NATIONAL ACADEMY OF ARBITRATORS: BOSTON MA MAY 7 – 10, 2024

CAN AN EMPLOYEE SAY THAT?
Employees freedom of speech on social media and its consequences

A Canadian Perspective

OUTLINE OF PRESENTATION BY GORDON LUBORSKY, NAA

- Discussions with my 15-year-old niece (aka – an expert source on this topic)

  - Facebook (USA) – launched in 2004; more than 3 billion users;[1]
  - YouTube (USA) – launched in 2005; more than 2.49 billion users;
  - Twitter (now X) – launched in 2006; more than 393 million users;
  - WhatsApp (USA) – launched in 2008; more than 2 billion users;
  - Instagram (USA) – launched in 2010; more than 2 billion users;
  - WeChat (China) – launched in 2011; more than 1.3 billion users;
  - Snapchat (USA) – launched in 2011; more than 750 million users;
  - Tik Tok (China) – launched in 2016; more than 1.09 billion users;
  - Threads (USA) – launched in 2023; already almost 100 million users;
  - Some 35 Social Media Platforms with over 100 million users worldwide as of 2023;

- "Talking" to friends in the backseat of the car!

  - "Smartphone" use reached 50% of population in 2012-2013;
  - Yet – recent studies suggest young people have increasingly poor attention spans; relatively poorer grades than earlier generations; higher levels of anxiety and depression than the pre-smartphone era – are they related?

  - Gen Z – 1997 – 2012 (11 – 16 years old);
  - Millennials – 1981 – 1996 (27 - 42 years old);
  - Gen X – 1965 - 1980 (43 – 58 years old);
  - Boomers - 1955 – 1964 (59 – 68).

1. The limits of off duty behaviour (including free speech) before Facebook, Twitter and other social media in Canada:

- Brown, Donald J. M. and David M. Beatty, *Canadian Labour Arbitration,* 5th ed. (Toronto: Thomson Reuters, online) at para. 7:15 – "Off-duty Behaviour"

> Arbitrators have always drawn a line between employees' working and private lives. They often make the point that employers are not custodians of the characters or reputations of their employees. The basic rule is that an employer has no jurisdiction or authority over what employees do…outside working hours, unless it can show that its legitimate business interests are affected in some way.

[1] Data from Wikipedia as of December 2023

> **As a result, in order for an employer to justify disciplining an employee for misconduct committed when he or she is not on duty, <u>it must prove that the behaviour in question detrimentally affects its reputation, renders the employee unable to discharge his or her employment obligations properly, causes other employees to refuse or to be reluctant to work with that person, or inhibits the employer's ability to efficiently manage and direct the production process.</u> …**
>
> **In all cases, however, arbitrators have insisted that employers show there is a real causal connection between the events that occurred when the employee was not on duty and the efficient operation of their businesses.** They are required to undertake a meaningful investigation of how seriously the employee's personal activities will affect their interests, and not rely on unsubstantiated supposition and speculation. …

- **<u>Selected (Notorious) Historical References in the Courts</u>**

<u>James Keegstra</u>

- Born in 1934. He was a public-school teacher and mayor of Eckville, Alberta Canada located in Central Alberta (strict religious upbringing in the Dutch Reformed Church)
- An "acclaimed" teacher in social studies and community leader
- In 1982 it was "discovered" he had for some time been teaching students "that the Jewish people seek to destroy Christianity and are responsible for depressions, anarchy, chaos, wars and revolution". He also taught that the Jewish people had "created the Holocaust to gain sympathy" when they were really, "deceptive, secretive, and inherently evil".
- He was fired from the school board in December, 1982; subsequently stripped of his teaching certificate, lost his bid for re-election as mayor, and was charged in 1984 with "unlawfully promoting hatred against an identifiable group, contrary to the provisions of the *Canadian Criminal Code* for which he was convicted at trial, that was overturned by the Alberta Court of Appeal on the grounds that it violated his right to freedom of speech, one of the fundamental freedoms enshrined by the then relatively new <u>Canadian Charter of Rights and Freedoms</u> ("Charter").
- On appeal to the Supreme Court of Canada, the trial decision was reinstated (in a split 4-3 decision – *R. v. Keegstra,* [1990] 3 SCR 697.
- Although finding the Criminal Code provisions in issue infringed his right of free speech enshrined under the Canadian Charter, the right of free speech (like other fundamental rights in the Charter) are subject to section 1 providing that the guaranteed freedoms under the Charter are **"subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".**

