Cyber-bullying in the workplace – Arbitrator upholds termination

In the labour arbitration context, an employee's personal use of the internet outside of work can often give rise to issues relating to the employee's off-duty conduct and the intersection between online behaviour and the workplace. With often unrestricted public access to social media content, it is evident that an employee's internet postings have the potential to tarnish an employer's reputation and in turn damage the employment relationship. In such cases, it is well-established that discipline can be imposed in response to an employee's on-line misconduct. A recent arbitration decision deals with what may be the next trend in this technological age – cyber-bullying in the workplace.

In *Canada Post Corporation and Canadian Union of Postal Workers* (March, 2012) the grievor, a postal clerk with an impressive 31 years of service, posted a series of malicious and mocking comments about her supervisors on her Facebook account. When management became aware of the postings, the grievor's employment was terminated. The union grieved the termination arguing that the grievor was provoked by the supervisors' abrasive management style and that the discipline was too harsh in light of the grievor's age and years of service.

THE FACEBOOK POSTINGS – "A DEGREE OF VENOM UNMATCHED"

The Facebook postings that gave rise to the discharge occurred over a one month period between October and November of 2009. On 14 separate dates the grievor posted 26 comments about her workplace and her supervisors. Arbitrator Ponak summarized the nature of these postings as follows:

> The postings are universally nasty in tone and content with the majority aimed at Superintendent D. She is frequently referred to in vulgar and contemptuous terms, including, "bitch"..."wicked bitch", "evil hag" and "devil", sometimes capitalized for emphasis. The postings contain threats, most notably "die bitch die", "run you over" and "missing permanently"...
>
> In addition to the abusive and intimidating language, the postings are mocking to the point of bullying with many of the more offensive comments accompanied by "lol" which stands for "laugh out loud". The postings invite others to join in and indeed others do offer their own mocking comments from time to time…
>
> The postings are mean, nasty and highly personal. They go well beyond general criticism of management and essentially target one person with a degree of venom unmatched in other social media cases...The current case is unprecedented in

> repeated mockery, the threatening language, the vile insults, and the debasement of an identifiable manager."[Page 57-58]

Upon becoming aware of the postings, the two targeted supervisors were extremely shaken. Both needed to take substantial time off work for emotional distress and one required medical care. Both managers were re-assigned to other locations and one had yet to return to a supervisory position even up to the date of the decision in March of 2012.

PROVOCATION DEFENCE REJECTED

The most important tranche of the union's defence was that the grievor was provoked into her misconduct because of management's bullying and belligerent behaviour. The Arbitrator reviewed the arbitral jurisprudence relating to the provocation defence and set out the test as follows:

1) Was there some act or series of acts that reasonably could be seen as provocative?
2) Was there a response against the perpetrator of the act(s) that was proportional to the provocative action?

In applying this test, the arbitrator noted that there was little doubt that the workplace in question was an unhappy place for a number of employees including the grievor. The Arbitrator accepted the evidence that one of the targeted supervisors had an abrasive management style and would yell, wave her fingers at people when making a point, and occasionally swear. Nevertheless, the arbitrator found that the great majority of the Facebook postings were neither proximate to a precipitating event, nor in response to something that happened to the grievor. Instead, the postings took place many hours, and sometimes even days after a purported triggering event had occurred. This significantly undermined the provocation defence.

In considering the second part of the provocation defence, the arbitrator found that even if the grievor had been legitimately provoked, her response was disproportionate to the provocation. The Arbitrator stated:

> "Even if I accept that Superintendent D had an aggressive management style that angered some employees, the degree of character assassination visited on her by the Grievor is all out proportion [sic] to the purported level of offence...the picture that emerges is that of the grievor and a small group of colleagues taking an active dislike to the superintendent for doing her job in a way in which they disapproved. The grievor then operationalized this dislike through her Facebook postings. This was not a legitimate response to a provocation – this was mean and nasty bullying of a manager who was attempting to carry out her job."

GRIEVOR UNAPOLOGETIC

The provocation defence ended up backfiring on the grievor, not just by virtue of the fact that it was rejected, but also because it undermined the sincerity of the apologies made by the grievor. The grievor had in fact apologized for her postings at the disciplinary interview conducted after the postings were discovered. Nevertheless, by putting forward the provocation defence, the grievor was seen by the Arbitrator to be shifting the blame for her postings to management. The Arbitrator commented on this as follows:

> "Though not stated in so many words, an important part of the Grievor's explanation for what she posted was that Superintendent D got what she deserved because of her treatment of Midtown staff; indeed, at one point in cross-examination that Grievor stated that the superintendent and supervisor were to blame (along with alcohol) for the contents of her Facebook site. On numerous occasions during questioning, the Grievor would refer to an incident or event at Midtown to justify what she wrote, distancing herself from responsibility..."

