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CAN THAT SWEET TWEET LAND YOU IN THE HOT SEAT?

This is the first article in a two-part series that will look at employees and social media use. It will introduce the topic, frame the issues and offer a few recent decisions involving use of Facebook, still the world's largest social media network. Part two of the series will offer further examples of off duty employee social media expression using other popular platforms.

By Tamina Mawji

Social media has permeated every aspect of society including the workplace. With employees increasingly using social media, employers have recognized the potential harm that could result from employee expression over the internet on social media platforms. Examples of imprudent uses of social media are often garnering attention in the news, public rhetoric and before courts and labour and employment tribunals. Through these cases we see that adjudicators treat social media use not as a new area of law but continue to employ established legal frameworks in assessing these disputes. The common thread and central concern is the balancing of the employer's right to regulate employee conduct and the employee's expectation of privacy and freedom of expression.

In the first of this two-part series, we will review the law surrounding discipline for social media activity, both inside and outside the workplace, and discuss a few recent decisions.

The Approach by Arbitrators

One of the implications of the rise of employee social media expression is the blurring of the traditional distinction between the work and personal lives of employees, raising questions surrounding the employer's right and scope to discipline employees for social media activity.

On-Duty Social Media Use

When personal social media use occurs on-duty, ie during working hours and/or at the workplace, the right to discipline arises from the employer's legitimate interest in regulating employee conduct inside the workplace. For instance, employee social media activity during working hours may run contrary to computer use policies involving personal use of employer-owned equipment or productivity and misuse of work time. In this context, social media use could be treated similarly to other forms of misconduct in accordance with the seminal William Scott analysis, which provides:

- 1) Has the employee given just and reasonable cause for some form of discipline by the employer?
- 2) If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case?
- 3) If the Arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?



STAY IN TOUCH

We welcome all suggestions and comments. Feel free to send your feedback to Doris Sun, Manager of Communications, at: dsun@cssea.bc.ca.

Off-Duty Social Media Use

When social media use occurs away from the workplace and/or on personal time, it is the topic of some debate between those who assert that what employees do in their own time is their own business, while others argue workplace repercussions are appropriate for off-duty conduct. This issue is not new and Arbitrators have applied the well-known legal test referred to as the “Millhaven test,” devised in the late 1960’s, when justifying discipline for off-duty misconduct. In recent years this test has been applied to a broad range of off-duty conduct including social media misuse. An employer must demonstrate that the employee’s misconduct has a detrimental impact upon the company’s operations. The threshold to be met is one, or more, of the following criteria:

- i. The conduct of the [employee] harms the Company’s reputation or product;
- ii. The [employee’s] behaviour renders the employee unable to perform his/her duties satisfactorily;
- iii. The [employee’s] behaviour leads to refusal, reluctance, or inability of the other employees to work with him/her;
- iv. The [employee] has been guilty of a serious breach of the *Criminal Code*, thus rendering their conduct injurious to the general reputation of the Company and its employees;
- v. The [employee’s] conduct makes it difficult for the Company to properly carry out its function, or efficiently manage its operations, and efficiently directing its working forces.

Recent Cases - Facebook Follies

We see in *Re Credit Valley Hospital v. CUPE Local 3252*, [2012] O.L.A.A. No. 29 an example where the grievor’s Facebook postings violated the Employer’s Confidentiality and Code of Conduct policies. After a tragedy occurred at the hospital in which an outpatient committed suicide from one of the multilevel parking garages, the grievor took pictures of the scene and posted them on his Facebook page. The grievor included the following captions with the pictures: “Mother pleads with kid not to jump off PRCC side of the parking lot but did anyways poor thing.” and “This is what I have to clean up.” Upholding the termination, the Arbitrator found that the grievor engaged in culpable misconduct by taking pictures and posting them on his Facebook page with comments that others viewed. The Arbitrator concluded that the grievor had breached the well-understood and all-encompassing fundamental obligations on employees to maintain the confidentiality of patient information and it was not just and reasonable to substitute a lesser penalty.

