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Tattoos: Not Just for Sailors and Stevedores Anymore

Reconciling corporate image with employee personal expression is not a tension new to the workplace. In the 1970s, policies that restricted men from wearing their hair long and growing sideburns were the subject of legal challenge. Today, tattoos are at the forefront of this longstanding conflict.

For an employer two questions emerge: (1) Is it legally permissible to prohibit the display of tattoos in the workplace; and (2) If it is, should an employer do so?

Can an employer prohibit the display of tattoos in the workplace?

The scope of an employer's ability to implement a policy prohibiting the display of tattoos depends on whether the workplace is unionized.

In a **non-unionized workplace**, an employer has absolute discretion to implement a dress code of its choosing provided its terms do not violate human rights legislation. In Canada, freedom from discrimination on the basis of having a tattoo is not a protected ground under human rights legislation. That said, human rights could be implicated if the display of a tattoo is a legitimate expression of a protected characteristic. For example, in the Hindu religion marking the forehead is believed to enhance spiritual well-being and some Hindu women may tattoo dots around their chin or eyes to ward off evil.

Even where a restriction on the display of tattoos is permitted, employers are well-advised to ensure the restriction is reasonable, clear and consistently applied. This is because when deciding a case of termination for cause, a court will almost always consider the following two factors: (1) Did the employer clearly communicate the standard of conduct employees were expected to meet; and (2) Was the employee treated fairly and consistently with all other employees in the workplace?

In a **unionized workplace**, employer policy-making power is more scrutinized than it is in a non-union environment. However, similar to the non-unionized context, a policy restricting the display of tattoos must meet certain criteria, including that it be: (1) reasonable; (2) clear and unequivocal; and (3) consistently enforced.

The application of these criteria to a policy which prohibited the display of "large tattoos" was recently considered in *Ottawa Hospital v CUPE, Local 4000*, a case in which the arbitrator found the policy void

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and unenforceable. The hospital's argument was three-fold: First, the prohibition of "large tattoos" was *reasonable* because the display of tattoos would undermine patient care. The hospital served an older demographic who tended to attribute negative characteristics to people with tattoos. For these older patients receiving service from an employee with a tattoo could undermine the patient's confidence in the hospital at a time when the patient was already experiencing stress. Second, while the prohibition of "large tattoos" was not necessarily clear, this lack of clarity ought to be accepted because strict guidelines would necessitate the imposition of an arbitrary limit on the size of a tattoo. Third, while there may have been some *inconsistent enforcement* of the policy in the past, this ought to be forgiven in a workplace of thousands of employees and hundreds of supervisors.

At a time when tattoos have become more mainstream, and there is less of a presumption that a tattoo reveals something negative about a person's work ethic or character, many businesses are revisiting whether a policy prohibiting their display serves a necessary objective.

The arbitrator found the policy void and unenforceable for two principal reasons: First, while he accepted the hospital's argument regarding the negative stereotype to which some patients may attribute a tattooed employee, he refused to conclude this had any impact on patient care. Second, although he acknowledged achieving clarity and consistency may be challenging, he refused to relax these requirements because otherwise employees might not know the standard they were required to meet, might be vulnerable to the subjective interpretations of individual supervisors, and could be at risk of being unfairly targeted for reasons other than their lack of adherence to the policy.

Is prohibiting the display of tattoos good corporate policy?

There is no single answer to this question. A "conservative" and "professional" image may be an asset to one business but a detriment to another. However, at a time when tattoos have become more mainstream, and there is less of a presumption that a tattoo reveals something negative about a person's work ethic or character, many businesses are revisiting whether a policy prohibiting their display serves a necessary objective.

A recent example is Starbucks which, after receiving an employee-initiated online petition that collected 25,000 signatures, amended its policy to permit the display of tattoos provided they are not located on the face or throat and do not depict hateful messages or swear words. Starbucks explained the company's decision by citing the importance of permitting "*our partners (employees) to be able to express their individuality more freely and show their tattoos*". While laudable, it is also possible Starbucks understood that a policy viewed by employees as arbitrary or unnecessary is likely to negatively impact employee morale and retention.

In a non-unionized workplace, an employer has absolute discretion to implement a dress code of its choosing provided its terms do not violate human rights legislation. In a unionized workplace employer policy-making power is more scrutinized.

Tips and best practices

In light of the foregoing, an employer considering implementing or revising a tattoo policy is encouraged to consider the following tips and best practices:

- **Be Critical:** Understand and critically evaluate the objective of the policy, and whether it outweighs the direct and indirect costs to the business.
- **Be Clear and Consistent:** Ensure the conduct prohibited is clearly identified, train supervisors and managers how to apply the policy, and conduct periodic audits to ensure the policy is enforced consistently.
- **Allow for Human Rights Accommodation:** Build in flexibility for the rare circumstance where the display of a tattoo is connected to a characteristic protected under human rights legislation.

To learn more and for assistance, contact any member of the Sherrard Kuzz LLP team.

DID YOU KNOW?