In short, the arbitrator found the Grievor to be unapologetic and unremorseful. Although the Arbitrator was cognizant of the grievor's age and years of service, factors which would normally weigh against termination, the grievor's attitude made her a "poor candidate for re-establishing the employment relationship." The grievance was dismissed.

In our view

Based on the toxic nature of the Facebook postings, the Arbitrator had little choice but to uphold the dismissal. Although this was a necessary result, it remains unfortunate in light of the grievor's age and long years of service. The case shows however that the ever-increasing popularity and use of social media outlets presents new challenges in the employment context. In the past, we have recommended that employer's develop a code of conduct to govern the use of social media in the workplace, and to set out the employer's expectations regarding how employees may associate themselves with the employer in their off-duty use of the Internet. Such a code of conduct may have the additional benefits of increasing an employee's awareness of privacy issues on the Internet and alerting employees of how easily online behaviour can cross into the workplace.

Violation of patients' privacy leads to nurse's discharge

In *North Bay Health Centre and Ontario Nurses' Association* (January, 2012) Arbitrator Abramsky dismissed the grievance of a nurse who was discharged after improperly accessing the medical records of over 5000 patients at the North Bay Health Centre. The nurse's unauthorized access to the health records was held to be a breach of the *Personal Health Information Protection Act*, the hospital's internal policies governing employee access to health records, and the College of Nurses' standards. In upholding the termination, the Arbitrator stressed the critical importance of maintaining the confidentiality of patient health information.

THE PRIVACY BREACHES

The privacy breaches occurred over a seven year period between August of 2004 and April of 2011. The grievor used her access to the hospital's Electronic Medical Records database to make over 12,000 inquiries of the system and access 5,804 individual patient health records. At the hearing, the grievor testified that she accessed patient information primarily for learning purposes and curiosity. She claimed that she "learned a lot by looking at labs and patient conditions". She further testified that she was able to use some of the information she learned to improve her practice for patients on her unit.

The hospital became aware of the unauthorized access almost by accident. In March of 2011, another employee of the hospital was admitted as a patient. This employee received so many visitors from other hospital employees that the manager of the unit became concerned about how they had learned about the employee's admission to the unit. She expressed her concerns to the hospital's Privacy Officer and asked whether there had been any improper access to the employee's medical information.

The Privacy Officer conducted an audit and found that a number of employees had in fact accessed the employee's medical information. She continued to monitor access and the grievor's name eventually came up. The Privacy Officer asked the grievor's manager to discuss the access with the grievor. When confronted about the improper access to the employee's medical records, the grievor candidly told her manager, "I do it all the time."

When the details of this conversation were relayed to the Privacy Officer, the Privacy Officer performed additional audits concerning the grievor's access to patient health records. This audit revealed that the grievor engaged in widespread access to patient information on units to which she was not assigned. The hospital proceeded to conduct

an investigation and held two investigatory meetings with the grievor with Union representation. The grievor acknowledged accessing numerous health records of patients that were not in her circle of care. At the conclusion of the investigatory process the hospital terminated the grievor's employment.

THE HOSPITAL'S PRIVACY POLICY AND THE *PERSONAL HEALTH INFORMATION PROTECTION ACT*

The hospital's policy relating to patient information restricted access to the following circumstances:

1. For Direct Care Use
   - When an individual is directly involved in the current and direct care of a patient.

2. Performance of One's Duties
   - Limited access will be granted to individuals on a need to know basis, based on job function.

During the hearing the union admitted that the grievor's actions violated the hospital's policy, but challenged that policy on the basis that it was in conflict with the *Personal Health Information Protection Act* (PHIPA). The union relied on section 37(1)(d) of PHIPA which states:

> Section 37.(1) A health information custodian may use personal health information about an individual,
> …
> (d) for the purpose of risk management, error management or for the purpose of activities to improve or maintain the quality of care or to improve or maintain the quality of any related programs or service of the custodian;
> (e) for educating agents to provide health care;…

The union argued that the grievor, as a registered nurse, was a "health care practitioner" and therefore a "health care custodian". As such, in the union's view, the grievor was permitted to use personal health information for learning purposes. This argument hinged on whether the grievor fell within the following definition of "health information custodian" under section 3(1) of PHIPA:

> Section 3.(a)(1) In this Act
>
> "health information custodian" subject to subsections (3) to (11), means a person or organization described in one of the following paragraphs who has custody or control of personal health information as a result of or in connection with performing the person's or organization's powers duties or the work described in the paragraph if any:

(1) A health care practitioner or a person who operates a group practice of health care practitioners.
(2) …
(3) …
(4) A person who operates one of the following facilities, programs or services:
i. A hospital with the meaning of the Public Hospitals Act…
<u>Exceptions</u>
(3) Except as prescribed, a person described in any of the following paragraphs is not a health information custodian in respect of personal health information that the person collects, uses or discloses while performing the person's powers or duties or the work described in the paragraph, if any:

1. A person described in paragraph 1, 2, or 5 of the definition of "health information custodian" in subsection (1) who is an agent of a health information custodian…[page 20]

The Arbitrator interpreted the above definition to mean that a person who is a health care practitioner is not a health information custodian if he or she is an agent of a health information custodian. The Arbitrator found support for this interpretation in the College of Nurses' Practice Standard, Confidentiality and Privacy – Personal Health Information. This document states that nurses who are employees or volunteers are considered agents of a custodian. The document contrasts this with nurses in independent practice who are instead considered custodians. On this basis the Arbitrator rejected the union's argument that the grievor was a health care custodian, and rejected the argument that the hospital's policy was in conflict with PHIPA.

Based on the extent of the grievor's actions over the seven year period, which the Arbitrator described as "truly breathtaking", the Arbitrator concluded that the hospital had just cause for discharge. In his view, the "grievor knew – or should have known – that she was violating the privacy rights of patients by accessing their medical information". The grievance was dismissed.

In our View

This case follows the arbitral jurisprudence relating to health information privacy breaches and recognizes that unauthorized access to medical records is a very serious offence. Arbitrators are consistently taking a hard line with health care employees who violate patient information confidentiality. In *Re Bluewater Health and ONA* (November 26, 2010) the Arbitrator went so far as to recommend that a "zero-tolerance" standard be the norm for health information privacy breaches, and that only in compelling circumstances should an arbitrator mitigate the penalty of discharge.

Termination for being impaired on the job requires clear evidence

A recent arbitration decision indicates that termination for impairment while on the job requires clear evidence. In *Toronto Transit Commission and Amalgamated Transit Union Local 113* (January, 2012) Arbitrator Slotnick reinstated a TTC employee after being discharged for being impaired at work. The Arbitrator noted the distinction in the proof needed between a decision to remove an employee from the workplace due to safety concerns, and the decision to discipline or terminate an employee for being impaired on the job. The Arbitrator noted that while there was clear evidence of the consumption of alcohol prior to the grievor's shift, there was inadequate evidence to support a conclusion of impairment.

SUPERVISORS SMELL ALCOHOL ON GRIEVOR'S BREATH

The grievor, a 34 year old with five years' seniority, was classified as a spare non-clerical employee working from one of the TTC's offices. His job functions included several duties which were assigned on a day-to-day basis based on need and seniority. On the day in question, the grievor was assigned to be a ticket agent order driver. This meant he would drive an unmarked car to distribute tickets and tokens to various vendors throughout the city.

At the beginning of the grievor's shift, another employee reported to the grievor's supervisor that the grievor "reeked of alcohol". The supervisor approached the grievor and asked the grievor to breathe out while she smelled his breath for alcohol. After noticing a strong odour of alcohol and bloodshot eyes she asked the grievor to come with her to her office. A second supervisor was brought in and confirmed the smell of alcohol, although she did not observe that the grievor's eyes were bloodshot. When asked why his breath smelled of alcohol, the grievor claimed that he did not know, as he had not been drinking that morning, although he had drank beer the night before. The grievor was relieved of duty on the basis that he was not fit to work.

MANDATORY DISCHARGE UNDER THE COLLECTIVE AGREEMENT

The following day, the grievor was discharged under the collective agreement's specific penalty clause for being impaired while on duty. This clause mandates discharge for an employee who is found to be "impaired while on duty by reason of consumption of an intoxicating beverage." Although the collective agreement did not define "impaired" or "impairment", the TTC had instituted a drug and alcohol policy which defined impairment as follows:

<u>Impairment</u>

> The modification of an individual's physical, mental or cognitive functioning resulting from the use, ingestion or inhalation of alcohol, illicit drugs or medication, and which adversely affects the performance or behaviour of the individual.

UNION CHALLENGES TERMINATION

The union grieved the termination on the basis that the TTC had not met the onus of establishing impairment. The union claimed that impairment means that the employee's ability to carry out his duties is affected. The union noted that this case was not about the consumption of alcohol while on duty. Instead, it was about the consumption of alcohol while off duty, and therefore, there must be some effect on the employer's ability to perform his job in order to attract the collective agreement's mandatory discharge provision.