Re USW, Local 9548 v. Tenaris Algoma Tubes Inc., 2014 CanLII 26445 (ON LA) illustrates that an employee’s off-duty social media conduct can poison the work environment and can constitute workplace harassment. The grievor, a crane operator, went on his Facebook account after his shift and complained about a female employee’s job performance as a stocker. The grievor did not identify the co-worker by name but referenced one of her distinctive physical characteristics which he said would reveal who she was. This post initiated a conversation that continued and escalated over the course of about two hours. Some Facebook “friends” responded including a third co-worker who commented on the post and suggested performing a physically aggressive act with that characteristic. The grievor agreed and suggested that further violent and humiliating sexual acts be inflicted upon the co-worker. The stocker became aware of the comments and reported the incident. Although the grievor took down the posts 10 hours later and apologized during the investigation, the Employer terminated his employment relying in part on its Code of Conduct and Harassment and Violence policies.

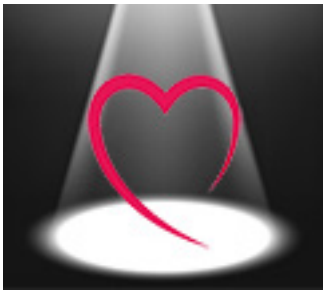
In upholding the termination, the Arbitrator emphasized the vicious and humiliating nature of the Facebook comments as a serious aggravating factor and considered that the grievor must have anticipated that the stocker would have seen or heard about the posts since the grievor’s Facebook “friends” included co-workers and he didn’t have any privacy settings. Another notable factor was that although the Employer’s harassment policies did not address Facebook or other social media, the absence of such references was not considered to be a factor mitigating the grievor’s actions. On the issue of progressive discipline, the Arbitrator states that “some offences are so serious that they warrant discharge. An employee does not necessarily get one free sexual harassment before he loses his job.”

Lessons Learned

These cases tell us that the balancing act between the competing interests of both the employer and employee are not necessarily of equal weight and that at times the employer’s interest to regulate employee conduct may be a more dominant consideration especially where the activities breach existing workplace policies that all employees are expected to uphold.

The *Tenaris Algoma Tubes Inc.* decision highlights that social media can be an extension of the workplace and that employee conduct that is harassing and threatening needs to be addressed by employers. It also serves as a reminder to update workplace policies to reflect the prevalence of social media harassment and a clear indication of the potential consequences of such harassment.

In the next part of our series, we will explore some cases where employees are expressing themselves on their own time in some cases, unrelated to the workplace.



THE SECTOR SPOTLIGHT

Stories of impact and innovation in the social services sector

EDITOR'S NOTE: *We are excited to introduce a new regular column that aims to shine a spotlight on members and associates who are conducting operations in innovative ways. It is hoped that these shared ideas will allow community social services agencies to function at their best. If you have a story to submit about a program or practice that has improved the workings of your agency, email Doris Sun at dsun@cssea.bc.ca for a chance to be featured.*

Art From The Heart

By Doris Sun

On a beautiful weekend in May — Mother's Day weekend — 27 art studios opened their doors to showcase a range of pieces as part of the highly anticipated annual Maple Ridge/Pitt Meadows Art Studio Tour. Among the stops on the tour were venues that specialized in paintings, sculpture, pottery, jewelry, candles, and more. All offered one-of-a-kind pieces but perhaps none as meaningful as those sold by Studio #6, Vicuña Art Studio.

Over 100 people stopped in to Vicuña over the weekend. The studio, operated and funded by Ridge Meadows Association for Community Living, showcased work that generated \$2,600 in sales, a great achievement considering the program's humble beginnings as a means to encourage individuals with developmental disabilities to connect with their creative selves. "For those who are non-verbal, it's such a great way to express themselves," says Ilse Phillips, Director and Instructor at Vicuña.

The studio has been open for nine years and in the past two, Ilse has seen firsthand the positive impact that art has had on those who would otherwise be challenged to express their feelings. She runs one-hour art classes accommodating up to four people and prides herself on creating a no pressure environment where individuals have free rein to pursue whatever medium appeals, with as little or as much instruction as desired. "Sometimes people just pick up a brush and the creativeness flows," says Ilse. "What's such a joy and such an inspiration to me is probably 90% of people who come through these doors may not have the inhibitions you and I might have. They might not have been taught Art in school or heard about composition, colour theory, etc. There is no background noise in their brain about how things should look."



The result of such artistic freedom is incredible art. Ilse recalls an individual who started pottery classes as he began to lose his vision and created beautiful figures based solely on touch and memory. Another individual with pinhole vision enjoys the painting process and produces vivid pieces that burst with the richness of different colours.