Malcolm Ross

- Born in 1947. A school teacher in Moncton, New Brunswick. He expressed his strong views declaring the Holocaust was a hoax and attacking the diary of Anne frank in a book he published in 1978 called, "Web of Deceit" and another in 1983 entitled, "The Real Holocaust". (Outside of the classroom).
- As a result of a complaint to the New Brunswick Human Rights Commission brought by the parent of one of his students against the New Brunswick School Board District 15, on the grounds that Mr. Ross's continued employment "created a poisoned environment for Jewish students", a Human Rights Board of Inquiry ordered the school board to terminate Ross's teaching contract (unless they could find a non-teaching position for him). Thus, he was terminated for his off-duty conduct. Which was considered incompatible with the public confidence in the school board to fulfill its duty to students and their parents.
- In court (famously represented by Doug Christie), the New Brunswick Court of Appeal overturned the school board's decision on the grounds that it violated Mr. Ross's rights to freedom of religion and freedom of expression.
- However, on further appeal the Supreme Court of Canada ruled that his removal from the classroom was justifiable, even though it did constitute a violation of his Charter freedoms, as a "reasonable limitation" under section 1 of the Charter, particularly given its finding that schoolteachers must be held to a higher standard of behaviour. *Ross v. New Brunswick School District No. 15* [1996] 1 SCR 825.

- **General principles followed by arbitrators dealing with off-duty misconduct outside social media**

Re Peel Board of Education and Ontario Secondary School Teachers' Federation (2002), 105 L.A.C. (4th) 15 (Ont. Arb.) (Burkett)

- Grievor was a high school teacher with about 19 years of service, who attended and participated in public meetings of groups expressing white supremacist and discriminatory views; which he never expressed in the classroom;
- Nevertheless, school board (one of the most ethnically and racially diverse in the province of Ontario, felt his attendance and participation in public meetings espousing such views damaged its reputation and placed his fitness as a teacher of children in reasonable doubt; and when he refused the school board's demands to cease such activities, he was terminated, which his union grieved, arguing its actions were contrary to the grievor's rights under the Canadian Charter to "freedom of expression" and "freedom of speech".
- Arbitrator Kevin Burkett dismissed the grievance. Following the principles expressed by the Supreme Court of Canada in *Keegstra* and in *Ross,* the arbitrator stated, "every individual has the right to a school system free from bias, prejudice and intolerance

[and that] a school board is a critical institution in society that has the right o operate according to its own mandate and that it ought not to take a passive role."

- While finding that the school board's actions interfered with the grievor's freedom of association and expression enshrined by the Canadian Charter, the arbitration board (following the Supreme Court of Canada precedent) held that the teacher's termination was "demonstrably justified in a free and democratic society" (per sec. 1 of the Charter), consequently dismissing the grievance.

<u>*Re Ottawa-Carleton District School Board v. O.S.S.T.F., District 25*</u> (2006), 154 L.A.C. (4th) 387 (Ont. Arb.) (Goodfellow)

- Another school board case, involving a chief custodian at an elementary school (not a teacher) in his 40s with 18 years of discipline-free service, robbed a bank during his lunch hour (producing a threatening note to a bank teller and receiving $350 in small bills), but was caught shortly thereafter by police. He was found to have a starter's pistol (that could not fire bullets) in his car and was later convicted of robbery by the courts, receiving two years "house arrest" with ability to work during the day;
- After his termination by the school board, arbitrator Russel Goodfellow denied his request to have get his job back, applying the principles stated in *Millhaven Works, and Oil, Chemical & Atomic Workers' Int'l Union, Loc. 9-670* (1967) (quoted in *Re Air Canada Workers Int'l Assoc. of Machinists, Lodge 148* (1973), 5 L.A.C. (2d) 7 (Andrews) at p. 8):

