SOCIAL MEDIA UPDATE

Presented by: Kristen Worbanski and Clair Cerilli

Off-Duty Conduct and Social Media

The general rule is that an employer has no authority over what employees do outside of working hours. However, in cases where a person's behaviour outside of the workplace somehow affects their work or their employer's business interests, they can be at risk of discipline. For an employer to justify disciplining an employee for misconduct committed when they are not on duty, it must prove that there is a link to the workplace.

The leading case that sets out the test for when Employers can discipline employees for off-duty conduct is *Millhaven Fibres Ltd. v. Oil, Chemical & Atomic Workers Int'l Union*, [1967] O.L.A.A. No. 4. In that case, the Grievor was discharged after harassing an employee who continued working and crossed picket lines during a strike. The harassment included threats and damage to the homes of the other employees. According to the Chair of the arbitration panel, J.C. Anderson, "the offence of willful damage to fellow employees was directly related to the employment of the grievor and [the other employees] at the Company's plant, and it would result in an intolerable situation if one employee who threatens another employee and who actually does willful damage to other employees' property, cannot be disciplined because such threatening language and willful damage took place away from the Company's premises".

In other words, Arbitrator Anderson was saying that simply because the behaviour happened away from the workplace does not mean that it cannot result in discipline. Arbitrator Anderson also provided the following factors that justify discipline for off-duty conduct, which arbitrators also apply in cases involving social media use:

1. the conduct of the grievor harms the Employer's reputation or product
2. the grievor's behaviour renders the employee unable to perform his duties satisfactorily
3. the grievor's behaviour leads to refusal, reluctance or inability of the other employees to work with him
4. the grievor has been guilty of a serious breach of the *Criminal Code* and thus rendering his conduct injurious to the general reputation of the Employer and its employees
5. [the conduct] places difficulty in the way of the Employer properly carrying out its function of efficiently managing its Works and efficiently directing its working forces.

It is not necessary for an Employer to show that all the factors are present in order to discipline an employee for their off-duty conduct.

The use of social media such as Facebook, Twitter, and Instagram has become a common part of many people's day-to-day lives. The reality, however, is that what gets posted on social media can have a direct or indirect impact on the employment relationship. In some cases, social media posts can result in workplace discipline leading up to and including termination, even when performed off-duty. This is particularly true when the post connects the employee to the workplace.

As a result, employees should be aware that they can be disciplined for their off-duty use of social media. As a general rule, employees should assume that any comments or posts they make on social media (even if they are making the post privately to "friends" only), may eventually get back to their employers. This is even true for posts which they eventually delete.

Below are a number of cases where an employee's off-duty social media use was grounds for discipline:

***Ontario Secondary School Teachers' Federation v Simcoe County District School Board*, 2013 CanLII 62014**

AB was a gay teacher employed in a small community. It was his perception that he had been the object of discrimination by his principal CD. On October 18, 2011, AB posted the following on Facebook:

> We've failed yet again. I'm ashamed that this happens in Ontario schools. It's difficult enough being an openly gay high school teacher in a small community. I can't imagine being an LGBQT student. I strive every day not be part of the problem. From this day forward I will be part of the solution. *To the homophobic Principal who told me that she didn't think a gay teacher should be part of the GSA [gay straight alliance]—we need real leaders, not sheep.* (italics added)

A number of "likes" were posted in response, one of which read:

> To the homophobic principal who told you she didn't think a gay teacher should be part of the GSA: I don't think she should be a principal let alone involved in our school environment guiding our children. I want my children to be proud of who they are and who they love no matter what gender !! This "old school" thinking has no room in my world !!

The Board asserted that a third-party investigation which followed AB's suspension, concluded that AB's claims were unfounded. The Board took exception to the post on several grounds including the fact that DC did not do what AB suggested and more generally with the "reputational damage" done by the posting, personally and professionally to DC and to the school in question, and to the Board. AB had a discipline

free record, although he was counselled (though not disciplined) for alleged harassment and gossiping about another teacher in the past. The Board acknowledged taking this counselling into consideration when the instant suspension was imposed.

The Association conceded that the posting was "intemperate" but argued it needed to be placed in context of the tragic student suicide in Ottawa that was referenced in the posting. They also argued that whatever third party may have found, AB held an honest "perception" that he had been the object of discrimination. They also noted his Facebook settings were of a private nature and that he did not use the principal's name. Further, the "like" described above was posted by a childhood friend of AB. They argued AB was remorseful, he had a clear record of over 10 years and the suspension was excessive.

