

OFF-DUTY SOCIAL MEDIA POSTS BY EMPLOYEES CAN BE CAUSE FOR DISCIPLINE – INCLUDING DISCHARGE

The use of social media sites such as Facebook and Twitter has become such a common part of our day to day lives that it can be easy to forget just how public these communications really are. The reality is, however, that what gets posted on social media does become public and in some cases may have a direct impact on the employment relationship.

Social media use was the central issue in three recent arbitrations where the grievors had been discharged for off-duty posts made to Facebook and Twitter. Although these cases deal with different types of misconduct, they offer guidance to employers on when the use of social media may give rise to disciplinary action.

Facebook Posts as Evidence of Sick Leave Fraud

Arbitrator Shime's recent decision in *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission* added to the growing body of jurisprudence establishing that social media posts can be used as evidence of employee misconduct. In this case, the grievor had exhausted his vacation entitlements in order to schedule six weeks off to plan and celebrate his wedding. Shortly before this extended vacation period, the grievor called in sick, claiming he had injured his back at home. While the grievor was able to produce a certificate indicating he was absent for medical reasons, his Facebook page indicated that he was in Las Vegas celebrating his bachelor party.

After receiving an anonymous tip, the employer reviewed the grievor's public Facebook page and found numerous pictures of the grievor visiting casinos, hotels, restaurants, bars and tourist attractions in Las Vegas. In addition, the grievor was tagged on his brother's Facebook post which stated in part, "Vegas tonight! Can't wait! Brother's bachelor party is gonna be fun!" Finally, the grievor had "checked-in" to a Vegas restaurant.

Arbitrator Shime found that these posts were evidence that the grievor had engaged in "blatantly intentional fraudulent behavior." In situations of false sick leave claims, Arbitrator Shime found that discharge is the appropriate penalty, subject only to mitigating factors. Although the grievor eventually showed remorse for his actions, and offered to repay the sick leave funds he had received, he also tried to claim that he only went to Las Vegas at the last minute. Arbitrator Shime dismissed the grievor's apologies and found this was nothing more than "after the fact remorse for losing a well-paid unionized job." Accordingly, the discharge was upheld.

Firefighters Discharged for Offensive Tweets

While Arbitrator Shime referred to social media posts as evidence establishing other misconduct, two recent decisions considered whether posting to social media outlets can, in and of itself, be considered misconduct worthy of discharge.

In August 2013, the National Post published an article revealing that two City of Toronto firefighters had posted offensive social media comments ("tweets") about women on Twitter. After conducting an investigation, the City terminated the employment of both firefighters, finding that their actions harmed the reputation of the City's fire service and were contrary to its human resources policies.

In *City of Toronto v. Toronto Professional Firefighters Association (Edwards Grievance)*, the City relied on the tweet one of the firefighters had posted about women (as quoted by the National Post), as well as two other tweets uncovered in its subsequent investigation, to substantiate discharge. Arbitrator Gail Misra reinstated him, finding that the tweet regarding "women" was a "one-time event" and the other two tweets, when taken in context, did not warrant discipline. She concluded discharge was too harsh a penalty, and substituted a three-day suspension.

Approximately one month later, in *City of Toronto v. Toronto Professional Firefighters Association (Bowman Grievance)*, Arbitrator Elaine Newman upheld the discharge of the second firefighter who had sent out various tweets that were disparaging to women, the disabled and visible minorities. In his Twitter activity, which had lasted for approximately two years, the grievor clearly identified himself as a Toronto firefighter.

In considering the conduct of the grievors in these cases, both arbitrators considered the seminal test articulated in *Re Millhaven Fibres Ltd. v. Atomic Workers Int'l Union, Local 9-567* (1967) which held that for a discharge arising out of off-duty conduct to be sustained, the onus is on the employer to show:

- (i) the conduct of the grievor harms the Company's reputation or product;
- (ii) the grievor's behaviour renders the employee unable to perform his duties satisfactorily;
- (iii) the grievor's behaviour leads to refusal, reluctance or inability of the other employees to work with him;
- (iv) the grievor has been guilty of a serious breach of the *Criminal Code* and thus rendering his conduct injurious to the general reputation of the Company and its employees;
- (v) places difficulty in the way of the Company properly carrying out its function of efficiently managing its works and efficiently directing its working forces.