> "…if the discharge is to be sustained on the basis of a justifiable reason arising out of conduct away from the place of work, there is on onus on the Company to show that: -
>
> (1) the conduct of the grievor harms the Company's reputation or product
> (2) the griever's behaviour renders the employe enable 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 or efficiently managing its works and efficiently directing his working forces.
>
> (Not necessary to show that all criteria exist to justify discipline or discharge for off-duty misconduct)

- While upholding the dismissal, the arbitrator reaffirmed the basic principle that:

> Employees of school boards, do not surrender their personal autonomy when they commence the employment relationship. In order for an employee's off-duty conduct to provide grounds for discipline or discharge, it must have a real and material connection to the workplace … And, where the interest asserted by the employer, as it is here, 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 (in this case, the school community) think if apprised of all of the relevant facts. Would the continued employment of the grievor, in all of the circumstances, so damage the reputation of the employer as to render that employment impossible or untenable?

Re Toronto District School Board and CUPE, Local 4400 (Van Word) (2009), 181 L.A.C. (4th) 49 (Ont. Arb.) (Luborsky)

- School Safety Monitor involved in off-duty physical altercation with the parent of one of the school's students at a local gas station, for which he was later criminally charged with assault (although the charges were later withdrawn);
- The school board suspended the employee without pay pending the outcome of the criminal proceedings. While the conduct was away from the workplace, the school believed its reputation (and the confidence of parents in the safety of its students) was placed into doubt by the misconduct.
- It was sufficient to trigger the employer's legitimate interests for the misconduct to have "the potential" of damaging its reputation in the community for providing a safe environment for children, which applied in this case.
- Ultimately, the grievance was allowed to the extent of upholding the suspension as a reasonable disciplinary response, applying the principle:

> "That the Employer generally is "not the custodian of the grievor's character or personal conduct" outside the workplace is not questioned…. In order to sustain any discipline in cases of off-duty misconduct, the Employer has the burden to establish that the misconduct has seriously prejudiced or injured its reputation and/or legitimate business interests, with the level of discipline proportionate to the harm".

2. Arbitral response to early use of e-mail, blogs, Facebook and Twitter (X) that negatively impact the workplace:

- **General principles from off-duty misconduct cases applied to use of computers/social media**

Chatham-Kent (Municipality) v. CAW-Canada, Local 127 (2007), 159 L.A.C. (4th) 321 (Ont. Arb.) (Williamson)

- Employee was a personal care giver at a municipal home for the aged with 8 years of service. She created a website blog (available to the public) in which she published pictures of residents and make derogatory comments about management and fellow employees, resulting in her termination;
- Grievance challenging termination denied because: (a) her comments breached confidentiality of the residents without their permission that were available to the public; (b) her comments were insubordinate of management that were available to the public; and (c) her comments demonstrated a disregard for residents and hostility unbecoming a personal care giver, "as well as being inappropriate for her to make the critical comments that she did on a public blog about some of her fellow employees"
- A key factor was the public availability of the comments damaging the employer's reputation pictures undermining the confidentiality of the home's residents. Grievor's long service insufficient to mitigate the penalty of discharge.