Arbitrator Hay concluded that the Board had the right to impose discipline but found that there were sufficient mitigating factors to reduce it a three-day suspension upon receipt of a straightforward letter of apology to CD from AB**.** They stated:

> 11. There can be no doubt that the Board had legitimate reason to impose discipline in this case. The nexus between AB's off-duty Facebook posting and his employment was patent.
>
> 12. The Board had every right to be deeply concerned about the content of such a posting as did the Principal who had every reason to be personally upset and angry. It would have taken no effort to identify CD; AB's school was identified on his Facebook wall. I do not believe that the Board's concern about "reputational damage" was in any way misplaced or exaggerated. The issues of particular concern to AB are also of great import to any school board. AB had no right to attack his Principal, and implicitly his employer, in such a way.
>
> 13. The Board drew my attention to a "Professional Advisory—Use of Electronic Communication and Social Media" approved by the Council of the Ontario College of Teachers. As noted in the Advisory, "Online identities and actions are visible to the public and can result in serious repercussions or embarrassment." Further on in the Advisory, members are advised among other things to:
>
> - Consider whether any posting may reflect poorly on you, your school or the teaching profession.
>
> - Avoid online criticism about students, colleagues, your employer or others within the school community.
>
> - Avoid impulsive, inappropriate or heated comments.
>
> 14. It is difficult to improve upon that practical advice.

15. AB's action was not only "intemperate" but wrong and, if he thought he was acting in private, he was not. If AB had concerns about what he believed to be discriminatory treatment, there were appropriate avenues open to him and a Federation to advise him properly. What he did was definitely reckless and far out of line.

16. Having said this however, Federation counsel made it clear that AB sincerely regrets his action. It is noteworthy that AB has significant service and a prior discipline free record. I also find it problematic that the Board gave consideration to a prior non-disciplinary counselling in choosing the length of suspension that it did.

Arbitrator Hay directed that AB provide a straightforward letter of apology to CD, and following receipt of such, that the Boar reduce the penalty imposed on AB to a three-day suspension.

YUSA and York University (Balaskas), Re, **2018 CarswellOnt 7618, Ontario Arbitration**

The grievor was terminated following an investigation into his activity on social media, which included a series of anti-Semitic posts. The grievor was employed at the University as a laboratory technologist and had been employed for approximately 13 years.

The University received a complaint that the grievor's Facebook posts violated the University's *Secretariat Policy on Hate Propaganda* and its *Policy Concerning Racism*. The grievor's posts were publicly available to any of Facebook's 1.71 billion active users at that time and were followed by students and staff. His profile was public and listed his employment at the University.

All of his Facebook posts were also public. These posts include innocuous messages about his daily life. They also include commentary about non-controversial topics or political issues that may be controversial or even offensive to some, but which are not necessarily anti-Semitic. However, he also made frequent posts alleging that either "Jews," generally, or "Zionists" specifically, were responsible for a variety of current or historical atrocities. Among these posts, several expressed blatantly anti-Semitic views and perpetuated racial stereotypes, including but not limited to posts that glorified Nazis and blamed the Jewish people for the Holocaust.

The grievor grieved his termination. In his evidence, the grievor claimed that he was not anti-Semitic, naming several Jewish friends and organizations that supported him. He also argued that his posts were simply providing the public with information that should be available to everyone. He sought reinstatement.

The union argued that the grievor was not in a sensitive sole such as that of a teacher, and rather was a laboratory technician in a university where controversial political expression that may be offensive to some was valued and protected. The union also argued that there was no evidence that the grievor intended to harm anybody or that his conduct had affected any student or employee at the university in a manner that would render him unable to work with them. The union argued that reputational harm to the University was not so substantial that continued employment would be untenable. Further, the union argued that there was a causal connection between the grievor's personality disorder, which among its effects, rendered him susceptible to conspiracy theories.

The University argued that when one examined the full body of the grievor's posts, it was clear that he has engaged in a systematic vilification of Jewish people that included holocaust denial and the celebration of Nazism, blood libel and the promotion of anti-Semitic conspiracy theories. These posts were made in a context where the grievor clearly associated himself with the University and his employment with the University, and the grievor has demonstrated that he has no intention of ceasing this activity.

