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# Cutting Edge Update on Privacy and Social Media in the Workplace: Balancing the Employer's Right to Information with the Employee's Right to Privacy

# Employer Access to Employees Outside Work Hours: Can online mean on the clock?

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Most of us think of a workplace as place we can periodically leave: we can punch out or leave the office or take a vacation. And when we leave the workplace, we leave our work duties behind and are free to live a private life outside of work. Historically, labour arbitrators – and the case law has developed primarily in the unionized context - have found that it is only in rare circumstances that an employer is entitled to investigate and/or rely on an employee's off-duty conduct or practices in order to implement disciplinary consequences within the workplace.

More recently, with technological and social changes bringing ever increasing amounts of employees' private information into the public, digital, and accessible realm of social media and the internet, employers and employees alike are having difficulty identifying an appropriate boundary between private, off-duty conduct/information and off-duty conduct/information an employer is entitled to access (and rely upon to implement discipline). Both employers and employees risk adverse consequences of misunderstanding this boundary.

This paper will examine employers' ability to access and rely on the information they find about their employees while their employees are off-duty, and in particular, information found online. While social media, by its publicity and accessibility, may afford employers more opportunities to access and rely on the unsavoury off-duty comments and conduct of employees, the test for an employer's legal right to access the information, and rely on it, remains largely the same as it has for the past fifty

years. The protection of privacy, however, is gaining importance and, particularly as social media evolves better privacy and security protections for its users, these protections should also act as barriers to employers' right to access to the information. Indeed, employers ought to be wary of an exaggerated understanding of their entitlement to access information about their employees' off-duty conduct for fear of infringing on an employee's privacy rights.

When employees are off duty, employers are generally no longer entitled to manage the employee or act as the custodian of the employee's off-the-clock character.[1] However, there are certain circumstances in which an employer will be justified in relying on the off-duty conduct of an employee to impose discipline. An employee's off-duty conduct must either:

> 1) harm the company's reputation or product;
> 2) render the employee unable to satisfactorily perform his or her duties;
> 3) lead the employee's colleagues to refuse to work with him or her, or be reluctant or unable to do so;
> 4) be in breach of the *Criminal Code* thus rendering continued employment with the company injurious to the reputation of the company; or
> 5) hinder the company's ability to manage its works and its workers.[2]

The question of whether an employee's off-duty conduct can constitute grounds for discipline is objective: the adjudicator must ask whether a reasonable and fair-

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[1] Brown & Beatty, *Canadian Labour Arbitration*, Canada Law Book, 7:3010; *Kamstack (Town)* (2000), 89 LAC (4th) 153 (Pelton).

[2] *Re Millhaven Works and Oil, Chemical & Atomic Workers Int'l Union, Loc. 9-670* (1967) [1967] OLAA No. 4, 1(A) Union-Management Arbitration Cases 328 [*Millhaven*], cited in *Wasaya Airways LP v. Air Line Pilots Association, International (Wyndels Grievance)*, [2010] CLAD No. 297 at para 65 (Marcotte) [*Wasaya Airways*].

minded person would find that the off-duty conduct had "a real and material connection to the workplace."[3]

Social media blurs the line between on- and off-duty conduct. Unlike an isolated act or misguided statement taking place off duty and off the employer's property, an internet post is recorded and may be read and viewed by the employee's managers, colleagues, and members of the public at any time of day. It can be widely disseminated in a matter of seconds, and the dissemination is difficult to control. In at least one case, a decision maker determined that there was no material difference between an insubordinate Facebook status update made off duty and an insubordinate comment made on the shop floor.[4] This finding has the effect of extending acceptable workplace conduct well beyond the bounds of working hours and the physical workplace.

In addition, there is a growing attitude in case law that those who choose to express thoughts in writing to others through email or social media must take responsibility for unintended broader circulation. In *Naylor Publication Co. (Canada) v. Media Union of Manitoba, Local 191*,[5] Arbitrator Peltz stated that "e-mail users ought to know that when they put out sensitive or offensive material into cyberspace, they can never be sure where the message will ultimately come to rest"[6] and that, despite the fact that emails are ostensibly private, "the author bears responsibility for the fact that

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[3] *Ottawa-Carleton District School Board v. Ontario Secondary School Teachers' Federation, District 25 (Plant Support Staff) (Cobb Grievance)*, [2006] OLAA No. 597 at para. 17 (Goodfellow).

[4] *Lougheed Imports Ltd. (c.o.b. West Coast Mazda) (Re)*, [2010] BCLRBD No. 190 at para 98 (Matacheskie)[*West Coast Mazda*]. The adjudicator found that the Facebook comments fit the test for insubordinate comments.

[5] [2003] MGAD No. 21 (Peltz) [*Naylor*].

[6] *Ibid* at para 140.

unintended readers become aware of the contents."[7] In another case, a labour arbitrator found that even where social media sites are ostensibly secret and circulated by invite only, "[t]he 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."[8]

Arbitrators have little patience for people who face disciplinary consequences in the workplace for comments and/or postings (ex. photographs) they knew or ought to have known were easily accessible to the public. In such circumstances, employers have been permitted to rely on employees' off-duty posts online.[9] In our view, however, the intended audience and circulation should be a primary factor where a social media user has taken measures to protect their privacy through passwords, pseudonyms, limited audiences and other security settings. One adjudicator found that, where Facebook privacy settings were used to limit the audience who could read the comment, such was "analogous to sharing a beer with colleagues and friends, or getting together with friends to confide details about their jobs,"[10] which tempered its weight. We favour this approach to the broader attitudes taken in *Naylor* and *Saskatchewan*, quoted above.

