



CARMAN J. OVERHOLT, Q.C.
EMILY PITCHER

**SOCIAL MEDIA:
OPPORTUNITIES AND
LIMITATIONS IN THE
WORKPLACE**

Fraser Milner Casgrain LLP
20th Floor, 250 Howe Street,
Vancouver BC, V6C 3R8
604 622 5165
carman.overholt@fmc-law.com

Social Media: Opportunities and Limitations in the Workplace

The internet and the opportunities created by social media for business present many new challenges for employers and those involved in management of organizations. The rules defining appropriate standards for electronic communications continue to evolve. The standards reflect a balance between employee freedom of speech and the rights of individuals to work in a respectful workplace and not to be subject to communications or conduct that constitutes harassment. Although many employers have introduced written policies relating to technology usage and blogging, the law is evolving gradually to meet the needs of employers in establishing appropriate standards for electronic communications and blogging. A number of decisions of arbitrators, tribunal members and the courts provide needed guidance in this area.

Lougheed Imports Ltd. (c.o.b. West Coast Mazda) (Re), [2010] B.C.L.R.B.D. No. 190 (“*Lougheed Imports*”)

In *Lougheed Imports*, the United Food and Commercial Workers International Union, Local 1518 (the “Union”) alleged that West Coast Mazda had breached the *Labour Relations Code* in terminating two of its employees. The employees had made a number of posts on their Facebook profiles that ranged from venting about workplace frustrations to “offensive, insulting and disrespectful comments” about their supervisors. The Union argued that the terminations were at least in part motivated by anti-union animus and should therefore be overturned. The Board however agreed with the employer: the Facebook posts constituted proper cause for termination and West Coast Mazda had not breached the Code in terminating the employees.

The former employees, identified only as A.P. and J.T. due to the “embarrassing and offensive nature” of their comments, had been employed at West Coast Mazda for two and four years, respectively, and both were known to the employer as union supporters. The employer was given notice of the Union’s application for certification on August 27, 2010 and the Union was certified shortly thereafter. As evidence of anti-union animus the Union pointed to the fact that it was also on August 27 that F.Y., a manager at West Coast Mazda and Facebook friend of both J.T. and A.P., began monitoring J.T.’s Facebook profile and keeping track of his work-related posts. The Board accepted F.Y.’s claim that the timing was a mere coincidence and that J.T.’s Facebook status on August 27, which read “Sometimes ya have good smooth days, when nobodys fucking with your ability to earn a living ... and sometimes accidents DO Happen, its unfortunate, but that’s why there called accidents right?”, was J.T.’s first work-related post and the first to cause F.Y any concern.

J.T. continued to make work-related posts on his Facebook account over the following weeks and eventually removed F.Y. as a friend on the site. While this effectively meant that F.Y could no longer view J.T.’s profile, F.Y. continued to monitor J.T.’s posts with the help of a former employee who remained on J.T.’s friend list. The posts included aggressive and threatening statements, references to F.Y. as “a complete jack-ass”, a “half-a tard”, and “the Fixed Ops/Head Prick”, and allegations that F.Y. was engaged in a sexual relationship with another male manager

at West Coast Mazda. The Board found that A.P. had also encouraged people not to spend money at his employer's business because West Coast Mazda had "ripped off" customers in the past.

On October 6, 2010, the employer conducted separate investigatory meetings with J.T. and A.P. at which they were represented by the Union. Each employee was presented with copies of the Facebook postings and asked whether they had made inappropriate comments about the business or the managers and both J.T. and A.P. denied making the postings. The following day, both employees were advised that their employment was terminated and were given letters setting out the reasons which involved "making disrespectful, damaging and derogatory comments on Facebook" that were inappropriate and insubordinate, created a hostile working environment, and were likely to damage the reputation and business interests of the employer.¹

The Union relied on *ETL Environmental Technology*, [1993] B.C.L.R.B.D. 216, for a list of factors to be considered in determining if a termination was motivated by anti-union animus. Among the factors is "the employer's previous attitude towards and treatment of similar conduct" which here, the Union argued, indicated a demonstrated failure to discipline employees for the racist, sexist, homophobic, and xenophobic comments often heard on the shop floor.² The Board found that such comments were not "similar conduct" because there could be no serious expectation of privacy given that the Facebook posts were visible to everyone on the employees' Facebook friends lists (i.e. 377 of J.T.'s friends and almost 100 of A.P.'s) and the posts were therefore damaging to the employer's business.³ Similarly, calling the manager derogatory and insulting names was not similar conduct to the inappropriate comments made at the business on a regular basis.

