Take A Lesson From The Donald Sterling Imbroglio: Private Conversations Can Get You Fired



My prediction is that the Donald Sterling scandal, will not only see him removed as owner of LA Clippers NBA franchise, but will cause a sea change in the conduct of public figures everywhere.

It will presage and parallel the impact the 1991 Clarence Thomas-Anita Hill imbroglio during Justice Thomas' U.S. Supreme Court nomination had on sexual harassment both in the United States and Canada. Sexual harassment charges before then were relatively rare.

I recall one (male) human resource executive, responding to the news boasting: "At my company, we don't fight sexual harassment, we grade it." That reaction was not atypical.

But, by putting the issue of sexual harassment on the front pages and making it part of public discourse, Canadians became sensitized, the number of cases multiplied and lawyers, me included, began a torrent of sexual harassment client seminars. Standard corporate policies quickly followed.

Sterling's private conversations have resulted in his eviction from the National Basketball Association.

Does this mean Canadian employees will be vulnerable to dismissal as result of intemperate "private" chats outside of the workplace? Of course, employees can be fired for any or no reason at all, but their recourse is an action for damages for wrongful dismissal.

The material question is whether such behaviour is legal cause for dismissal without compensation. If the conduct deleteriously affects your employer, it can indeed be cause for dismissal. If a chief executive, for example, does something in his private life that brings the company into disrepute, that would be cause for discharge just as it would be if the head of HR in a multi-racial company was caught making racist remarks to a friend that became publicized.

Citing the leading, oft quoted, English Court of Appeal decision of Pearce v Foster:

If a person conducts himself in a way inconsistent with the faithful discharge of his

duty, it is misconduct which justifies immediate dismissal. That misconduct need not be misconduct in the carrying on of the service or the business. It is sufficient if it is conduct which is prejudicial or likely to be prejudicial to the interests or the reputation of the employer and the employer will be justified, not only if he discovers it at the time, but also if he discovers it afterwards, in dismissing that employee.

It makes little difference that Sterling believed he was speaking privately but was surreptitiously taped. In Canada, it is entirely legal to tape your own conversations. Canadians can go around all day, if they wish, with a tape recorder and play that recording later. There is no issue of admissibility either in court or in its use by your employer if it was sent a copy of it.

To date, most of the cases in this area have derived from social media. Many courts and arbitration boards have found cause for the discharge of employees who malign their employer or its customers on what they believed to be private chats or postings on Facebook or Twitter.

With so many of us having pocket recording devices on our iPhones, Androids and BlackBerrys, Canadians will become much more circumspect. All enunciated private thoughts could become fodder for your HR department’s subsequent predations. Nothing you say to anyone else can any longer be assumed to be “private” and private thoughts, which become public, may get you called on the carpet and dismissed.

One thing is certain. Canadians’ candour, wherever they work and play, is going to become significantly reduced.

Last Updated: June 25 2014

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