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ARBITRATORS ADDRESS OFF-DUTY SOCIAL MEDIA COMMENTS

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Two recent City of Toronto arbitrations have addressed the issue of discipline for off-duty social media comments.

On November 12, 2014, Arbitrator Elaine Newman found that the social media comments of an off-duty Toronto firefighter, which disparaged women, the disabled and visible minorities (among others), constituted serious misconduct and damaged the reputation of the Toronto Fire Services. The firefighter's discharge was upheld.

Previously, on October 14, 2014, Arbitrator Gail Misra had reinstated a Toronto firefighter who was discharged for his social media comments. She found that, based on the nature of the comments, discharge was too harsh a penalty in the circumstances.

In this *FTR Now*, we discuss these awards and the guidance they provide for employers dealing with inappropriate social media comments made by off-duty employees.

***THE CITY OF TORONTO AND THE TORONTO PROFESSIONAL FIRE FIGHTERS' ASSOCIATION, LOCAL 3888* (12 NOVEMBER 2014, NEWMAN)**

The grievor, a firefighter with two and one half years service, had sent out various social media comments ("tweets") on Twitter that were disparaging of women, the disabled and visible minorities (among others). In the Twitter activity, he clearly identified himself as a Toronto firefighter.

In August 2013, three of his comments directed at women were reported on by the National Post. The National Post article suggested that the culture of the Toronto Fire Services may not be welcoming to women. Around that time the City of Toronto had launched its "Pathway to Diversity" program which

was designed to increase the recruitment of firefighters who are female and who represent the diversity of Toronto's population.

As a result of that article, the grievor was suspended with pay. During a subsequent investigation, other offensive tweets came to the attention of the employer. The grievor was ultimately terminated for violating applicable policies and guidelines of the City of Toronto and Toronto Fire Services as well as harming the reputation of Toronto Fire Services.

At arbitration, the Association argued that discharge was too excessive a penalty in the circumstances, taking into account, among other things, the grievor's remorse, his letter of apology, his subsequent sensitivity training, his belief that the tweets were private and his assertion that he never intended to harm his employer.

Arbitrator Elaine Newman upheld the discharge.

She first 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:

1. the conduct of the grievor harms the Company's reputation or product;
2. the grievor's behaviour renders the employee unable to perform his duties satisfactorily;
3. the grievor's behaviour leads to refusal, reluctance or inability of the other employees to work with him;
4. 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;
5. 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 been generally accepted by arbitrators that not all the *Millhaven* factors have to be satisfied; rather any conduct giving rise to any one factor may warrant discipline or discharge. As noted by Arbitrator Newman, since *Millhaven* was rendered in 1967, this test has been consistently applied.

However, Arbitrator Newman referred to the significant changes in cultural awareness and sensitivity, as well in the diversity of the workplace, which has taken place over the last several decades. She stated it was therefore timely to revisit the fourth branch of the *Millhaven* test 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 serious acts of discrimination."

In an important warning to all social media users, Arbitrator Newman also found that the grievor's use of his Twitter account was reckless and he was responsible for the consequences of his tweets. She accepted that the grievor had not read the Twitter rules, but stated:

> […] 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.

Arbitrator Newman ultimately concluded that the grievor's tweets violated a number of the employer's policies. Among other things, the policies required that members must not act in a manner which would discredit the Toronto Fire Services and that they must not discriminate against any person by any means, including towards members of the public and co-workers. By denigrating women, visible minorities and disabled people, among others, the grievor was found to have violated his employer's human rights policy. Moreover, Arbitrator Newman found through his evidence at hearing that the grievor demonstrated a lack insight into the entirety of the responsibility of being a firefighter. In her words:

> The job involves more than attending at a fire, or attending as the first responder when someone calls 911 for a medical emergency. It involves more than performing the life saving

> interventions that he has learned and practiced. The other part of the job, the part that I am not convinced he can perform to satisfaction, is the part that requires him to conduct himself in a way that brings honour to the uniform. I have to wonder if a deaf person, a woman in labour, a homeless person, a member of a visible minority group, apprised of his comments, would welcome this man into their home in a time of need.

Finally, Arbitrator Newman concluded that actual damage was caused to the reputation of the Toronto Fire Services by the grievor's off-duty conduct, stating that "I agree that where an employer suffers both widespread negative press scrutiny and public controversy, actual damage may be presumed. That would, in my view, be true of any Employer that sought to maintain a good reputation. It is particularly true of one in the public service."

***TORONTO PROFESSIONAL FIREFIGHTERS ASSOCIATION, LOCAL 3888 V GRIEVANCE OF LAWAUN EDWARDS, F13-142-07,* 2014 CANLII 62879 (ON LA)**

In this case Arbitrator Gail Misra reinstated a Toronto firefighter with two and one half years service who had been discharged for making inappropriate comments about women on Twitter. One of these comments, in which he suggested giving a woman a "swat in the back of the head" to "reset the brain", had been reported on in the same National Post article as the comments of the grievor in the Newman award, above.

The employer investigated and two other offensive tweets came to its attention. The grievor was discharged on the basis that the tweets, among other things, harmed the reputation of Toronto Fire Services, were contrary to its human resource policies and potentially created a poisoned work environment.

Arbitrator Misra found that the grievor had identified himself as a Toronto firefighter on his Twitter profile and there was some connection between the tweets and the grievor's workplace. There was no basis for the grievor's belief that the tweets were private. Moreover, the griever was aware of the City's human rights policies and requirements under the Toronto Fire Services' operating policy that firefighters, among other things, be good ambassadors for the Fire Services.

The arbitrator found that the grievor's comment about women was inappropriate and that the grievor should have known it would be considered demeaning. However, it was a "one-time event" and was not an attempt to challenge the employer's efforts to hire more women. The other two tweets, taken in context, were not inflammatory and did not warrant discipline. Arbitrator Misra noted the grievor had a clean disciplinary record and good performance reviews. She substituted discharge with a three-day suspension and ordered repayment of lost wages and benefits for the period of termination.

IMPLICATIONS FOR EMPLOYERS

These two awards add to the growing body of jurisprudence governing off-duty conduct by employees and their use of social media.

Arbitrator Newman's expansion of the fourth branch of the *Millhaven* test to include a serious breach of human rights policies or the *Human Rights Code* is significant. It clarifies that off-duty conduct which is discriminatory in nature may be viewed as harming the employer's reputation, an issue of importance to all employers and in particular those in the public sector where workers may be held to a higher standard.

While the awards were made in the unionized context, they also serve to reaffirm the following general propositions that also apply to non-unionized work places:

> does the employer have human rights and code of conduct policies which address social media behaviour. More specifically, does the employer have a Social Media Use Policy in place which has been communicated to its employees;
>
> it is the responsibility of social media users to understand the risks of usage, regardless of whether they think their comments are private; and
>
> workers who work with the public, such as firefighters, EMS employees, police officers, and teachers, may be held to a higher standard than other workers.

For more information on these awards or any other issues, please contact your regular Hicks Morley lawyer.

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