The Board noted that while employees are entitled to their opinions, displaying opinions about work related issues "may have consequences within the employment relationship."⁴ The Board also observed that this was a relatively novel issue in that the employer had never encountered a situation involving an employee's use of Facebook and this helped justify the employer's conduct in monitoring the Facebook profiles over time rather than confronting the employees or taking disciplinary action at the outset. Here, the fact that the employees had no previous discipline did not outweigh the fact that West Coast Mazda had never encountered similar conduct and that the offence was serious insubordination and conduct damaging to the employer's reputation.⁵

British Columbia v. British Columbia Government and Service Employees' Union (Grierson Grievance), [2010] B.C.C.A.A.A. No. 54 ("*Grierson*")

In *Grierson*, the arbitrator was asked to determine whether the employer had just cause to terminate two employees for sending and receiving inappropriate emails at work. The grievors

¹ *Lougheed Imports* at para. 54.

² *Lougheed Imports* at para. 80.

³ *Lougheed Imports* at para. 97.

⁴ *Lougheed Imports* at para. 107.

⁵ *Lougheed Imports* at para. 110.

admitted to participating in the circulation of the emails, which consisted of hardcore pornography, homophobic material, and videos and photographs of graphic and extreme violence, but argued that while some discipline was appropriate, a suspension should be substituted for termination. The arbitrator denied the grievances finding that there had been a “long standing and coordinated pattern of accessing highly offensive material and then distributing it, all knowingly in breach of the applicable standards of conduct.”⁶ The grievors’ reservations as to their acceptance of responsibility as well as their attempt to place the blame on others was an aggravating factor.

The grievors, Grierson and McMartin, had been employed by the Compliance and Enforcement Section of the Ministry of Forests and Range (the “Ministry”) for 14 and 24 years respectively and neither had any discipline on record. They were provided with computers and government email accounts as part of their employment with the employer maintaining the right at any time to examine the contents of emails being sent and received by employees. The use of these resources was also subject to a policy, of which the grievors admit to being aware, reading in part as follows: “users must not access Internet sites that might bring the public service into disrepute or harm government’s reputation, such as those that carry offensive material.”

The Executive Director of Organizational Development at the Ministry was asked in 2009 to coordinate an investigation into the inappropriate use of emails by employees. A review of email use by employees lead to the conclusion that the grievors were central to the distribution of offensive material at the Ministry. They were subsequently interviewed with respect to these findings and suspended without pay. Shortly thereafter, each of the grievors received a letter stating that their actions brought the public service into disrepute and breached the trust of the employer such that the employment relationship had been irrevocably harmed and that their use of government resources to receive and distribute offensive material was sufficiently serious to require termination. Grierson's termination was also based in part on excessive use of his work computer for personal purposes.

In reaching his decision, the arbitrator stated that the case was not about the general rights of the grievors to access information, offensive or otherwise, on the internet. Rather the issue was that they had done so at work thereby violating the general standards of conduct expected of public servants and the high standards expected of employees in their role. He noted that while “[t]he possibilities of the internet may be a wondrous thing to some... [it] also contains large amounts of offensive, degrading and hurtful material that has no place at the worksite” and it is therefore the responsibility of employees to exercise their judgment as to what is appropriate for the workplace.⁷ He also observed that the grievors knew from the standards of conduct and other policies that their conduct was not acceptable and that they had deliberately violated those standards.