EV Logistics v. Retail Wholesale Union, Local 580 2008 CarswellBC 357 (British Columbia Labour Relations Board); per H. J. Laing (Adjudicator)

- Grievor was a 22-year-old working as a forklift driver on the night shift in a dry-goods storage warehouse, having short service with no discipline. He posted hateful messages on-line making racist remarks about people of East Indian dissent (of which there were a number in the workplace), and espousing white supremist sentiments, approval of Hitler, Naziism, etc.
- When the employer became aware of the blog (reported by another employee) it contacted police who visited the Grievor at his home (to check on his mental health and ability to safely attend work). The grievor immediately withdrew his derogatory blogs and replaced them with an apology. He also wrote an extensive apology to the employer, but was nevertheless terminated.
- Applying the arbitral jurisprudence in cases of off-duty misconduct, Arbitrator Laing held that "while the employer is not the custodian of the grievor's character or personal conduct, his conduct may be a disciplinary concern to the employer if it adversely impacts on the legitimate business interests of the employer" (given its identification of the place of employment with hateful commentary that was meant to be read by employees) , justifying discipline, but that termination was inappropriate because:
- (a) they were not directed at the employer directly or any employee(s) in particular; (b) the grievor took down his postings immediately upon being contacted by police and replaced his on-line writings with an apology; (c) he also apologized to the employer in writing and (d) testified in a manner that acknowledged his wrongdoing, shame and humiliation in his behaviour, leading the arbitrator to conclude he could be safely returned to work with little likelihood of repeating his

misconduct. Also, (e) given his young age, personal circumstances (including depression) and absence of any disciplinary record…

- His discharged was reduced to a suspension without pay and he was reinstated to the workplace without compensation.

- **Use of social media to disparage the employer and/or its employees resulting in termination or substantial discipline**

GENERALLY HELD THAT EMPLOYEES MAKING INAPPROPRIATE ON-LINE COMMENTS (WHETHER BY E-MAIL, BLOGGS OR SOCIAL MEDIA) ARE ACCOUNTABLE FOR COMMENTS WHEREVER THEY MAY GO (AND HOWEVER LONG THEY MAY EXIST) WITH A PENALTY PROPORTIONATE TO ITS "HARM" AND SUBJECT TO THE USUAL MITIGATING CONSIDERATIONS. THE FOCUS IS ON DAMAGE TO THE EMPLOYER'S REPUTATION AND/OR COMMENTS THAT DISPARAGE/HARASS THE EMPLOYER AND/OR OTHER EMPLOYEES UNDERMINING RELATIONSHIPS

S.G.E.U. v. Saskatchewan (Ministry of Corrections, Public Safety & Policing) 2009 CarswellSask913 (Sask. Arb.) (Sheila Denysiuk)

- The three grievors were correctional workers who created a Facebook Group in which they made racist and disparaging remarks about inmates of aboriginal heritage (who were entitled to compensation as a result of their mistreatment at provincial "Indian Residential Schools'), and was generally critical of the Government employer's administration of that fund. The Facebook Group included many employees and 36 people from the broader community. The employees created the Facebook Group "quite likely at work" using the employer's computers posting the offensive materials during working hours.
- **The arbitration board rejected grievors' argument that the Facebook Group was "private", stating that: *"The reality of Facebook and other internet sites is that privacy and secrecy can never be guaranteed. Participants can never be entirely sure who will view the site".***
- Given the absence of any apologies, recognition of wrongdoing or expressions of remorse by the grievors, the board of arbitration held the postings detrimentally affected the employer's reputation, being sufficiently offensive to justify discipline where it found, "the grievors' conduct was injurious to the interests of the government and that it was incompatible with the faithful discharge of their duties".

Re Wasaya Airways LP and Air Line Pilots Association, International (Wyndels) (2010), 195 L.A.C. (4th) 1 (Ont. Arb.) (Marcotte)

- Grievor was a pilot with 3.5 years of service who made disparaging/racists comments about his employer (and its owners who were a number of First Nations) on his Facebook account which were published to at least 27 individuals including non-employees, contrary to the employer's policies mandating respect for First Nations heritage and human rights legislation, which was found to have damaged the reputation of the employer and reasonably expected to cause harm to its relationship with its customers, resulting in the Grievor's termination. Not clear whether privacy safeguards were in place, but the Grievor was accountable regardless.

