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Employment and Labour Law Update

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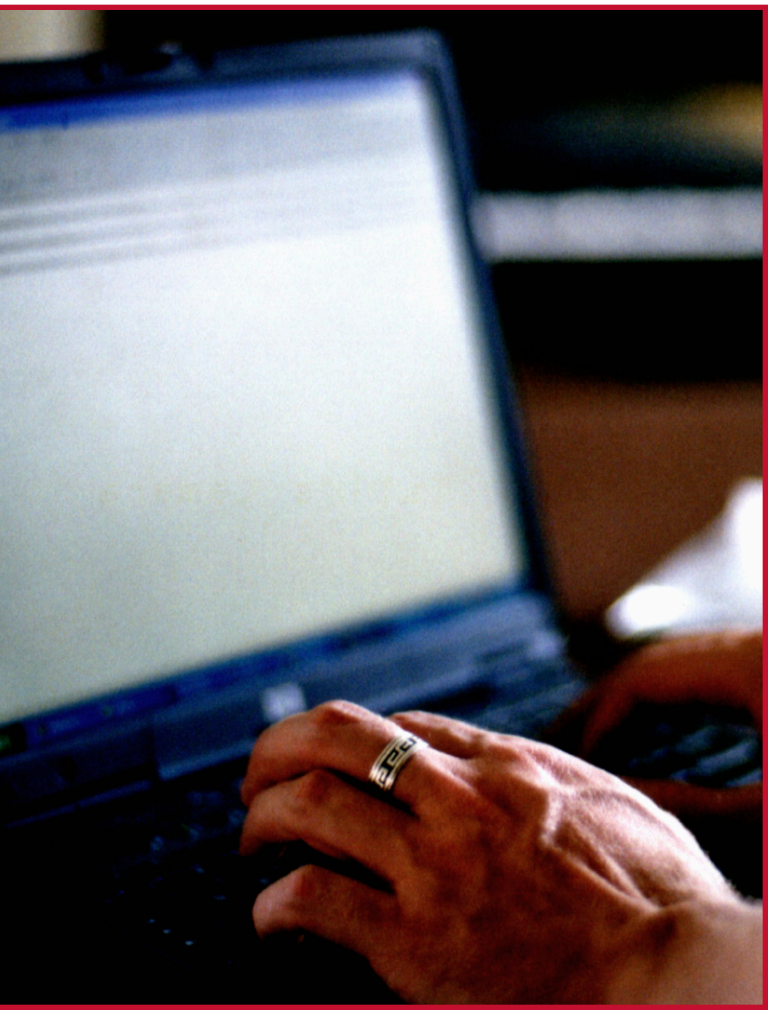

Crossing the Line

When Off-Duty Online Postings Justify Discipline

Courts and labour arbitrators have traditionally drawn a line between an employee's work and private life, declining to uphold discipline for "off-duty" conduct where there is no clear connection to the workplace. However, with the proliferation of online social media and the ease with which objectionable online comments can now be linked to the poster's employer, the line has begun to blur. This is forcing employers to consider disciplining or even terminating employees who post offensive content to protect the legitimate business interests of their organizations.

Canadian adjudicators have only just begun to set sail into these largely uncharted waters. However, it is becoming increasingly clear the distinction between a posting worthy of discipline and one that is not, is the extent to which the posting affects (or could affect) the workplace. If there is no connection to or discernible impact on the workplace, there will be little chance of upholding discipline.

A recent high-profile case

In the aftermath of the tragic suicide of British Columbia high school student, Amanda Todd, in October, a number of media outlets reported on the related termination of Justin Hutchings, an employee of a retail store in London, Ontario. After hearing of the death of Ms. Todd, who had endured online bullying and harassment prior to her suicide, Mr. Hutchings, a man with no apparent connection to Ms. Todd, provocatively posted to Facebook the comment: "Thank God this b---- is dead".

A Calgary woman who had started a group to police Facebook comments about Ms. Todd came across the offensive posting and when she clicked on Mr. Hutchings' Facebook profile saw the name of his employer. She reported the posting to the employer which immediately terminated Mr. Hutchings' employment purportedly because the posting was contrary to the values of the organization and Mr. Hutchings could be publicly identified as being its employee.

Was the termination justifiable in law?

What have arbitrators said?

Arbitrators have upheld serious discipline for inappropriate social media postings when there is a connection to the workplace. For example:

- In a blog in which he identified his employer, an employee posted hateful messages about East Indians and comments supporting Nazism. Upon discovering the blog, the employee was terminated for cause. The arbitrator concluded that, while there was no evidence of actual harm to the employer, because it was named in

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the blog, there was a serious reputational risk to it. This justified the imposition of discipline, but not termination. In reaching this conclusion, the arbitrator considered the fact the comments did not directly target the employer or its employees (40% of whom were of East Indian descent) and the employee had shown remorse. Had the blog entries represented the employee's "actual views rather than the reckless ranting of an emotionally impulsive young person," the termination would have been upheld.

