Offensive And Threatening Facebook Post Is Just Cause

A recent arbitration decision from Newfoundland and Labrador demonstrates how Facebook postings are essentially a broadcast of an individual's personal thoughts to the world at large. In this new decision, those postings backfired on an employee and the employer's discharge for cause was upheld by the arbitrator. Stewart McKelvey's Harold M. Smith, Q.C., defended the grievance on behalf of the employer. The following is a brief review of the decision.

What happened?

A 13-year employee of Corner Brook Pulp and Paper (the Company) was asked to clean an area with a pressure washer that involved spraying water near a live machine. The employee had a "near miss" in which she alleged that she came close to being electrocuted. There was no dispute that this was a serious incident but it may have been brought about by the improper procedure used by the employees assigned. The Company was in the process of investigating the incident to determine what safety recommendations should be made, but apparently, the investigation was moving too slowly for the employee. She expressed her frustration in a lengthy Facebook post. The employer confronted the employee about her posting. She was unapologetic, but was eventually discharged for cause. The union grieved.

How bad were the Facebook "comments"?

The comments posted by the grievor may be examples of the worst things an employee can possibly say about an employer and co-workers. The posting referenced the Company by name and identified the grievor as an employee of the Company. Here's what Arbitrator Oakley said about the grievor's post:

- *The content of the posting is disparaging of the Company and its reputation.*
- *The posting contains offensive and derogatory comments about management and the two Managers have been named in the posting…*
- *The posting refers to "half retarded baymen management" and "fucking stupid retarded half French bayman".*
- *The posting contains threats of extreme violence and ongoing threats of violence or harassment. These comments are directed specifically to the Managers … and includes the statement "I won't stop until you draw a welfare check or are behind bars"… The posting contains an extremely offensive threat in the*

sentence, "Lets see how insignificant you feel when you Got a rope around ur neck and ur balls soaking in gasoline"… The posting also contains the threat "when i see you now, you know u better run".

At the hearing, the grievor agreed that the post was unacceptable and apologized for what she had written. She testified that she did not recall posting the comments, though she did not deny that she had personally made them. She testified that she had been on anti-depressant medication in the months leading up to the incident and had not been sleeping well. At the time of the posting, she said, she was weaning herself off the medication, but notably, no medical evidence was called at the hearing.

Arbitrator Oakley found that the grievor had no reason to be frustrated with the investigation's progress and agreed with the Company that the posting was inappropriate, offensive, and threatened physical violence saying:

- *The posting reasonably caused [the Managers] to be concerned about their safety and the safety of their families.*
- *The posting uses threatening and offensive language. It is also written in an organized and structured manner … The posting contains severe threats of physical harm, makes offensive comments about named individuals and makes derogatory comments about the Employer.*

Were there any mitigating factors?

Arbitrator Oakley recognized that the grievor was a 13-year employee, and that had removed the posting from her Facebook account as soon as the company had brought it to her attention. She had a relatively clean disciplinary record. Notwithstanding this, Arbitrator Oakley said:

…There are insufficient mitigating factors to support substitution of another penalty in place of discharge, having regard to the language used in the Facebook posting, the Grievor's response when confronted with the posting, the effect of the posting on the Managers named in the posting, the disparaging comments about the Company in the posting…and the arbitral authorities.

What was the arbitrator's conclusion?

The Arbitrator noted that prior arbitration awards have found Facebook conversations are circulated widely. A case in which a Facebook post is found to be private in nature will almost certainly be the exception rather than the rule in the current legal climate. He also did not accept the grievor's evidence that she was "crazy and delusional" when the post was made. Rather, her posting was coherent and structured, and during the time that it was made, the grievor continued to attend at work. The Company had just cause to terminate.

What does this mean for you?

The use of social policy as a means of venting frustration or anger by employees is a real issue in today's workplace. While the number of Canadian decisions involving discipline for objectionable social media statements is growing, the number providing guidance as to when discipline in the form of discharge is appropriate can be counted on one hand. In this case, the content of the Facebook post was on the serious end of the spectrum, justifying termination. The comments were highly objectionable and threatening to the safety of the grievor's supervisors, not to mention expressly disparaging of the employer. There was no question for the arbitrator as to whether

the employee’s single Facebook post was a “serious disciplinary offence” which could be relied upon by the employer for summary dismissal. This case is a reminder that some opinions expressed by employees are so fundamentally wrong that discharge may be the only resort.

The *CEP, Local 64 and Corner Brook Pulp and Paper Limited (Stokes)* decision was released on December 11, 2013 and is reported at 2013 CarswellNfld 468.

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