Arbitrator Gedalof indicated that discipline cases involving off-duty conduct must be assessed carefully on their own facts. The nature of the conduct and the workplace, the employee's duties, and the personal circumstances of the employee in issue were all relevant considerations. Where the alleged misconduct consisted of some form of expression, the cases raised many complex, nuanced and difficult issues. These issues touched on fundamental rights such as freedom of speech and political thought, the important divide between one's private life and one's employment responsibilities, the extent to which an employer can seek to restrict an employee's right to express themselves as they see fit under pain of discipline or discharge, and the extent to which an employer must demonstrate actual harm arising from off-duty conduct before it was justified in taking action against the employee. They noted that the fact that an employee engaged in off-duty conduct that some might find offensive was clearly not in and of itself grounds for discipline. However, they also accepted that, in this case, the grievor's conduct was clearly culpable.

Arbitrator Gedalof concluded that the grievor's posts constituted the dissemination of hate propaganda within the meaning of and contrary to the University's policies. They further noted that when questioned about his conduct, the grievor exhibited little to no insight into the problematic nature of his posts and gave the University reasonable grounds to believe that he would continue to promote anti-Semitic views.

They then reviewed the medical evidence. They concluded that the grievor did suffer from a personality disorder and that this affected his behaviour, rendering him inflexible and moralistic. This condition might have explained the grievor's compulsion to post his

moralistic views in such a persistent manner, but the grievor's condition did not explain or excuse the anti-Semitic nature of those posts, or the grievor's failure to comply with the University's policies.

Arbitrator Gedalof noted that the grievor was a long-service employee, and generally, this would be a significant mitigating factor; however, this grievor had amassed a substantial discipline record and had been subjected to appropriate progressive discipline. The grievance was dismissed.

***A.B. v. Canada Revenue Agency,* 2019 CarswellNat 3419 (Federal Public Sector Labour Relations and Employment Board)**

The grievor was born and raised in Afghanistan and self-identified as a person of Muslim faith. While growing up in war-torn Kabul the grievor formed strongly held views about the Afghanistan conflict. He was left with bitterness towards NATO military activities in his homeland. This was evidenced by his social media posts where he voiced these strongly held beliefs. These included Twitter posts that appeared to glorify the Boston Marathon terror bombing and celebrated the deaths of NATO personnel.

The grievor was employed by the Canada Revenue Agency, and after discovering these posts they suspended his reliability status and then ultimately terminated him. The grievor alleged that in terminating him, his employer engaged in a discriminatory practice. The grievor also stated that his employer read his many tweets and then made assumptions about him due to his ethnicity and religion. The grievor also alleged that he was discriminated against due to his attendance at a mosque where a different mosque member had become radicalized.

In his testimony, the grievor attempted to justify his social media behaviour. For example, when faced with his concerning tweet about the Boston Marathon the grievor stated that his English was not good and, therefore, he may have incorrectly included hashtags in his tweets, like #bostonmarathon if it was trending on Twitter that day. He testified that when he wrote the tweet, he meant to connect the harm from the marathon attack to more harm to members of the US military in Afghanistan.

The employer took the position that based on his social media posts, the grievor has been observed glamourizing martyrdom, expressing sympathy for a listed terrorist entity in Canada, and justifying terrorist attacks in the West. While his actions to date had not been violent in nature, he had expressed support for the violent actions of others. If the grievor were to decide to use/facilitate violence as a means to further the radical agenda which he appeared to support, CRA staff and/or infrastructure could be targeted.

The Board first considered whether the grievor had established a *prima facie* case that he had been discriminated against. The Board concluded that there was no evidence to

suggest that the mere fact that the grievor worshipped at a mosque led the employer to consider him a risk. The fact that an individual who had become radicalized had gone to the same mosque as the grievor and that the grievor, through his many disturbing tweets, was at risk of being recruited by terrorists provided a reasonable and non-prejudicial link to the concern of risk.

They then considered whether the CRA had provided a reasonable explanation for suspending and revoking the grievor's reliability status. The Board accepted the employer's submission that any employee, regardless of race or religion, who exhibited the same disturbing behaviour as the grievor would face the same consequences of having their reliability status revoked. In the alternative, the Board indicated that if there was insufficient evidence to find a *prima facie* case of discrimination, the employer had demonstrated a *bona fide* occupational requirement that justified its action.

This case also concerned the grievor's request to have his name removed from the decision. The grievor stated that he lived in fear of being labelled a terrorist and that he had experienced racist comments in the past. The grievor stated that he fears that due to the racism he suffered from, he would become unemployable if this decision was published identifying him. He was concerned that the evidence of his social media activity would leave the impression that he was a terrorist sympathizer.

On this issue, the Board was persuaded by the grievor's testimony that he had been subjected to racist treatment (not related to matters raised in this hearing) but in his day-to-day life in Canada. They accepted his submissions that if this decision was published with his full name, it could significantly increase the risk of this racist treatment being exacerbated. They, therefore, granted his request for anonymization of the decision.