- Although the employer had not suffered actual harm, an arbitrator ordered the 'resignation' of an airline pilot who was terminated as a result of a Facebook posting with a connection to his employment. The employer was an airline owned by a number of First Nations and which primarily served clients from First Nations communities. Following his posting of a "top ten list" entitled, "*You know you fly in the north when...,*" considered by his employer to be offensive and degrading to First Nations people, the pilot was fired, largely in light of the irreparable harm the posting could have caused the airline's business. The arbitrator found the airline had a "substantial and warranted" reputational concern arising out of the pilot's postings.

Tips for employers

While adjudicators continue to generate case law that should bring greater clarity to this evolving issue, employers can take steps to proactively protect themselves. To this end, consider the following:

A. Off-duty conduct may be considered misconduct if the conduct:

- Harms the company's reputation.
- Makes it impossible for the employee to perform his/her duties satisfactorily.
- Results in other employees refusing to work with the offending employee.
- Makes it difficult for the company to do business efficiently.

B. It is prudent to have a policy that directly addresses social networking and blogs. This policy should:

- Clearly outline permitted and prohibited uses of social media.
- Remind employees online communications may be read by anyone (including the employer, co-workers and members of the public).
- Reiterate any applicable policies, such as harassment, IT/computer use, confidentiality, conflicts of interest and privacy, *etc*.
- Advise whether the employer monitors social networking sites.
- Prohibit employees from:
  - Using company-owned resources for social networking (unless this is allowed as legitimate workplace activity, in which case there should be clear parameters).
  - Disclosing confidential information about the company, employees or customers.
  - Posting material that may violate the privacy rights of others.
  - Publishing negative comments, not only about the employer, other employees, or customers, but <u>any</u> comments that may negatively affect the employer's reputation.
- Expressly warn employees that any breach of the policy may result in discipline up to and including termination.

Employers are also well advised to:

- Monitor "cyberspace" for comments that could negatively impact the company's reputation.
- Create electronic and hard-copy records of offensive postings to preserve potential evidence.

To learn more and/or for assistance preparing and implementing a social media policy tailored to your organization, contact a member of Sherrard Kuzz LLP.

DID YOU KNOW?

Ontario Ministry of Labour inspectors will be conducting a health and safety inspection blitz in the construction and health care industries during the months of February and March 2013.

Construction Employers: Inspections will focus on slips, trips and falls.

- **Ensure employees are performing work in compliance with safety best practices:** This includes fall protection, emergency planning, and ladder safety. Conduct regular tool-box talks and safety reviews to keep employees vigilant about safety.
- **Inspect equipment, such as ladders, platforms, and fall protection gear:** Ensure all equipment is in compliance with safety regulations and employees are using equipment properly. Remove and replace defective equipment.
- **Remove worksite hazards immediately:** Inspectors will be looking for worksite hazards that will cause workers to slip, trip or fall. This includes falls from heights, ladders or platforms, as well as same-level falls. Hazards include uneven or slippery surfaces, unsuitable footwear, obstructions, and poor lighting.

Health Care Employers: Inspections will focus on workplace violence and harassment.

- **Ensure health and safety policies address workplace violence and harassment.**
- **Confirm staff are trained on the contents of health and safety policies.**
- **Develop and maintain programs to implement violence and harassment provisions in health and safety policies.**

Construction and Health Care Employers: Remember to...

- **Review with staff the roles and duties of workers, supervisors, and employers under the OHSA.**
- **Post up-to-date health and safety information at the workplace:** The OHSA, and any explanatory information provided by the Ministry, must be posted in a visible location. This includes a new safety poster issued by the Ministry on October 1, 2012 (available online at http://www.labour.gov.on.ca/english/hs/pdf/poster_prevention.pdf)
- **Confirm staff training and certification is up-to-date.**

Early Retirement Incentives Are Not Discriminatory -

However the way in which they're presented might be

Although mandatory retirement was abolished in Ontario in December of 2006, it is still permissible to use an early retirement incentive as a means of "encouraging" the voluntary departure of an older worker from the workforce.

The benefits of an early retirement incentive

From an employer's perspective, an early retirement incentive program can be a useful tool to downsize and/or revitalize a workplace, allowing an organization to reduce its staff complement, cut costs, reorganize operations, and allow more recently educated employees to make their way up the workplace ladder, all without having to resort to more disruptive measures such as termination or layoff.

Because early retirement incentives are, by their very nature, designed to target older workers, the idea is often met with hesitation, and the question: "Does offering an early retirement incentive constitute discrimination in employment on the basis of age in contravention of Canadian human rights legislation?"

Employees often welcome the opportunity of early retirement. Provided with a financial incentive, often of significant value, in exchange for voluntary departure from the workplace, early retirement may permit an employee to pursue new interests and opportunities he or she might not have otherwise pursued.