Individuals who are clients of Ridge Meadows Association for Community Living pay a subsidized fee of \$4 per class, which contributes to the cost of supplies like frames, mats, paints, brushes etc. Artists are given the opportunity to have their pieces showcased at one of three art shows that Vicuña participates in annually, with 60% of any sales paid to the artist. The remaining 40% of sales are funneled back into the studio to cover expenses and keep the program running. Last December, Ilse had the pleasure of paying artists over \$1,300 from sales.

For individuals who are motivated to earn income, it's a wonderful accomplishment to have their pieces sold but for a majority of artists, a true sense of accomplishment comes from the excitement in knowing that someone from the public was interested

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enough in a piece to purchase it. “I remind them that when their work is in an Art Show, it is viewed by the public, they have a new role in life — they are an artist,” says Ilse.

Local businesses have also taken notice and shown support for the studio. Blenz coffee shop and Mr. Lunch restaurant in Maple Ridge both display art from Vicuña. In addition, art is displayed at a local library.

The sense of pride that comes with having a piece exhibited cannot be overstated. When a Vicuña artist, Jodi was chosen to have her art exhibited at the city art gallery for six weeks, her whole family attended the opening reception and were beaming with pride.

This sense of empowerment is something Ilse hopes will continue to grow as she puts more effort into grassroots community marketing. Among her strategies, Ilse is counting on her artists to spread the word about upcoming shows by telling five people in each of their networks.

She is also setting up solo exhibitions and partnering with another community social service agency, posAbilities, to showcase pieces at their art show.

“It’s incredibly inspirational to be here,” she says. Each of the artists inspire me. It’s thrilling!”



COMING SOON: ONLINE ART GALLERY

If you can’t make it out to the studio in person, you will soon be able to view and purchase pieces online!

The studio is setting up a link through the Ridge Meadows Association for Community Living website so check back for updates!

WELCOME TO CSSEA!

COURTNEY MCLACHLAN



Courtney is one of two new Consultants who joined CSSEA in June. She grew up in the seaside village of Lions Bay in Howe Sound and obtained a political science degree from Dalhousie University before moving to Australia to obtain her law degree. Prior to joining CSSEA, Courtney worked primarily in private sector employment law and civil litigation. Courtney is called to the bar in Ontario and British Columbia.

When not working, Courtney enjoys chasing her boston terrier, Judge, as well as partaking in the Vancouver trifecta: hiking, biking and yoga. In 2016, Courtney completed a 30-day yoga challenge and hiked the West Coast Trail on Vancouver Island.

MARGERY PAZDOR

Margery grew up in a small town in the East Kootenay region of BC. Her life before law included coordinating a volunteer-run art gallery, working at a Parks Canada Information Centre, doing medical genetics research in Newfoundland, and teaching English to high school students in France. She also did a lot of studying and as a result, has almost as many degrees as she does letters in her last name! Prior to joining CSSEA, Margery worked primarily in class action litigation. Margery was privileged to work on the Woodlands Class Action, where she represented individuals with intellectual and physical disabilities in a class action lawsuit against the Province.

When not working, Margery can often be found playing or listening to music.



DEANNA FEDIO



Deanna is CSSEA's articling student, and is excited to have found her way here. Originally from Edmonton, she received her JD from Thompson Rivers University and decided to stay in BC. During her time in law school, she volunteered as a human rights and resource extraction researcher with local and international NGOs and activist groups. An avid foodie and cook, she's always happy to get recommendations on new restaurants to check out or recipes to add to her list of favourites.



5 REASONS TO ATTEND 2017 AGM AND CONFERENCE

- 1. Have a say in 2019 Bargaining:** You will have the opportunity to select your 2019 bargaining representatives or to put your name forward.
- 2. An Hour to Feel Inspired:** Our keynote speaker, Mark Brand, is an internationally-recognized social entrepreneur and advocate. He will be delivering an hour-long keynote address that is sure to be memorable, emotional and provocative.
- 3. Meet New Friends:** We are extending some coffee breaks, planning fun networking events and allowing time on the agenda for attendees to catch up with old colleagues and mingle with new ones.
- 4. Celebrate Excellence:** The third annual Awards of Excellence will be honouring four individuals working in the sector who have shown greatness on the job. Join us in celebrating their achievements!
- 5. Experience beauty:** It's been five years since we last visited the Okanagan and much has changed in the vibrant city of Kelowna. Visit the registration desk for maps and resources that will help you make the best of your stay!

REGISTER NOW AT [HTTPS://CONFERENCE.CSSEA.BC.CA](https://conference.cssea.bc.ca)