***Horizon Plastics Ltd. and UFCW, Local 75 (Fardella),* Re, 2019 CarswellOnt 6910, Ontario Arbitration**

The employer was a manufacturer that received large volumes of products by rail. They, therefore, had to keep the tracks clear so that trains were not prevented from making a delivery due to ice build-up. The grievor had worked for the employer for 30 years and was assigned to a job where he had to clear and de-ice the tracks.

The grievor was instructed by his supervisor to "run a crowbar through the snow and knock the snow out of the tracks right away". This was common practice. The grievor refused to perform the task right away and stated that it was not his job. He swore at his supervisor and stated that he thought it was inappropriate that his supervisor expected him to "jump out of his seat and fly out there" to remove the ice. The grievor eventually did some cleaning and de-icing later in the day.

The grievor later shared a post on his supervisor's Facebook page. This post read, in part:

> "Lol Bosshole A person who turns into an asshole ten seconds after being made Supervisor."

The grievor testified that his girlfriend saw the "Bosshole" post on Facebook. They laughed about it, and she told him he should send it to his supervisor. He listened to her. He said that he thought his supervisor would laugh at the post. It was meant to be a joke, which "is what Facebook is all about, mostly joking with people".

The Employer met with the grievor. During the meeting, the grievor did not acknowledge engaging in any inappropriate conduct or show any contrition regarding his actions. The grievor was suspended for one day for insubordination. At the hearing, the grievor did not acknowledge engaging in any inappropriate conduct or show any contrition. He said there was nothing to be sorry for and that his supervisor could not take a joke. The grievor was suspended for one day.

The issue here was whether Arbitrator Levinson should substitute a lesser penalty for the suspension. The employer argued that the grievor engaged in a series of insubordinate misconduct, including work refusal and then the Facebook post. His long service and the clear record did not mitigate against the suspension, particularly given the grievor's lack of contrition and failure to take accountability. The Union argued that the circumstances were unique and included "spur-of-the-moment" actions which involved an element of provocation and his posting on Facebook, which he intended as a joke. His length of service and clear disciplinary record supported a lesser penalty.

Arbitrator Levinson found that the employee's actions, on the whole, could not be accurately characterized as being spur-of-the-moment. He repeatedly ignored his supervisor's direction and was insolent toward his supervisor by repeatedly directing profanity at him. This insolence continued via the Facebook post one day later. While the Facebook post was off-duty conduct, there was a sufficient connection to the workplace and to his supervisor. The content of the Facebook post represented a continuation of his insolence toward the supervisor and, therefore, could not be seen as spur-of-the-moment. Arbitrator Levinson did not find that this Facebook post was intended to be a joke and the employee showed no contrition for his actions.

They concluded it would not be just and reasonable to substitute another penalty. The grievance was dismissed.

***Strom v. Saskatchewan Registered Nurses' Assn.*, 2020 SKCA 112**

In this case, a registered nurse, Ms. Strom, had posted comments on social media relating to the end-of-life care that her grandfather had received at a care facility in Saskatchewan. In the comments, she criticized the competence and professionalism of the staff — including registered nurses — who worked at the facility.

Ms. Strom's initial post specifically addressed her grandfather's time in palliative care and alleged that not everyone was "up to speed" on how to approach end-of-life care. Although Ms. Strom was a nurse, she was not employed at the centre where her father was treated. She alleged in the comments on her post that she wanted to bring attention to the often-subpar care her grandparents received, stating that "As an RN and avid health care advocate myself, I just HAVE to speak up! Whatever reasons/excuses people give for not giving quality care, I Do Not Care. It. Just. Needs. To. Be. Fixed. And NOW!"

Ms. Strom made her Facebook post and comments known to the provincial Minister of Health and the provincial Leader of the Opposition. She did this by tweeting to them both a link to the Facebook discussion that included the above comments. By doing so she changed her Facebook settings so that the discussion, which to that point had been accessible only by her Facebook friends, became accessible by anyone who followed the link that she had tweeted.

The discipline committee of the Saskatchewan Registered Nurses' Association ruled that, in publicly posting the comments, Ms. Strom had engaged in professional misconduct. The discipline committee assessed a fine of $1,000.00 and ordered Ms. Strom to pay $25,000.00 for the costs of the proceedings.

Ms. Strom appealed the decision to the Saskatchewan Court of Queen's Bench, stating that the appeal had restricted her freedom of expression and therefore the discipline incorrectly assessed a fine. The Saskatchewan Court of Queen's Bench dismissed the appeal ruling that the committee's decision was reasonable.

