

Without Boundaries, Internet Conduct Can Frustrate



Bottom Line

Regulatory bodies oversee certain professional workers, including teachers, accountants, and many health professionals. These regulatory bodies often impose standards of conduct on their members, the violation of which may result in a professional worker having their status or license with the regulatory body suspended or revoked. Two recent decisions from the Divisional Court consider the role of professional regulatory bodies' oversight of their members' behaviour on the internet.

Employers who employ professional workers should be aware that the suspension or loss of a professional status or license could prevent those workers from performing the duties of their position. In these circumstances, the contract of employment between themselves and the professional worker may be frustrated, meaning that it has become impossible for the professional worker to perform their work.

Professional Sanction for Conduct on the Internet

Two recent judicial review decisions from the Ontario Superior Court of Justice Divisional Court highlight the perils of social media and internet use by regulated professionals.

In *Chaban v Royal College of Dental Surgeons of Ontario*, [2024 ONSC 1075](#) ("Chaban"), the Divisional Court upheld a decision imposed by the Inquiries, Complaints and Reports Committee (the "Committee") of the Royal College of Dental Surgeons of Ontario (the "Royal College") against a member ("Dr. Chaban") because of his social media activity.

The Committee investigated Dr. Chaban following a complaint from a member of the public regarding two videos Dr. Chaban posted to TikTok. TikTok is a mobile-first video sharing social media platform that allows users to disseminate short-form video content to other users. The member of the public asserted that Dr. Chaban's videos were "sexist and disgusting," as they featured him lip-syncing to audio clips containing overtly sexual messages. Dr. Chaban's publicly accessible TikTok profile page disclosed that he was a dentist in Toronto.

In a decision dated 7 June 2023, the Committee made several determinations. These

included that the videos were “sexualized, offensive and demonstrated a lack of professional judgment,” that they were directly linked to Dr. Chaban’s practice of dentistry, that they compromised public confidence in dentistry, and that they violated two practice advisories, the “Prevention of Sexual Abuse and Boundary Violations” and the “Professional Use of Social Media.” The Royal College publishes these advisories to guide the conduct of the dentists that it regulates. As a result of its findings, the Committee directed Dr. Chaban to complete a specified continuing education or remediation program, as well as attend an oral caution.

Dr. Chaban applied for judicial review of the Committee’s decision. Dr. Chaban argued that his conduct did not breach the “Prevention of Sexual Abuse and Boundary Violations” advisory and that the Committee’s sanction was disproportionate and overly severe.

Assessing the Committee’s decision on a reasonableness standard of review, the Divisional Court upheld its findings. Regarding Dr. Chaban’s argument that his videos did not violate the “Prevention of Sexual Abuse and Boundary Violations” advisory, the Court noted that the Committee reasonably interpreted and applied this advisory, which requires dentists to “maintain professionalism in their written communication, including content on websites and social media.” This advisory further requires dentists to ensure that their workplaces do not “include sexually suggestive jokes, posters, pictures, and/or documents that could be offensive to patients or staff.” The Court held that the Committee’s sanction was also reasonable, as it imposed only remedial or educational consequences on Dr. Chaban, which were appropriate in light of his conduct.

In dismissing Dr. Chaban’s application for judicial review, the Divisional Court relied on its earlier decision in *Peterson v College of Psychologists of Ontario*, [2023 ONSC 4685](#). This was another application for judicial review, in this case brought by a psychologist (“Dr. Peterson”) regulated by the College of Psychologists of Ontario (the “College”). As in Chaban, the College investigated allegations of improper and unprofessional conduct by Dr. Peterson, much of which occurred on social media platforms. Dr. Peterson faced multiple allegations: in 2022 alone, they ranged from name-calling people he disagreed with to misgendering transgender and non-binary people to making inflammatory comments about suicide. Sanctioning Dr. Peterson for his public and social media statements, the College required him to complete a specified continuing education or remedial program.

A three-member panel of the Divisional Court upheld the College’s findings and sanctions against Dr. Peterson. Again, applying a reasonableness standard, the Divisional Court found that the College’s decision to sanction Dr. Peterson was reasonable. The Court noted that the College’s findings were justified, intelligible, and transparent, hallmarks of reasonable decision-making. Consequently, the Divisional Court dismissed Dr. Peterson’s application for judicial review of the College’s decision.

Frustration of Contract for Loss of an Essential License or Qualification

Neither Dr. Chaban nor Dr. Peterson lost their licenses to practice their professions, so the legal doctrine of “frustration of contract” did not arise in either case. However, a contract of employment between a worker and their employer, whether written or implied, can become frustrated when a worker loses a license or qualification that is essential to the performance of their position. The result is that the contract effectively ceases, with one or both parties to that contract no longer able to perform its terms. When a contract of employment is frustrated in

Ontario for reasons other than the illness or injury of the employee, section 2 of O. Reg. 288/01 under the *Employment Standards Act, 2000*, states that the employee is not owed notice of termination or termination pay.

Canadian courts have held that a contract of employment can become frustrated if there is an event or occurrence outside of the parties' control that renders performance of the contract either impossible or radically different from what the parties contemplated when they entered into the contract. In these cases, there is an event outside of the control of the parties—that is, the loss of the essential license or qualification via a decision or direction of a regulatory body—which in turn makes it impossible for the employee to perform some or all of their workplace duties. Since the early 1990s, the loss of essential licenses or qualifications has been a prototypical example of frustration with the employment contract (see, for example, the 1991 Saskatchewan Court of Appeal case of [*Thomas v. Lafleche Union Hospital*](#)).

Labour arbitrators take a different approach, however, balancing employees' interests against those of the employer. Where an employer discharges a worker in these circumstances, some arbitrators may expect that the employer be able to show that it could not temporarily accommodate a worker in a position that does not require the lost license or qualification. Some labour arbitrators have accordingly held that in unionized workplaces, a suspended license or lost qualification does not provide employers with an immediate right to dismiss a worker, as not meeting a "just cause" standard.

Whether unionized or not, employers should be cautious about discharging employees for the loss of an essential license or qualification. Employers should assess each individual situation as it arises, ideally seeking legal advice tailored to the specific case at hand.

Takeaway

While neither Dr. Chaban nor Dr. Peterson lost their licenses or professional qualifications as a result of their social media activity, such a case could arise. Though the regulatory bodies of many professions—including teachers, nurses, and doctors—provide guidelines on responsible public statements and social media use, the pervasive use of the internet and social media, along with users' temptation to "overshare" on these platforms, increase the odds of this outcome.

To proactively address these situations, minimize legal risk, and safeguard organizational reputation, employers should craft and communicate clear policies on the acceptable use of social media. The specifics of these policies will vary, but they ought to encourage employees' responsible use of both social media and the internet broadly. For employers whose workers include professionally regulated employees, it may also be advisable to incorporate the directives and guidance of the workers' regulatory body into the relevant policy.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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