- The Grievor immediately issued a written apology; the conduct was an isolated event in an otherwise commendable employment relationship; and the Grievor was found to have been suffering from emotional/mental issues arising out of his absence from his home for two years to pursue employment; the following mitigating factors (from *Re Steel equipment Co. and U.S.W., Local 3257* (1964), 14 L.A.C. 356 (Reville)) were applied in reducing the penalty of discharge: (1) previous good record; (2) long service; (3) whether the misconduct was an isolated incident; (4) provocation; (5) whether the offence was committed on the spur of the moment or premeditated; (6) whether the penalty has created a special economic hardship; and (7) evidence that the company rules of conduct have not been uniformly enforces, thus constituting a form of discrimination.
- Having regard to the foregoing considerations, discharge was inappropriate and a four-month suspension without pay was substituted on his record;
- Nevertheless, given the Grievor's comments disparaging First Nations people made any further relationship with the employer untenable, the Grievor's employment was not re-instated (but he was ordered to resign).

Re Bell Technical Solutions and CEP (Facebook Postings) (2012), 224 L.A.C. (4th) 287 (Ont. Arb.) (Chauvin)

- "It is well-established that inappropriate Facebook postings can result in discipline or discharge depending upon the severity of the postings. The nature and frequency of the comments must be carefully considered to determine how insolent, insulting, insubordinate and/or damaging they were to the individual(s) or the company."
- Comprehensive review of recent cases supported a "nuanced" approach to the justification of discipline and the level of appropriate discipline in each case focusing on mitigating factors.
- Among the mitigating factors considered in determining whether and/or the degree of appropriate discipline are: (a) Being uncooperative, defiant or dishonest during the course of the employer's investigation; (b) admitting the misconduct, accepting responsibility, showing remorse and offering a genuine, as opposed to an insincere, apology; and (c) provocation, such as inappropriate behaviour by a manager which incites, in whole or in part, the misconduct of the employee which may be considered a significant mitigating factor.
- In this case, two employees were terminated and one received a five-day suspension for disrespectful postings on Facebook;
- (a) one of the terminations of an employee with 18 months service was upheld (where the Grievor made frequent disparaging remarks about his supervisor and the company, without contribution; (b) one termination of an employee with 9.5 years service was reduced to a significant one-year disciplinary suspension where the frequency and nature of the derogatory language was not as egregious and not specifically directed to company; and (c) an employee with 7.5 years of service who received a five-day suspension with pay for derogatory and insulting remarks was held to be appropriate.

Re Canada Post Corp. v C.U.P.W. 2012 CarswellAlta449 (Fed. Arb.) (Ponak)

- Employee with 31-years of service posted derogatory, mocking statements about her supervisors to more than 50 of her Facebook "friends" which included coworkers and people outside the workplace. Two of the disparaged supervisors became extremely distraught after hearing about and reading the postings, requiring time off work for emotional distress.
- Arbitrator Ponak wrote that, "There is ample case law that supports the principle that what employees write in their Facebook postings, blog and emails, if publicly disseminated and destructive of workplace relationships can result in discipline" (emphasis added).
- Given the wide distribution of what the arbitrator found to be "far beyond the boundaries of acceptable workplace criticism…undermining managerial authority and further poisoning an already challenging work environment", the arbitrator concluded the employer had just cause to terminate the employment relationship., rejecting the union's appeal to substitute a lesser penalty where the grievor was "largely unapologetic".

Re Tenaris Algoma Tubes Inc. and USWA, Local 9548 (D.), (2014), 244 L.A.C. (4th) 63 (Ont. Arb.) (Trachuk)