Yet, despite their inherent advantages, early retirement incentives have received their share of criticism. Because early retirement incentives are, by their very nature, designed to target older workers, the idea is often met with hesitation, and the question: *"Does offering an early retirement incentive constitute discrimination in employment on the basis of age in contravention of Canadian human rights legislation?"*

The Human Rights Tribunal wades in

The Human Rights Tribunal of Ontario has considered this question and found the simple act of making an early retirement incentive available to older workers does not, in and of itself, constitute age discrimination. That said, the Tribunal's case law suggests caution must be exercised to ensure the *manner* in which early retirement incentives are presented does not put undue pressure on eligible employees to accept offers. In other words, where an employer's conduct is unduly influential, such that an employee feels forced to consent to the early retirement option, a finding of discrimination may result.

The Tribunal's recent decision in *Deane v. Ontario (Community Safety and Correctional Services)* provides a helpful illustration of the distinction between an early retirement offer, which itself is not discriminatory, and the manner in which the offer is presented, which in this case was deemed to amount to an infringement of an employee's human rights.

The case of Ms. Deane

Ms. Deane was 60 years old and had worked for the Ontario Public Service for more than 20 years. When she became eligible to retire with an unreduced pension her supervisor met with her on multiple occasions to discuss retirement. During these meetings the supervisor made various comments which Ms. Deane interpreted as pressure to accept the early retirement option. This included several negative comments about the number of employees working on secondment in Ms. Deane's department, of which Ms. Deane was one; suggesting Ms. Deane would be "foolish" not to retire because she could then receive her pension while working for a different government entity or employer; and arranging an unsolicited teleconference with two of the supervisor's retired acquaintances to discuss the advantages of retirement.

Ms. Deane eventually accepted the early retirement option, but later filed an application with the Human Rights Tribunal alleging she had experienced harassment and discrimination on the basis of age. At the core of her application was her claim she had been forced to accept her employer's early retirement offer against her wishes.

The Tribunal ruled while the early retirement offer itself was not problematic, the supervisor's actions had unduly influenced Ms. Deane's decision. Even if the supervisor's actions were well-intentioned, the Tribunal noted, his comments and conduct pressured Ms. Deane into accepting the early retirement option, amounting to discrimination on the basis of age. Ms. Deane was awarded $7,000 for injury to dignity, feelings and self-respect. Vice-Chair Cook made the following general observations:

> *Treating an employee as if the employee is going to retire imminently when the employee is not going to retire imminently can infringe a person's Code-protected rights because the basis for the treatment is the employee's age.*
>
> *Similarly, encouraging an older employee to take advantage of retirement options might result in discrimination because the message could be that the older employee is no longer valued as an employee.*

Tips for employers

The *Deane* case underscores the importance of ensuring an early retirement option is just that: *optional*. An employee to whom an early retirement offer is extended must have the ability to voluntarily accept or reject the offer. Where an employer overtly or impliedly encourages, pressures, or coerces an employee into retirement, this activity may run afoul of human rights legislation.

To avoid a situation like the one which arose in *Deane*, employers should consider the following best practices:

- **Neutral communication:** Ensure the early retirement offer is communicated in a neutral way. Discussion should revolve around the employee's eligibility and the details of the offer, not the employer's views whether the employee should accept the offer.
- **Avoid threats or promises:** Do not link the employee's acceptance or rejection of the offer to any particular workplace outcome. For instance, avoid comments such as: "If you do not

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accept the early retirement offer, we are going to have to issue layoff notices."

- **Avoid unsolicited commentary:** However well-intentioned, avoid unsolicited editorial commentary about the benefits of retirement which may be construed as pressure.
- **Identify a neutral contact person:** Identify a contact person from whom eligible employees may seek information about early retirement options. Where the size of your organization permits, this person should be someone who is not the eligible employee's immediate supervisor so as to avoid the perception of managerial pressure.

To learn more and/or for assistance structuring an early retirement program tailored to your workplace, contact a member of the Sherrard Kuzz LLP team.

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Privacy and Surveillance: Understanding An Employer's Rights and Obligations

1. Is there a "Right" to Privacy?
- Privacy legislation and its impact on your workplace
- New cases in the area of privacy
- Unique considerations for unionized employers

2. Employee Monitoring and Surveillance
- Can an employer monitor an employee's email, internet and smartphone use?
- When can cameras be used in the workplace?
- Surveillance outside the workplace - is it ever appropriate?

3. Addressing IT-Related Misconduct
- Practical tips for drafting and implementing an effective electronic usage policy
- Recent trends in discipline and discharge for IT-related misconduct

4. Looking to the Future…fingerprints, retinal scans, "clouds" and beyond
- What are the potential privacy issues with new and emerging technologies?

DATE: **Wednesday March 20, 2013; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: **Mississauga Convention Centre,** 75 Derry Rd West, Mississauga ON L5W1G3

COST: Please be our guest

RSVP: **By Friday March 8, 2013 at www.sherrardkuzz.com/seminars.php** or to 416.603.0700
(for emergencies our 24 Hour Line is 416.420.0738)

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

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SHERRARD KUZZ LLP
Employment & Labour Lawyers

250 Yonge Street, Suite 3300
Toronto, Ontario, Canada M5B 2L7
Tel 416.603.0700
Fax 416.603.6035
24 Hour 416.420.0738
www.sherrardkuzz.com

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