It has generally been accepted by arbitrators that employers do not need to satisfy all of the *Millhaven* factors in order to uphold discipline for off-duty conduct. On the contrary, conduct giving rise to any one factor in the *Millhaven* test may warrant discipline or discharge. Ultimately, the test to be applied is, "Would a reasonable and fair-minded member of the public, if apprised of all the facts, consider that the grievor's continued employment would so damage the reputation of the Employer as to render that employment untenable?"

Although this test has been consistently applied, Arbitrator Newman found that in light of the significant changes which have taken place over the last several decades with respect to cultural awareness and sensitivity, as well in the diversity of the workplace, the test should be revisited. In particular, Arbitrator Newman found that the fourth branch of the *Millhaven* test should be expanded to reflect the fact that a reasonable person would consider a human rights violation to constitute very serious misconduct and suggested the following restatement: "Has the grievor been guilty of a serious breach of the *Criminal Code* or of a Human Rights Policy or *Code*, thus rendering his or her conduct injurious to the reputation of the Company and its employees?"

Arbitrator Newman then stated that disseminating "slurs, derogatory comments, insults, in the form of jokes, even if created by someone else, constitute[s] serious acts of discrimination." In upholding the discharge, Arbitrator Newman found that grievor's tweets violated a number of the employer's policies which stated, among other things, that members must not act in a manner which would discredit the Toronto Fire Services, that they must not discriminate against any person by any means, and that they were prohibited from "engaging in behavior that would constitute discrimination or harassment towards members of the public and co-workers." Most significantly, by repeatedly denigrating women, visible minorities and disabled people, among others, the grievor disregarded and violated his employer's human rights policy. Finally, Arbitrator Newman found the grievor's apology lacked credibility.

Interestingly, in both cases the grievors claimed that they believed their tweets were private and that neither had read Twitter's terms of use. Both arbitrators rejected these arguments. As explained by Arbitrator Newman,

[...] when engaging in social media use, it is my view that the user must accept responsibility when the content of his or her communications is disseminated in exactly the manner promoted by the social media provider. This is what social media is intended to do. Once we use these devices, once we load that gun, it is potentially dangerous.

Finally, both arbitrators agreed that where the employer is claiming that an employee's off-duty conduct harms the employer's reputation, both actual, or presumed actual, harm and potential harm can be considered. In both cases, this test was met. However, the cases resulted in different outcomes based solely on the facts – in the Newman decision the grievor had posted offensive tweets for two years, while in the Misra decision the offensive tweet was found to be a one-time event.

Implications for Employers

Although these decisions deal with different disciplinary issues, they add to the growing body of jurisprudence governing the use of social media activity as evidence of misconduct.

As these cases demonstrate, there is no expectation of privacy surrounding the use of social media. An employee's off-duty posts can be used as evidence to justify termination. The more traditional use of social media evidence is found in the *TTC* decision, where public Facebook posts were used as evidence of fraud. However as demonstrated by the City of Toronto cases, social media posts can, in and of themselves, constitute misconduct.

In addition, Arbitrator Newman's expansion of the *Millhaven* test to include serious breaches of the *Human Rights Code* is significant. This decision clarifies that off-duty conduct which is discriminatory in nature may be viewed as harming the employer's reputation. This finding is of importance to all employers and in particular those in the public sector, where workers may be held to a higher standard.

In light of these decisions, employers should take this opportunity to review their policies on, among other things, social media use and human rights. They should determine if a Social Media Use Policy is in place and whether that policy has been communicated to employees. By establishing clear guidelines which include reference to off-duty conduct, the kinds of behaviour demonstrated in these cases may be avoided. However if this type of misconduct does occur, having a policy in place which has been communicated to employees provides an employer with additional evidence to rely on in upholding the discipline.

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