- Considered the discharge grievance of a male crane operator with3.5 years of service who, having a complaint about the performance of a female coworker (referred to as "X"), wrote a post on his Facebook account after his shift referring to distinctive physical characteristics of X (without specifically naming her) and later advocated performing "a violent and humiliating sex act be inflicted upon X" and then "mentioned a cruel nickname associated with X's personal characteristic".
- The targeted woman soon found out about the posts from another coworker and complained to Human Resources officials, who were able to view the derogatory posts on-line which was open to the general public (that the Grievor removed 10 hours later).
- Arbitrator Trachuk reasoned that the Grievor "must have anticipated that [X] would see the posts or hear about them because his Facebook friends included coworkers [and] he had apparently not used any privacy setting".
- The grossly derogatory comments on Facebook were found to be "an act of publicity" and that the Grievor knew he was sharing his views about X with all of his Facebook friends and apparently anyone else who went to his page, leading to the only reasonable conclusion that the Grievor must have intended X to find out about the comments, which were "directed at poisoning X' work environment", justifying discipline.
- The elements of publication of patently humiliating and threatening comments to a wide audience with the intention of affecting the intended victim's sense of security in the work environment were essential considerations by the arbitrator in upholding the discharge.

3. Recent arbitral responses to use of social media that negatively impacts the workplace developing a fact specific approach and considering mitigating factors, sometimes negating all discipline:

Re ATU, Local 508 and Halifax (Regional Municipality) (McQuarrie) 2017 CarswellNS 1024 (NS Arb.) (Kahryn Raymond)

- Grievor was one of three employees who posted derogatory comments on Facebook about a particular community that, while not using overtly racist language, was reasonably interpreted as associating a poorly maintained community with the race of the majority of its residents. While none of the postings specifically identified the Grievor as a bus driver, anyone reviewing her posts could come to that realization. Even though the employer didn't monitor social media use by its employees (and did not have a specific policy regarding its use), the employer became aware of the derogatory posts from an anonymous letter.
- Two of the three employees found to have made the derogatory posts were given letters of counselling; but because the Grievor already had a disciplinary record, and showed no remorse for her misconduct, the employer decided it appropriate to terminate the employment relationship.
- The arbitrator agreed the employer need not produce evidence of widespread reputational harm through direct evidence of public controversy or negative attention in the press. Rather, it need only establish that the Grievor's conduct has the potential for significant detriment to its business, reputation or ability to operate its business effectively. The evidence satisfied that test, justifying discipline for the employee.
- However, the employer's decision to terminate the Grievor was an excessive response in the circumstances (having regard to the usual mitigating considerations) in the context of her 11 years of service), justifying reinstatement following a 30-day suspension without pay; with only 75% of usual compensation after that period to her reinstatement.
- In taking this approach, the arbitrator carefully considered the content of the inappropriate posts, concluding they were "not as despicable as many of the examples [in the case law]. It contains no threats, vile insults, or personalized attacks on individuals. There was no intention to be racist. The Grievor's post does not disparage the Employer."
- This conclusion possibly demonstrates a more flexible approach to discipline requiring a careful review of the actual words used and the intention of the writer in using those words, along with the extensive consideration of mitigating factors. Also of key importance is the offending employee's recognition of wrongdoing and the reasonable anticipation that such misconduct will not be repeated.

Re Canadian Broadcasting Corporation and Canadian Media Guild (Khan) (2021), 324 L.A.C. (4th) 307 (Can. Arb.) (Slotnick)

CASES ILLUSTRATIVE OF THE INCREASING CONSIDERATION OF PRIVACY RIGHTS AS THEY MIGHT INTERSECT WITH THE USE OF SOCIAL MEDIA BY EMPLOYEES TO EXPRESS THEIR OPINIONIS TO FRIENDS AND/OR COLLEAGUES.

- Grievor was a temporary reporter/editor working out of Winnipeg (for less than 2 years), who took offence at comments made by former broadcaster, Don Cherry, in November 2019 having racist overtones, which resulted in the eventual firing of that broadcaster. The Grievor posted "tweets" on his personal Twitter account that was critical of management, which management found out about and counselled the Grievor against (but didn't otherwise discipline him).