A significant factor in the arbitrator’s decision to dismiss the grievances was the grievors’ refusal to accept responsibility for their actions. He noted that where contrition had been a mitigating

⁶ *Grierson* at para 92.

⁷ *Grierson* at para. 80.

factor in other cases, not only was there little evidence of that here, the grievors, “[i]nstead of accepting full and unconditional responsibility... were bellicose and arrogant.”⁸ The arbitrator found that the grievors had accessed “internet sites related to racism, hate and sex knowing such access was prohibited; they brought the Ministry of Forests and Range into disrepute; they harmed its reputation; they did not meet acceptable social standards; they created a negative work environment rather than a positive one; and they did not treat women and others with respect and dignity” and that the employer therefore had just cause in terminating their employment.⁹

The grievors appealed to the Labour Relations Board on the grounds that the arbitrator’s award was inconsistent with Code principles, did not promote the concept of progressive discipline, failed to give adequate weight to the applicants’ long and unblemished term of employment, and was inconsistent with the bulk of the jurisprudence in similar cases and that the arbitrator had made factual errors in reaching his decision. The Board reviewed the arbitrator’s decisions and dismissed the appeal.¹⁰

***Chatham-Kent (Municipality) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 127 (Clarke Grievance)*, [2007] O.L.A.A. No. 135 (“Chatham-Kent”)**

In *Chatham-Kent*, the employer terminated the employment of Jessica Clarke (“Clarke”) for breach of the confidentiality agreement, insubordination, and conduct unbecoming a personal caregiver at the home for the aged where she worked. The termination had occurred after the employer discovered that Clarke, a personal care attendant at a home for the aged, had created a blog, accessible to anyone with internet access, where she published resident information and pictures without resident consent and had made inappropriate comments about residents entrusted to her care. It was the position of the union that there was no just cause for any discipline while the employer argued that Clarke’s actions constituted a serious breach of confidentiality in circumstances where there is an elevated duty to ensure privacy. The arbitrator found that, given the nature and extent of Clarke’s misconduct, the decision of the employer should not be disturbed and the grievance was dismissed.

The parties agreed that Clarke had maintained the blog in question for approximately four months in 2006 until she deleted it after being interviewed about it by management. The public blog, described by the arbitrator as “ill-written.... blunt and laced with coarse language, and... bitchy in style with an attempt at humour” included expressions of displeasure at decisions being made by management (identified by first name and last initial), criticisms of coworkers, disparaging remarks about the business generally, and discussions of residents which included their first names and various medical conditions. It was also not in dispute that Clarke had twice signed a confidentiality agreement “by which she agreed to respect the privacy of residents, their families and other employees, and to treat the Home’s clinical, administrative, and

⁸ *Grierson* at para. 92.

⁹ *Grierson* at para. 92.

¹⁰ *Grierson (Re)*, [2010] B.C.L.R.B.D. No. 162.

financial information concerning residents, their families, employees, and the Home as confidential information.”¹¹ It was, however, the union’s submission that Clarke was not computer literate and believed the blog to be private and only available to her three coworkers and not the public at large. The union also argued that “the content of the blog is not much different from the kind of comments made daily over lunch by the employees” and that there was no attempt to undermine the dignity of any resident.

The arbitrator reviewed Clarke’s blog, noting descriptions of the home as “a hole”, statements that she “is friggin pissed off” and that she “hates her job” and references to management as “stupid fucking assholes”, and found that blog comments such as these “must be found to be insolent disrespectful, and contemptuous of management” and an attempt to undermine their reputation and authority.¹² In finding that such conduct was worthy of discipline he noted that Clarke “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.”¹³

It was further found that Clarke had breached the confidentiality agreement in establishing a public website as opposed to a private one and posting information about residents and that “the whole tone, manner, and the tasteless language she used to graphically discuss aspects of her daily work activities at the Home, address the perceived strenuousness and unjustness of her work day, and berate the work ethic of some of her co-workers, was inappropriate and conduct unbecoming a Personal Care Giver.”¹⁴

In addressing the union’s argument that the comments on the blog were similar to what employees would talk about on their break and should therefore be condoned, the arbitrator found that this overlooked the fact that the information was available to the public and ignored that the standards in the health care sector for confidentiality of personal information are high and significantly different from those that would apply in some other industries. Here, on the grounds that she had breached the confidentiality agreement, made insubordinate remarks about management, and demonstrated conduct unbecoming a personal care giver in showing clear disregard for residents’ need for care, Clarke’s discharge was upheld.