Ms. Strom appealed to the Saskatchewan Court of Appeal.

Ms. Strom submitted that the discipline committee failed to consider or grant sufficient weight to a variety of relevant factors which included the duty and unique value of professional advocacy and the importance of accountability relating to the healthcare system. In a similar vein, she asserted there was a failure to give sufficient weight to freedom of expression and the value of public discourse. Ms. Strom also pointed to various factors relating to the personal nature of the posts. She alleged that the discipline committee failed to give sufficient weight to what may be described as the right of a registered nurse to private life and personal autonomy. On this note, she pointed to the fact that the posts were made when she was on maternity leave and were "provoked" by the death of her grandfather. She asserted that the evidence did not support the inference that the posts were contrary to the best interests of nurses or damaged the reputation of

the profession of registered nursing and that the discipline committee made no such finding of fact. Ms. Strom noted that there was no proof the posts were untrue, as the parties agreed that the truth of their content was not in issue. Indeed, it was her position that the discipline committee should have accorded greater weight to the fact that the posts were balanced and mild in tone and that Ms. Strom had acted in good faith.

The SRNA emphasized the breadth of the discipline committee's authority to decide whether professional misconduct was made out. It noted that Ms. Strom identified herself as a registered nurse. In the SRNA's view, there was evidence to support all the findings made by the discipline committee, including the inference that the posts were contrary to the best interests of nurses or damages the reputation of the profession. They also characterized the posts harshly, as an attack on the reputation of the small number of nurses who worked at St. Joseph's rather than a comment on public policy. In its view, the posts criticized the integrity and competence of some, if not most, of those nurses, such that a reasonable person reading the posts could conclude that the majority of the small number of nurses who worked at St. Joseph's were incompetent, lacked compassion and did not care about their patients. It asserted that she was negligent and thus unprofessional in failing to confirm the facts and pointed out that she had the option to pursue her concerns through appropriate channels before going public. It noted that she was aware of cautionary guidance that had been provided to nurses relating to the use of social media.

The Saskatchewan Court of Appeal indicated that the central question was whether the discipline committee gave sufficient weight to Ms. Strom's right to freedom of expression and autonomy in her personal life. They noted that it was clear that the publication of a balance Facebook post by a registered nurse about the need for improvement in the overall quality of palliative care provided by Saskatchewan nurses, without naming names or identifying a particular institution – would not justify a finding of professional misconduct. They stated:

> There would be no basis to conclude that the conduct in question - taking account of the tone, content and purpose of the post, being to generate or engage in political or social discourse - would damage the ability of the nurse to carry out their professional duties, negatively impact the interests of the public, or tend to harm the reputation of the profession. That is so despite the fact a public call for such change could be taken to be critical of nurses and doctors involved in palliative care. Moreover, the right to participate in social and political discourse is an important aspect of personal autonomy and free speech and is at the heart of a liberal democracy.
>
> Similarly, a single emotional outburst by a registered nurse at the deathbed of a child or spouse criticizing the treatment provided by medical staff would generally

> lack a sufficient nexus to justify a professional sanction. Such an outburst would be profoundly personal. Grief can bring people low or cause them to rage. Those hearing of such comments would understand that context, reducing their potential impact on other nurses or the profession. While those unfairly criticized in such a circumstance may suffer hurt feelings and deserve sympathy, a negative impact on the public interest, nurses or the profession is a horse of a different colour.

With these considerations in mind, the Saskatchewan Court of Appeal concluded that the discipline committee decision disclosed a series of omissions that constituted an error in principle. They noted that nothing was made of the fact that Ms. Strom's initial post included a link to a newspaper article, which was a policy argument related to improved in palliative care in Canada. Further, the discipline committee's analysis did not refer to her laudatory comments or the fact that the posts were a conversation about long-term care in general. They concluded that the decision "cherry picked" the most critical portions of the posts. There was also no mention that Ms. Strom self-identified as a grieving granddaughter. To the contrary, the discipline committee harshly and simplistically summarized her statements as generalized public venting. There was also no mention that the posts were a brief online conversation with a few participants that occurred in the course of a single day. Nor was there any reference to the fact that the posts had not been shown to be untrue or even exaggerated.

The Saskatchewan Court of Appeal also addressed the *Charter*. Applying the test under section 1 of the *Charter* they accepted that protecting the public interest and the standing of the nursing profession by enforcing standards regarding public speech was a pressing and substantial objective and that the disciplinary committee's decision was rationally connected to the advancement of this objective. However, they were not convinced that finding Ms. Strom guilty of professional misconduct was the least intrusive option available to promote this objective. They found that the disciplinary committee's decision denied Ms. Strom the right to choose their means of communication and would preclude her from using her unique knowledge and professional credibility to publicly advance important issues relating to long-term care. This was exacerbated by the fact that it related to her freedom of expression while off-duty and in relation to her private life, emphasizing that Ms. Strom was posting as a grieving granddaughter while on maternity leave.