In addition, where measures to protect privacy and limit dissemination are in place, the manner in which the employer accesses such social media postings should

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[7] *Ibid* at para 149.

[8] *Saskatchewan (Ministry of Corrections, Public Safety and Policing) and SGEU (Hawryluk) (Re)* (2009), 106 CLAS 157 at para. 27 (Denysiuk)[*Saskatchewan*].

[9] *Chatham-Kent (Municipality) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 127 (Clarke Grievance)*, [2007] OLAA No. 135 at para. 25 (Williamson)[*Chatham-Kent*] and *Alberta v. Alberta Union of Public Employees (Re R)*, [2008] AGAA No. 20 (Ponak)[*Alberta*], upon judicial review, the outcome was varied in *Alberta v. Alberta Union of Public Employees (R Grievance)*, [2011] AGAA No. 58 (Ponak).

[10] *Groves v. Cargojet Holdings Inc.*, [2011] CLAD No. 257 at para 76 (Somers).

also be scrutinized: most labour arbitrators demand a standard of reasonableness in the context of employers' investigations into employee conduct.[11] The circumstances must reasonably warrant investigation and the manner of investigation must be reasonable.[12] As such, where an employer goes searching online for traces of an employee's private life without any reasonable basis to do so and/or where the search goes beyond the scope of reasonableness, such may constitute a violation of the employee's privacy rights.

This is particularly true in the context of a growing body of legal protection for individual privacy, and particularly privacy in the workplace. The Supreme Court of Canada confirmed in *R. v. Cole*[13] that employees are entitled to expect a reasonable degree of privacy in the workplace. The Court set out the following "totality of the circumstances" test by which to measure the reasonableness of an employee's expectation of privacy:

> The "totality of the circumstances" test is one of substance, not of form. Four lines of inquiry guide the application of the test: (1) an examination of the subject matter of the alleged search; (2) a determination as to whether the claimant had a direct interest in the subject matter; (3) an inquiry into whether the claimant had a subjective expectation of privacy in the subject matter; and (4) an assessment as to whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances (*Tessling*, at para. 32; *Patrick*, at para. 27).[14]

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[11] Lancaster's Labour Arbitration eNewsletter, *Relevance test, not privacy rights, determines admissibility of video surveillance evidence, arbitrator declares*, June 5, 2007, Issue No. 90, Commentary.
[12] *Canadian Pacific Ltd. v. BMWE (Chahal, Re)*, (1996) 59 L.A.C. (4th) 111 (Picher).
[13] 2012 SCC 53.
[14] *Ibid* at para. 40.

In addition, employees' privacy interests are also guarded by the Ontario Court of Appeal's determination in *Jones v. Tsige*[15] that intrusion into a person's privacy constitutes a tort at common law, the elements of which are as follows:

> [F]irst, that the defendant's conduct must be intentional, within which I would include reckless; second that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action.[16]

Both the reasonable expectation of privacy in the workplace test and the civil protection of privacy serve to shield employees from employers accessing and relying on employees' off duty and private affairs. Indeed, Arbitrator Sims recently awarded damages against an employer to compensate employees for the employer's violation of their reasonable expectation of privacy in the workplace,[17] although the breach was not related to social media but rather unauthorized credit checks.

No cases dealing with unlawful access to private social media is known to these authors. As yet, the manner of the employer's access has not been an issue in most cases dealing with social media. Rather, the content of the post on social media has been the most important fact decision makers will consider in evaluating whether employers may fairly rely on social media posts of employees. Off-duty posts on social media that are insubordinate to managers,[18] injurious to the employer's business

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[15] 2012 ONCA 32.
[16] *Ibid.* at para 71.
[17] *Alberta v. Alberta Union of Provincial Employees (Privacy Rights Grievance)* (2012), 221 LAC (4th) 104 (Sims).
[18] See for example *Chatham-Kent, supra* note 9 and *Alberta, supra* note 9.

operation,[19] in violation of workplace policies and agreements,[20] or racist[21] have been found to have been appropriately relied upon by employers to support disciplinary action.

Many of the things employees say and post online on social media sites are widely and publicly available. Employer's access to such has not generally been limited. However, where comments were made off-duty, workplace parties ought to consider the *Millhaven* test, quoted above, to determine whether the employer may rely on the social media post to discipline the employee. Moreover, where employees' comments are intended to be private, disseminated to a small audience, and/or access to the posts is password protected, employer's ability to access and rely on the information should be subject to the employees' common law and workplace privacy rights, no matter the content.

On this theory, the boundaries between an employee's off-duty conduct and his or her employment obligations have not changed: off-duty conduct that has no real or substantial connection to the employment relationship should never be grounds for discipline or dismissal. What has changed is the potential audience of the off-duty conduct. In this regard, social media has exponentially broadened the potential audience thereby making public those thoughts, comments and actions that were previously private.

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[19] See for example *Chatham-Kent, supra* note 9; and *Alberta, supra* note 9; and *West Coast Mazda, supra* note 4.

[20] See for example *Chatham-Kent, supra* note 9; *Saskatchewan, supra* note 8; *Ontario Public Service Employees Union v. Ontario (Ministry of Community and Social Services) (Aboutaeib Grievance)*, [2011] OGSBA No. 167 (Johnston)(*Ontario*); *Wasaya Airways, supra* note 2; *Credit Valley Hospital v. CUPE Local 3252 (Braithwaite Grievance)*, [2012] OLAA No. 29 (Levinson); and *EV Logistics v. Retail Wholesale Union, Local 580*, [2008] BCCAAA No. 22 (Liang).

[21] *Saskatchewan, supra* note 8 and *Wasaya Airways, supra* note 2.