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ANOTHER BRICK IN THE WALL: ARBITRATOR UPHOLDS DISCHARGE FOR OFFENSIVE FACEBOOK POSTINGS

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A prominent labour arbitrator has upheld the discharge of a long-term employee for posting offensive material about her supervisors on Facebook, and in doing so, has clarified some of the legal principles applicable to misconduct involving social media.

In ***Canada Post Corporation v. Canadian Union of Postal Workers***[1], a postal worker with 31 years of service made comments on Facebook over the course of four weeks that maligned and seemed to threaten two of her supervisors. While the postal worker thought that her posts were private, and restricted to her 52 Facebook Friends (including some co-workers), she had failed to engage the privacy settings, leaving her Facebook Wall publicly accessible. The Facebook posts were reported to management by another employee. When the supervisors accessed the site to investigate, they were both so disturbed by the contents that they reported the postings to the police and required time away from work.

The posts referred to one of the supervisors as "evil," a "bitch," a "hag," "C_unt," and "the devil". The other supervisor was characterized as a "yes man" and an "idiot". The posts also contained threatening language such as "DIE BITCH DIE," and "WRONG AGAIN BITCH you gonna be the one missing PERMANENTLY".

The posts also provided numerous examples of insubordination towards Canada Post and its managers:

- "3 nights of freedom from Postal Hell.
- Lovin' my indefinite suspension
- Hell called. They want the Devil back. Sorry, she's busy enforcing productivity @ [the postal depot]
- I'm texting in Sick. My idiot supervisor is 24.
- Tonight is my first night back, since my suspension, but I'm just not feeling well enough to meet expectations, hell I'm on my fourth cooler, so I'm staying home to rest/ pass out. Lolol, I've gone Postal."

While the Grievor posted most of the Facebook material while she was off-duty, some of the posts were made using her cell phone while at work.

1 ***Canada Post Corporation v. Canadian Union of Postal Workers***. (Grievance #730-07-01912) was issued on March 21, 2012 and has not yet been reported.

Canada Post regarded the posts as reprehensible, grossly insubordinate, threatening, and openly defiant and contemptuous of management. Consequently, the postal worker was discharged.

In grieving the termination, the Union contended that the Facebook posts were made primarily in response to two incidents that occurred at the postal depot in the Fall of 2009: a staff meeting that was called in order to address performance concerns, and a confrontation that occurred on the work floor between the Grievor's Superintendent and another co-worker. The Union asserted that the posts were the result of provocation stemming from these incidents and an allegedly hostile workplace created by the supervisors, and that alcohol was a contributing factor in the Grievor's intemperate postings. While accepting that the Grievor's posts constituted misconduct, the Union maintained that the mitigating circumstances, including provocation, alcohol use and the Grievor's seniority, as well as the absence of any reliance by the employer on a past disciplinary history, warranted lesser discipline.

Arbitrator Allen Ponak found some of the posts "offensive and frightening" (57), noting that the Grievor displayed "a degree of venom that is unmatched in other social media cases" (58).

Throughout the arbitration, the Grievor steadfastly maintained that she thought her Facebook posts were private. Arbitrator Ponak accepted the Grievor's evidence that she did not believe her posts would be publicly available on the Internet. However, he concluded that while her misunderstanding was a common one, it did not relieve her of responsibility for the consequences of her actions, which resulted in "significant harm to the targeted supervisors" (70). He found it reckless of the Grievor not to have considered how easily the posts could be disseminated on the Internet. Even if the Grievor had engaged her privacy settings, the fact that several of her Facebook friends were also her co-workers squarely brought the posts within the realm of the workplace.

In her testimony, the Grievor repeatedly tried to blame the posts on her alcohol use at home. Arbitrator Ponak placed little weight on the Grievor's claim that she was drunk. The posts were generally articulate and demonstrated a command of spelling and grammar and selective use of capital letters and punctuation, which belied a lack of capacity. Additionally, there was no discernable difference between the posts made while at work, and those posted from home. Finally, the Arbitrator concluded that no defense of diminished capacity was available because no medical evidence was led to establish that the Grievor was incapable of knowing right from wrong.

The Union mounted a provocation defense, arguing that the Grievor's posts were a reaction to her Superintendant's allegedly aggressive management style. With respect to the first branch of the provocation test, which requires that the behaviour in question be objectively provocative, Arbitrator Ponak found that the Grievor's Superintendant was neither physically aggressive, nor did she scream (although she sometimes raised her voice), regularly use foul language, or engage in bullying behaviour. Accordingly, her conduct did not meet the threshold necessary because it would not deprive an ordinary person of self-control. The second branch of the defense, which requires that the response be both proportional and proximate, was also not established. In this regard, the evidence revealed that the Grievor was not directly involved in most of the incidents involving her supervisors about which she and her co-workers testified. Prior to the Fall of 2009, the Grievor had minimal contact with her Superintendant. Consequently, Arbitrator Ponak concluded that "the degree of character assassination" contained in the posts was entirely disproportionate in the circumstances (69). Moreover, because the Grievor posted on her Facebook wall numerous

times over the course of one month, the postings could not be characterized as an immediate and short-lived display of emotion, and therefore, the immediacy requirement of the defense was not established.

The fact that the Grievor was “remarkably unrepentant” contributed to Arbitrator Ponak’s finding that reinstatement was not a viable option in these circumstances. Although she did tender a written apology, the Arbitrator interpreted this document, and the Grievor’s testimony, as showing regret at the fact that the posts had been discovered, rather than demonstrating a sincere understanding of the consequences of her actions and displaying any genuine contrition.

The Union emphasized the Grievor’s long service with Canada Post, and the fact that she was just a few years away from pension eligibility, arguing that this was a strong mitigating factor justifying a lesser penalty. Nevertheless, Arbitrator Ponak concluded that discharge was appropriate because an employee’s long service alone cannot provide immunity for gross misconduct that involves “threatening language, vile insults and the debasement of an identifiable manager” (58).

This decision confirms the principle that material posted by employees on social media websites that, through their recklessness, is “publicly disseminated and destructive of workplace relationships” can result in substantial discipline (56). In upholding Canada Post’s decision to discharge the Grievor, Arbitrator Ponak found that the offensive nature of the Facebook posts, the significant harm caused to the two supervisors, and the Grievor’s lack of acknowledgement of her wrongdoing supported termination. ▲

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