The Saskatchewan Court of Appeal acknowledged that a professional regulator could impose requirements relating to civility, but that did not mean the entire life of a professional should be subject to inordinate scrutiny on the basis of more onerous standards of behaviour, as that would lead to a substantial invasion of the privacy rights and fundamental freedoms of professionals.

The appeal was allowed, and the disciplinary committee's decision was set aside.

The British Columbia Commissioner for Teacher Regulation v Shannon Lee Rerie

Rerie was a secondary school teacher. The following events occurred on January 23, 2020:

- A local newspaper published an article on Facebook featuring four students from the school who had excelled in a team sporting event. Two of the students had Rerie as a teacher in the 2018/2019 school year.
- Rerie commented on the article on her personal Facebook page as follows: "Wish they'd been nicer students in my class… I'd be way more impressed with this." Rerie included a shrugging shoulder emoji and a thinking emoji.
- One of Rerie's Facebook friends copied the post and circulated it more broadly. This resulted in the post coming to the attention of one of the parents. One parent was concerned that the existence of the post could negatively affect their child's scholarship application (para 4).

On February 4, 2020, the District made a report to the Commissioner regarding Rerie under section 16 of the *School Act*. The District issued Rerie a letter of discipline and suspended her for two days without pay. Rerie was also required to provide a written apology to the students and their parents. It was noted that a school administrator had previously spoken with Rerie several times over the preceding ten years about her Facebook account, the need to tighten her security over it and to watch what she posts.

The Commissioner considered this matter and determined to propose a consent resolution agreement to Rerie in accordance with section 53(1)(a) of the *Teachers Act*. It included that Rerie:

- admit the facts set out above.
- admit that the conduct constituted professional misconduct.
- agree to a reprimand under the *Act*; in determining that a reprimand was an appropriate consequence, the Commissioner considered that Rerie shared confidential information about students in the school which was both inaccurate and inappropriate was a factor.
- Agree to not make any statements orally or in writing which contradicted, disputed, or called into question the terms of this agreement.

***Sheridan College and OPSEU, Local 245 (Hipsz), Re*, 2022 CarswellOnt 18162**

The grievor worked as student-athlete advisor at Sheridan College (the "College"). In September 2020, the grievor received an "Expectation Memo" from his employer. The

memo was not disciplinary in nature but was a method of providing an employee with important information about the employer's concerns regarding a particular issue. There was no dispute about what led to the memo. In and around July 23, 2020, the College saw a Tweet asking if the grievor was an employee of the College, as the sender noted that the grievor was posting crude pictures of United States Representative, Alexandria Ocasio-Cortez and was calling her a "dumb ho". The person noted that "the tweets may reflect quite negatively on your university and your athletics program".

In the course of investigating the complaint, the College had found that the grievor was a prolific Twitter contributor, who identified himself as an educator who worked at a college, thus not specifically identifying the College as his employer. However, he had also mentioned the Sheridan bus routes and Brampton in other posts, so it appeared to the College that the person who had sent the complaining tweet to the College had been able to identify where the grievor worked. The College identified a series of tweets and retweets during their investigation.

The grievor testified that after receiving the memo, he had deleted his Twitter account.

On August 7, 2020 all employees of the College were sent an email by Dr. Jane Ngobia, Vice President, Inclusive Communities, and Ryan Piper, Vice President, Human Resources, advising that the College would be requiring them to participate in new equity, diversity and inclusion ("EDI") training. There was no dispute that the grievor completed the training, however, the grievor had raised several concerns about the EDI training to his manager. He felt that some of the content was not accurate or that it was not aligned with the *Ontario Human Rights Code*. In particular, he objected to a chart that in his view suggested that if one was White and Catholic, one was privileged. He testified that he had been to school for one year in Kentucky and that he had seen real poverty there for all races.

Ultimately, the grievor sent several slides included in the EDI training to Rebel News. Rebel News produced a YouTube video about the College's EDI training program titled, "Why Whiteness? Leaked college diversity training claims white people "dominant" over other races". The article stated that "a former staff member at Sheridan College in Mississauga, Ontario has provided documents from the college's "diversity training', which is mandatory for all full-time employees at the institution". The YouTube video and reportage included slides from the EDI training, quoted extensively from the training materials, and took issue with the concept of "white supremacy" as it was discussed in the training program.

