened due to harassment.

As such, employers need to be aware of their obligations to provide a workplace free of harassment and discrimination when operating their social media sites. They should undertake all reasonable and practical measures to protect the employees from harassment by members of the public on social media, which should include the following:

- Establish and implement a social media policy which sets out acceptable conduct and provides useful and practical definitions of offensive, harassing, discriminatory comments or conduct.
- Develop procedures and responses for dealing with offensive posts/remarks on social media. These would include understanding the limits of the particular platform and what steps can be taken to remove or delete offensive postings.
- Reduce the number of complaints about employees that are made publicly by moving interactions with members of the public who are making complaints about employees via social media to private channels (such as direct messaging on Twitter).

**Did you know**…Effective October 1, 2016, the general minimum wage increased from $11.25 to $11.40 an hour. This minimum wage applies to most employees

## Quick Hit: Employer Compliance with OHSA Workplace Violence Provisions

In one of the first cases litigating the workplace violence provisions of the *Occupational Health and Safety Act* (OHSA), *Ontario (Ministry of Labour) v. Royal Ottawa Health Care Group*[15], the Ontario Court of Justice recently dismissed all three charges laid by the Ministry of Labour against the Royal Ottawa Health Care Group for failure to comply with provisions of OHSA and to protect its employees from workplace violence.

The charges arose after an incident in which a patient violently assaulted and injured two nurses and one personal care attendant. The patient had been in the Schizophrenia Unit of the hospital and had two prior incidents of violence . At the time of the incident in this case, the patient was in the Recovery Program and not considered to pose a threat. The Court found:

1. The hospital did not fail to develop and maintain the measures and procedures for summonsing assistance in instances of workplace violence. A workplace policy was in place which provided for the immediate summonsing of assistance and there was “no delay in the workers’ ability to summons assistance.”
2. The employer did not fail to provide information, instruction and supervision to the workers to protect their health and safety. Training programs had been made available to all staff and the Court stated that what the hospital did was appropriate.
3. The employer did not fail in its obligation to take every precaution in the circumstances for the protection of a worker.

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[1] 2005 HRTO 30 (CanLII).

[2] 2012 HRTO 1977 (CanLII).

[3] 2016 HRTO 347 (CanLII).

[4] *Niagara Falls (City) v CUPE*, *Local 133*, [1991] 24 LAC (4th) 124, 24 CLAS 688 (Ont. Arb).

[5] See *Limestone District School Board v. CUPE, Local 1480* [2007] OLAA No. 404, 163 LAC (4th) 428.

[6] *Millhaven Fibres Ltd. Oil, Chemical & Atomic Workers International Union, Local 9-670 (Mattis Grievance),* [1967] OLAA No 4.

[7] See *MRFA v. Mount Royal University,* [2011] AGAA No 55, 213 LAC (4th) 1.

[8] See *Huron-Superior Catholic District School Board and Huron-Superior Occasional Teacher Local (OECTA), Re* [2013] OLAA No 374.

[9] *See Vale Canada Ltd v USW, Local 6500 (Courchesne), Re* (2012) 222 LAC (4th) 398 (Ont Arb).

[10] [2007] OLAA No 135.

[11] *Ibid* at para 2.

[12] *Ibid* at para 25.

[13] [2012] OLAA No 29, 109 CLAS 95.

[14] *Ibid* at para 6.

[15] 2016 ONCJ 456 (CanLII).

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