- To overly simplify a long fact situation, the Grievor subsequently posted derogatory comments on his personal twitter account and through the WhatsApp app to friends and to an outside reporter, that was critical of CBC management, disparaged certain individuals and used homophobic language.
- One communication was directed to a friend on a competitor magazine, who used the information to publicise the controversy outside the CBC. In communicating the information, the Grievor used a CBC computer which he shared with other employees and inadvertently left his twitter and WhatsApp accounts open, which another employee discovered and reported to the employer.
- The employer consequently terminated the Grievor's employment for: (a) contacting an external news outlet disclosing internal matters; (b) making disparaging comments via twitter about CBC management; and (c) using a homophobic slur on WhatsApp, all of which was said to damage the employer's reputation and trust in the employee's fidelity.
- Arbitrator Slotnick upheld the grievance, ordering the employer to reinstate the Grievor to his temporary employment status for the following reasons:
- (a) even though the Grievor used a employer-owned computer to communicate the disparaging messages, he had a reasonable expectation of privacy (and, in fact, the release of that information by another employee was found to be wrongful); (b) his communication of the disparaging comments about his employer had occurred over 10 months earlier (the employer only discovered by intruding on the Grievor's privacy); and (c) he had utilized the WhatsApp app which is an encrypted and not public platform to communicate some of the offensive material to his personal friends.
- In discounting the evidence of disparaging comments discovered by intruding on the Grievor's privacy rights, the arbitrator referred to a decision of the Supreme Court of Canada in ***R. v. Cole*** **[2012] 3 S.C.R. 34** supporting the principle "that Canadians may reasonably expect privacy in the information contained on their own personal computers [which applied to] information on work computers, at least where personal use is permitted or reasonably expected."

Re ATU, Local 1583 and Ontario (Metrolinx) (Juteram), (2023), 352 L.A.C. (4th) 219 (Ont. Arb.) (Luborsky)

- A group of seven employees were communicating with each other via the WhatsApp encrypted app (not available to the general public) during which they commented in crude disparaging terms that certain female employees had gained employment advantages by performing sexual acts with male supervisors, and referred to a former executive of the employer agency as a "back-stabbing dick".
- One of the female employees identified in some of the posts was made aware of the comments made about her when someone (who she refused to identify) forwarded a screen shot of some of the offensive comments via a cellphone communication, but she refused to file a formal complaint of sexual harassment with the employer.
- Nevertheless, when the employer's human resources officials became aware of the offensive communications (some seven months after-the-fact) they demanded that one of the Grievors identified as Mr. Juteram, disclose the contents of the WhatsApp communications with his colleagues, on the basis of which the employer later terminated the five employees found to have made the inappropriate remarks, which had been made more than 19 months earlier.
- At arbitration all grievances were allowed and all Grievors were reinstated. The arbitrator held that while the Grievors' cellphone text messages were shameful and reflected poorly on their

character, they occurred outside the workplace on the Grievors' own time, using their personal cellphones through an on-line medium they reasonably believed and intended to be private to the Grievors and its other participants not available to the public generally, in circumstances beyond the Employer's authority.

- The Grievors' did not give up to the Employer their fundamental right to privacy and freedom of speech on their own time with their colleagues and friends, while utilizing their personal cellphones over a private electronic network inaccessible to the public generally, even if their comments are reprehensible and clash with the Employer's policies or social norms of decency that jay constitute forms of sexual harassment if made at work during working hours or in a public forum having a demonstrated hostile impact on employees in the workplace.
- Of no less significance, the Employer failed to follow its own detailed substantive and procedural safeguards under its own policies regarding the use of social media.

4. What is the future direction on the subject of off-duty use of social media? Some suggestions towards are nuanced approach to the use of social media, which recognizes the present reality that…

- All employees have cellphones/smartphones they typically take into the workplace;
- All employees are typically active on some form of social media, primarily with colleagues, friends and family;
- A cellphone or smartphone is an inherently private device containing personal correspondence, pictures and financial information;
- Employer policies regarding the use of social media must be specific, reasonable and uniformly enforced;
- The "nature" of the social media platform is an important factor: Is it available to the public generally or only specified individuals?
- To be a matter within the employer's authority the comments on social media must be shown to have a substantial impact on the workplace and/or the reputation of the employer;
- Even then, the employer is required to consider all of the usual factors that might mitigate the penalty of discharge.