Since the video was posted on February 25, 2021, by 3:23 p.m. on March 25, 2021, the video had been viewed 13, 517 times and had 357 comments.

The College identified the grievor as having something to do with the Rebel News reporting as his name could be seen on a tab on a screen shot used in the EDI training materials. The grievor was placed on a non-disciplinary leave with pay effective immediately pending review of the matter. Approximately 10 days later, the College held a fact-finding meeting with the grievor. At the meeting, the grievor confirmed that he had shared with Rebel News the training materials that were in the screen shots used in the video. The grievor indicated that there had been some diversity training at Coca Cola in the U.S. about "how to be less white"; that when it was leaked to the public there had been a backlash, and as a result Coca Cola had pulled the training. That was what he was hoping would happen at the College as he found the EDI training offensive and wanted the College to stop using it. When asked why the grievor felt he could not raise his issues regarding the training within the College, the grievor had indicated that he had no confidence in using official channels within the College based on his past experience.

The grievor was ultimately terminated.

Arbitrator Misra indicated that the facts in this case were not really in dispute. The questions to address were whether the Employer had established that it had just cause to discipline the grievor for his actions; if so, whether discharge was an excessive response in all the circumstances of the case, and if it was found that it was an excessive response, what alternative discipline should be substituted, having considered any mitigating factors which may militate in favour of a lesser penalty.

The arbitrator began their analysis with the concept of an employee's duty of fidelity to their employer. The College had argued that in light of the grievor's action, it was difficult for the College to envision a productive ongoing employment relationship. Arbitrator Misra stated:

> 105 Based on the jurisprudence, there is no doubt that Mr. Hipsz owed Sheridan College a duty of fidelity and loyalty as a fundamental element of his employment relationship. It is also clear on the evidence that he was not exposing to the media that the College had committed a crime or that there had been some serious negligence or wrongdoing.
>
> 106 The grievor in this case was an Athletics advisor to students at the College. He knew that the College, based in the Greater Toronto Area, and specifically in Brampton, served an ethnically and racially diverse population of staff and students. He knew that it had made EDI a part of its current strategic plan, and that it wanted to try to address issues of racism, inequity and inclusion in its institution. One of the ways it wanted to do so was through the provision of sensitivity training for its staff so that they may understand the concepts of conscious and unconscious bias, how one's level of privilege may affect one's place in the social

order, and how one may try to recognize and address biases and prejudices in order to have a more inclusive workplace and student environment.

107 It is clear from the grievor's evidence that from the Fall of 2020 on, after the EDI online training was first rolled out to the staff, the grievor was upset about the material. However, while he texted his manager Mr. Flack the screen shot of the "Where do I have Privilege or Marginality", all that the grievor's message caption said was "Rural Kentucky prime example". Despite the grievor's assertion that he should not have to tell Mr. Flack what to do, it is unclear based on the evidence why Mr. Flack would have taken from that message that Mr. Hipsz wanted or expected him to do anything about the EDI training. The grievor conceded in his evidence that he had not in fact asked Mr. Flack to do anything at the time, and he never complained about the EDI training to his manager, the Union, or anyone else within the College at any other point before he went to Rebel News months later.

108 Not only did the grievor fail to exhaust any and all reasonable avenues to resolve his displeasure with the EDI training internally before going to the media, he also did not seek free advice or support from the Human Rights Legal Support Centre regarding his view of the EDI training being a breach of the Code, nor complain to the HRTO about the alleged violation of the Code.

109 The fact that the grievor took his expression of dissatisfaction with the EDI training to RN in February 2021 is noteworthy in that relatively recently prior to him doing so, on September 17, 2020, he had received the social media Expectations Memo regarding his prolific use of Twitter to express himself in ways that the College viewed as detrimental to its public image. While non-disciplinary in nature, that Memo had brought to the grievor's attention two things. The first was that the grievor's conduct both inside and outside the College could negatively impact the Employer's reputation, and that as such he needed to exercise good judgment and ensure that the College's interests were not negatively impacted by his conduct. The second was that the grievor needed to understand the guiding principles of the College's Code for Professionalism and Civility regarding workplace behaviour and communications, both within and outside of the College.