The union argued that none of the TTC's witnesses who saw the grievor on the day in question provided any evidence that the grievor was unable to perform his job. Instead, the only evidence they put forth was that the grievor's breath smelled of alcohol and, in the case of one witness, that his eyes were bloodshot.

ARBITRATOR: "INADEQUATE EVIDENCE TO SUPPORT A CONCLUSION OF IMPAIRMENT"

The Arbitrator found it unlikely that the two supervisors were both mistaken when they smelled alcohol on the grievor's breath. He noted that it is well-accepted in the case law that no special expertise is required to detect the smell of alcohol and therefore accepted that on the morning in question the grievor did in fact smell of alcohol.

The Arbitrator went on to consider the case law on the issue of on-duty impairment and quoted extensively from the decision in *Re Toronto (City) and C.U.P.E Local 43* (1993):

> In my opinion, "under the influence of alcohol" usually implies some impairment or incapacity occasioned by the consumption of alcohol. The impairment or incapacity may be slight -- for example, it might well be below the level that would sustain a conviction for impaired driving -- but it must be demonstrable…In imposing discipline for being under the influence where it has not been shown that the alcohol was consumed at work or on duty, an employer is responding to off-duty conduct…In my opinion, an employer could not discipline an employee for being "under the influence of alcohol" solely because it had come to the employer's attention that the employee had taken a drink some time before attending at work. For the discipline to be sustained, it would have to be shown that the employee was in some degree impaired or incapacitated. Bad breath or bloodshot eyes alone may not be sufficient to sustain discipline for being under the influence…

Based on the case law, the Arbitrator concluded that in order for the discharge to be upheld, something more is necessary beyond the mere odour of alcohol. There must be evidence that the employee's ability to perform his duties was affected or potentially affected. Arbitrator Slotnick noted that there was no evidence of any impairment, such as slurred speech, belligerence, poor balance, rambling, incoherent speaking, or boisterousness. Although he accepted the TTC's argument that an employee does not have to be falling down drunk to be impaired, he could not accept a conclusion of impairment without evidence of a modification of the employee's physical, mental or cognitive functioning (as stated in the TTC's own definition of impairment). The Arbitrator proceeded to allow the grievance and reinstate the grievor stating that while there was evidence of consumption of alcohol in the grievor's case, "there is simply inadequate evidence to support a conclusion of impairment."

In our view

This case follows a number of arbitration decisions that have held that the smell of alcohol alone is not enough to justify dismissal. In dealing with alcohol or drug impairment at the workplace, employers should be mindful of their obligations under the *Occupational Health and Safety Act* to provide a safe workplace for employees. The smell of alcohol on an employee's breath can give rise to safety concerns, and therefore justify removal from the workplace for the day. As this case indicates however, discipline for on-duty impairment requires actual evidence in order to be sustained.

Disciplining workplace violence – employers must consider all relevant circumstances

A recent arbitration decision indicates that the common law requirements of reasonableness and proportionality continue to apply when employers are imposing discipline for workplace violence. In *Rheem Canada Limited and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW)* (June, 2012) Arbitrator Newman reduced a three-day suspension to two days in part because the employer failed to consider the employee's good disciplinary record. The Arbitrator's decision is a warning to employers that automatic levels of discipline may not be upheld where the employer fails to consider all of the relevant circumstances, even in cases of workplace violence.

AN ANGRY CONFRONTATION

The conduct giving rise to the discipline occurred in February of 2012 when the grievor angrily confronted a co-worker for using a particular tow motor. The grievor claimed that the tow motor was "his" and repeatedly yelled at his co-worker to get off of it. The co-worker claimed that the grievor was about a metre away, very angry, "puffed up" and gesticulating with his hands. This made the co-worker feel threatened and unsafe to the extent that he sought out the supervisor. While he was looking for the supervisor the grievor approached him again and continued to yell at him and accused him of "causing problems". When the co-worker recounted the incident to the supervisor he was instructed to return to the tow-motor while the supervisor observed. The co-worker returned to the tow-motor and asked the grievor if he could talk with him. The grievor angrily rejected this request and the co-worker returned to the supervisor's office and proceeded to file a complaint of harassment.

The employer proceeded to investigate the incident and conducted an interview of the grievor. During this meeting, the grievor refused to sit down and refused to tell his side of the story. He denied having done anything wrong, provided no indication that he understood the seriousness of the situation, and gave no indication of remorse. The employer stated that at the time of making the disciplinary decision, it was dealing with an uncooperative and unremorseful individual who did not appreciate the seriousness of his misconduct.