By **December 31, 2014** organizations with 20 or more employees in Ontario must file their next Accessibility Report under the *Accessibility for Ontarians with Disabilities Act*.

For more information or assistance, contact Leah Simon at lsimon@sherrardkuzz.com

Ghomeshi Allegations Spark Vigorous Debate About Off Duty Conduct

The recent dismissal of Jian Ghomeshi from the Canadian Broadcasting Corporation has made off duty conduct this year's most talked-about workplace issue. What surprises many members of the public is that *off duty conduct* can result in workplace discipline. The question they ask is: *When would an employee's private life ever become a workplace issue?* The answer is quite simply this: *When the employee's conduct negatively impacts the employer's legitimate business interests.*

When can an employee's private life become an employer's business

It is an implied term of any employment relationship that an employee has an obligation to faithfully perform his or her duties. When an employee acts in a manner contrary to this obligation, whether on or off duty, and the conduct negatively impacts or is likely to impact the employer's legitimate business interests, the employer may discipline the employee up to and including dismissal. This principle of law is neither new nor novel and was articulated in the leading decision of *Pearce v Foster*, an 1886 decision of the English Court of Appeal, still referred to by Canadian courts and arbitrators:

... where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him...

The misconduct, according to my view, need not be in the carrying on of the service or the business. It is sufficient if it is conduct which is prejudicial or likely to be prejudicial to the interests or to the reputation of the master, and the master will be justified... (emphasis added)

What is the meaning of 'negatively impact a legitimate business interest'?

Generally speaking, conduct is likely to be considered detrimental to an employer's business interests in any of the following circumstances:

- The nature of the conduct prevents the employee from continuing to perform his or her duties (*e.g.* loss of credibility or confidence where the employee is in a position of trust)
- Co-workers have refused or are reluctant to continue to work with the employee as a result of learning about his or her conduct (often related to violence or harassment)
- There is a risk of injury to co-workers or members of the public
- The employee has been guilty of a serious breach of the *Criminal Code*
- The conduct has harmed or will harm the employer's reputation or brand

Specifically in regards to reputation or brand, the damage or potential damage must be considered *substantive* in the eyes of a regular member of the public:

...where the interest asserted by the employer...is in its public reputation and in its ability to be able to successfully carry out its works, the concern must be both substantial and warranted. The test, so far as possible, is an objective one: **what would a reasonable and fair-minded member of the public...think if apprised of all the relevant facts? Would the continued employment of the [employee], in all the circumstances, so damage the reputation of the employer as to render that employment impossible or untenable?** (*Ottawa-Carlton District School Board and OSSTF, District 25* (2006) (emphasis added)

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Not surprisingly, this analysis is highly contextual and depends on both the nature of the employer's business and the alleged misconduct. Some off duty conduct is easy to condemn (*e.g.*, serious criminal conduct). Other conduct is not so straight forward including, for example, where the conduct is not illegal per se, but may nonetheless undermine the employer's business interests (*e.g.*, private racist remarks). In this latter case, an employer might start by asking two preliminary questions: (1) Is the employee an important representative of the organization (not necessarily the key representative); and (2) Is the employee's conduct inconsistent with and harmful to the employer's reputation? Essentially it is the same type of analysis when a celebrity or sports figure loses a lucrative sponsorship because they have engaged in 'off duty' conduct the sponsor considers inconsistent with its brand. Think back to 2009 when Kellogg's declined to renew Michael Phelps's sponsorship after a photo of him smoking marijuana at a college party went viral.

Upcoming Seminar

To learn more about this important topic, join us at our upcoming *HReview* Breakfast Seminar at which we will consider these and related issues in greater depth and offer practical ways to identify, investigate and manage the damage caused by off duty conduct. For details and how to register, please see the back page of this newsletter.

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Ghomeshi Allegations Spark Vigorous Debate About Off Duty Conduct

The dismissal this past Fall of Jian Ghomeshi from the Canadian Broadcasting Corporation made *off duty conduct* this year's most talked-about workplace issue. Join us as we discuss this interesting topic including key legal issues and practical HR tips:

1) Off Duty Conduct

- When can an employer discipline or discharge an employee for off duty conduct?
- Does it matter whether the conduct becomes public?
- What type of evidence demonstrates reputational harm to an employer?
- Potential liability if an investigation is not (or is improperly) conducted.

2) Damage Control

- How should an employer respond to questions from the media?
- When should an employer "get in front" of a story and when should it be reactionary?
- Using social media to get the message out.

DATE: Wednesday January 28, 2015; 7:30 – 9:30 a.m. (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: Hilton Garden Inn Toronto/Vaughan, 3201 Highway 7 West, Vaughan, ON L4K 5Z7

COST: Complimentary

RSVP: By Monday January 19, 2015 at www.sherrardkuzz.com/seminars.php

Law Society of Upper Canada CPD Credits: This seminar may be applied toward 1.5 substantive CPD credits.

HRPA CHRP designated members should inquire at www.hrpa.ca for eligibility guidelines regarding this *HReview Seminar*.

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Jean Cumming Lexpert® Editor-in-Chief

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