***Alberta Union of Provincial Employees v. Alberta*, 2009 ABQB 208, 176 A.C.W.S. (3d) 525 (“Alberta”)**

The grievor was an administrative employee in the Alberta Public Service and was dismissed after her employer became aware of a number of blogs she had created. An investigation was undertaken following discovery of the blogs and a subsequent meeting was held between a union liaison, several management representatives, and the grievor at which she was given a

¹¹ *Chatham-Kent* at para. 6.

¹² *Chatham-Kent* at para. 25.

¹³ *Ibid.*

¹⁴ *Chatham-Kent* at para. 26.

letter of termination. The majority of the Arbitration Board upheld the dismissal and the union sought judicial review on the grounds that the Board had made a number of reviewable errors.

In the blog, the grievor revealed that she worked for the Alberta government, detailed her work-related frustrations, discussed confidential files, and provided identifying and often unflattering descriptions of her co-workers and supervisors. In finding for the employer, the Board noted that “[w]hile the Grievor has a right to create personal blogs and is entitled to her opinions about the people with whom she works, publicly displaying those opinions may have consequences within an employment relationship.... in expressing contempt for her managers, ridiculing her co-workers, and denigrating administrative processes, [the grievor] engaged in serious misconduct that irreparably severed the employment relationship, justifying discharge.”¹⁵

The Alberta Court of Queen’s Bench granted the application for judicial review on the basis that the Board erred in its interpretation and application of the representation clause in the collective agreement and the Alberta Court of Appeal later dismissed the appeal agreeing that the matter was to be referred back to the Board.¹⁶

EV Logistics v. Retail Wholesale Union, Local 580 (Discharge Grievance), [2008] B.C.C.A.A. No. 22 (“*EV Logistics*”)

EV Logistics concerned the discharge of an employee as a result of the contents of a publicly available blog that he maintained. The blog, which contained violent fantasies, racist comments, numerous references to the employee’s admiration for Hitler, and photographs and statements identifying the blogger as an employee of EV Logistics (the “Employee”), came to the attention of management by way of an anonymous email expressing concern about its contents. Following a meeting with the employee, two supervisors, and the union representative, the employee was suspended and later terminated. Finding that there were sufficient mitigating factors, the arbitrator directed that the grievor be reinstated in his former employment position.

The employee was 22 years old at the time of arbitration and had been employed by the company for approximately 6 years. Though he had a clean disciplinary record, the contents of the blog were such that the employer became concerned about the safety of his employees and the RCMP were contacted and asked to ensure that the employee was not a threat to himself or others. In the subsequent meeting with the employer, the employee disclosed that he “suffered from depression, had experienced significant challenges in his life, had not known his mother as she had left the family when he was three weeks old, was raised primarily by his grandparents and had been overweight until age 15”, all of which was given significant consideration by the arbitrator.¹⁷ The employee also explained that he did not admire Hitler “but admired his ability to influence and control people” and that he never thought that what he wrote would affect his job. He offered to apologize and sent a lengthy written apology to his supervisor on the same day as the meeting.

¹⁵ *Alberta v. Alberta Union of Provincial Employees (R. Grievance)*, [2008] A.G.A.A. No. 20 at para. 97.

¹⁶ *Alberta Union of Provincial Employees v. Alberta*, 2010 ABCA 216.

¹⁷ *EV Logistics* para. 15.