In the employer's view, the grievor's conduct amounted to workplace violence under the *Occupational Health and Safety Act*, and was a clear contravention of the employer's rules and policies. This justified the three-day suspension. The union sought a reduction of the three-day suspension on the basis that the grievor eventually admitted his wrongful

acts and came to appreciate both the seriousness of his misconduct and the impact of his actions on his co-worker.

WORKPLACE VIOLENCE AND HARASSMENT UNDER BILL 168

The Arbitrator began her analysis by considering the definitions of workplace harassment and workplace violence in the *OHSA* as amended by Bill 168 which introduced the workplace violence and harassment provisions.

> "workplace harassment" means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome.
>
> "workplace violence" means,
> (a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,
> (b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,
> (c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker in a workplace, that could cause physical injury to the worker.

Arbitrator Newman found that there was a course of conduct, albeit brief, that was known to be unwelcome. The grievor himself admitted that although he had no intention of threatening his co-worker, his words and actions did intimidate his co-worker and made him feel unsafe. As a result, the arbitrator concluded that the grievor's conduct fell within the statutory definition of workplace harassment.

Arbitrator Newman went on to consider whether the conduct amounted to workplace violence. She noted that the definition of workplace violence is deliberately broad and intended to be preventative and to achieve deterrence of behaviour in the workplace that is disruptive to both the physical and emotional health of the recipient. She went on to state:

> "…when one employee confronts another, with voice angrily raised, and where the physicality of the speaker intimidates to such an extent that the recipient is made to feel unsafe, the recipient acts reasonably when he or she interprets that conduct as a threat. It is my view that the misconduct so described constitutes workplace violence within the meaning of the Occupational Health and Safety Act."

WAS THE PENALTY APPROPRIATE?

The Arbitrator found that the employer acted appropriately when faced with the grievor's misconduct. The employer had policies in place to train employees on the issues of

workplace harassment and violence. It had brought a serious approach to the prevention of workplace harassment and violence and acted swiftly, thoroughly and thoughtfully to address the grievor's misconduct. With the ultimate goal of preventing workplace violence, the employer was entitled to deal harshly with violations of its workplace violence prevention policy.

Nevertheless, the Arbitrator found that the employer did not, as part of its process in determining the appropriate penalty, take into account the grievor's good disciplinary record. The grievor had over two years of good service marred only by two warnings relating to tardiness. Although the employer had good grounds to impose discipline, the Arbitrator noted that the discipline cannot be arbitrary. She quoted the following from her own decision in *The Corporation of the City of Kingston and the Canadian Union of Public Employees, Local 109* (August, 2011):

> After the Bill 168 amendments to the Occupational Health and Safety Act, it remains good law that discipline must be determined on the facts of each case, guided by the usual criteria referred to in the arbitral jurisprudence, and must be reasonable and proportionate. It would be a mistake for any employer to assume the Bill 168 amendments make termination automatic or necessary if the misconduct amounts to workplace violence.

Arbitrator Newman then went on to comment on zero tolerance policies in the workplace:

> ""Zero tolerance" policies are useful workplace devices. They speak clearly, and send a strong message. They do not, however, replace an employer's obligation, in every case of discipline, to consider all relevant individual circumstances of the case, including the personal disciplinary record of the employee. Disciplinary responses must be reasonable and proportionate to the offence, and considered in the context of the employment relationship. A solid employee with a good record, who, for one reason or another loses his temper on a given day and commits an act of workplace violence, will face a meaningful disciplinary response for a first offence. But the discipline will not be as severe as that imposed upon a repeat offender, who does not appear to be getting the message that the workplace will not tolerate violent misconduct."

Based on the failure of the employer to consider the grievor's positive past disciplinary record, as well as the grievor's candid and genuine admission of wrongdoing at the hearing, the Arbitrator exercised her discretion and reduced the discipline to a two-day suspension.

In Our View

The developing jurisprudence relating to Bill 168 and workplace violence indicate that employers must consider all of the relevant factors when imposing discipline in cases of

workplace violence. The factors outlined in *Dominion Glass Co. and United Glass and Ceramic Workers, Local 203* (1975) will continue to be of use to employers when considering how to discipline employees who engage in workplace violence:

Who was threatened or attacked?
Was this a momentary flare-up or a premeditated act?
How serious was the threat or attack?
Was a weapon involved?
Was there provocation?
What is the grievor's length of service?
What are the economic consequences of a discharge on the grievor?
Is there genuine remorse?
Has a sincere apology been made?
Has the grievor accepted responsibility for his or her actions?