In the termination letter the employer stated that the blog posts were “inherently reprehensible” and fundamentally inconsistent with the values of Canadian society and that the views expressed in the blog in association with the identity of the employer indicated that the employee was “unsuited for continued employment”.¹⁸ The employer argued that the dismissal was justified in light of the offensive, racist and hateful blog postings and because of the nature of the internet in that such postings should be considered much more invasive in assessing the degree and extent of the damage caused and the level of responsibility of the person doing the posting. The union argued that there was no connection between the business interests of the employer and the employee’s blog and that, in the alternative, there were a number of mitigating factors such that a significant reduction in the disciplinary charge was appropriate.

In reaching her conclusion, the arbitrator found that the grievor’s young age as well as the challenges he had faced in his life provided important context in considering the gravity of the offence and the reasons for his actions. She found that there was a connection between the blogging and the business interests of the employer and that where employment is linked to off-duty conduct that is sufficiently abhorrent and reprehensible, harm can be presumed provided that there is public access to that conduct. However, given that the existence and identification of the employment relationship was only coincidental to the grievor’s conduct and that the grievor had acted appropriately as soon as he realized his wrongdoing in apologizing for his actions, a reduction in the disciplinary penalty was justified.

Wasaya Airways LP v. Air Line Pilots Assn., International (Wyndels Grievance), [2010] C.L.A.D. No. 297, 195 L.A.C. (4th) 1 (“*Wasaya*”)

In *Wasaya*, airline pilot John Wyndels filed a grievance after being dismissed from his employment with Wasaya Airways LP as a result of a posting he had made on Facebook. The company submitted that the statements, while off-duty conduct, harmed the company’s reputation and that given that the Facebook post contained “extremely serious, offensive and derogatory remarks concerning the Company’s owners and customers”, the dismissal was justified. The Association argued that any harm was speculative rather than actual and that less severe discipline ought to have been levied.

The company is an airline that provides service to approximately 40 First Nations Communities with its customer base being described as “at least 90%” First Nations People. The company’s “Employee Policies and Procedure Handbook” lists a number of “First Nations values”, viewed as “guiding principles” in the organization and it was accepted that respect for the First Nations people was essential given that it was a business run, serviced and used by First Nations people. The Facebook post, which was not reproduced in the decision, consisted of a “Top 10 list” titled “You know you fly in the north when...” and described as racist, offensive, disrespectful, and derogatory and “not in the least bit complimentary towards the Company’s clients.”

In his decision, the arbitrator cited *Alberta* and *Chatham-Kent* for the proposition that “where the internet is used to display commentary or opinion, the individual doing so must be assumed

¹⁸ *EV Logistics* para. 27.

to have known that there is potential for virtually world-wide access to those statements.”¹⁹ Unlike in those cases, there was nothing in the Facebook post identifying the company, or stating that the grievor was an employee of it, however, the remarks were found to have a real and material connection to the airline and gave reason to the company to have both substantial and warranted concerns about potential reputational harm.²⁰ While the conduct did not directly affect the grievor’s ability to perform his duties, the fact that his presence in First Nations Communities as a pilot with the company had the potential to harm the Company’s reputation thereby rendering him unable to perform his duties.

The arbitrator concluded that while the grievor’s misconduct was a serious breach of the Company’s policies, the discipline imposed was excessive in light of a number of mitigating factors. However, given that the Facebook post had the potential for significant detrimental effect on the Company’s reputation and that management expressed an unwillingness to work with him again, the employee’s misconduct was such that the employment relationship was found to have been rendered untenable. The arbitrator’s award provided that the grievor was entitled to full compensation and benefits for a 3 month period during which he was deemed to have been suspended after which he was to resign from the company with the letter of dismissal being expunged from his record.

Conclusion

These recent decisions illustrate the complexity of the legal and human resources issues raised for employers in addressing the use of social media in their organizations. Although the relevant common law principles were created before the electronic age, they remain relevant and useful in addressing disputes and potential claims related to the use of social media in the workplace.

Carman J. Overholt, Q.C. and Emily Pitcher
December 19, 2010

¹⁹ *Wasaya* at para. 98.

²⁰ *Wasaya* at para. 99.