The Arbitrator then considered the harm that had been caused by the YouTube video. They noted that in this case, there was negative press scrutiny, as Rebel News posted a YouTube video castigating the College for its EDI training materials. Citing the amount of times the video had been viewed, Arbitrator Misra concluded that, while it is unnecessary for an employer to prove actual damage to reputation, there was evidence of actual damage to the College's reputation. Moreover, the Arbitrator found this was the grievor’s intention all along. Equally troubling was that in the course of seeking to denigrate his

employer's reputation, the grievor had also pointed RN in the direction of the College's Vice President, Inclusive Communities, a Black woman. That had led to RN dredging up an uncomplimentary video regarding Dr. Ngobia, a video that the grievor admits he was familiar with prior to the RN posting.

Arbitrator Misra additionally found that the grievor violated the College's Code for Professionalism and Civility in that he did not act in good faith with respect to the College's interests and policies; he was unethical in his conduct by surreptitiously going to the media; and he did not act with integrity towards his employer when he knew that the College had a strategic plan that included a focus on EDI, but he failed to first raise his concerns internally.

For all of these reasons, the Arbitrator found that the Employer had just cause to discipline the grievor for his actions.

Next, having found that the College has established just cause for discipline in this case, the Arbitrator considered whether discharge was an excessive response in all the circumstances of the case, and whether there are any mitigating factors that should be considered should a reduction of the discipline be warranted. Arbitrator Misra concluded that the College's decision to discharge was warranted and that there were insufficient mitigating factors that could lead to a reduction in that level of discipline. They stated:

> 145 Despite the Union's argument that the grievor's offence had not been serious as the training materials were not confidential, I have found that this was a serious offence as the grievor breached his duty to the College to act with loyalty and fidelity. The issue is not simply whether the EDI training materials were confidential: it is that the grievor wanted the College to be publicly denigrated, and for there to be such a backlash that it would be shamed into withdrawing its EDI training for staff. This, despite Mr. Hipsz' knowledge that EDI generally was a part of the College's Strategic Plan, and that reference to it had been incorporated into the Code for Professionalism and Civility.
>
> …
>
> 147 Finally, the grievor knew from the beginning that what he was doing was so seriously wrong that he could be fired, and that was the reason he told RN that he only wanted to be identified as a former instructor because he had "mouths to feed". I am satisfied that the grievor knew, even before he sent his first message to RN, that what he was doing was serious misconduct which could lead to dismissal, but he went ahead anyway.

Lastly, they considered the concept of progressive discipline. They noted that progressive discipline is the *de facto* appropriate course for most employee misconduct in the workplace. However, as arbitrators often note, each case turns on its own facts, and in instances of serious misconduct, and where the facts support it, there may be no requirement for an employer to follow progressive discipline. They further found that in this case, the grievor had been put on notice, albeit through a non-disciplinary Expectations Memo, of what his employer expected of him five months before the incident that led to his termination. He nonetheless went ahead with the express intent of publicly denigrating his employer in order to make the College withdraw its EDI training.

Arbitrator Misra concluded that the grievor did not try to ascertain from any reliable source whether his view that the EDI training material or exercise was in fact a breach of the *Human Rights Code* before he went to Rebel News with his story. He made no effort to try to have his concerns addressed within the College, or through his Union. The grievor did not understand or refused to accept that he did anything wrong by going to the media as he had consistently maintained that he was seeking "transparency", a term he never defined in the context of this case, but which apparently for him meant shaming his employer into stopping its EDI training efforts with its staff, just as Coca Cola had done in the United States. While he claimed he wanted to start a conversation, that was apparently a conversation only with those who shared his views about White privilege on Rebel News, but not within the Sheridan College community. They stated:

> 164 I have found that the grievor engaged in serious misconduct and a breach of his duty of fidelity and loyalty to his employer when he purposefully contacted Rebel News and provided it with slides from the College's EDI training, and pointed the news outlet in the direction of Dr. Ngobia, knowing the type and tenor of reportage that would result. He knew from the outset that his actions may lead to his dismissal, but he went ahead anyway. He showed reckless disregard for the reputation of his employer, and whether knowingly or not, for Dr. Ngobia's reputation. He has irrevocably breached the trust relationship that is fundamental to the employment relationship.
>
> 165 Neither before this hearing, nor in the course of his testimony did the grievor show any remorse for his actions, and he continued to maintain that his pursuit of "transparency" trumped any wrongdoing on his part. While Mr. Hipsz made a weak attempt to show remorse about RN's negative treatment of Dr. Ngobia, he had in fact never raised his apparent concern in that regard with Rebel News, nor at any time during the investigation had he asked management to pass on his apologies to Dr. Ngobia. Overall, he remained unrepentant, with his only refrain being that he could have done things differently. On the evidence before me there is nothing to suggest that the grievor would act much differently if faced with a similar situation again. I therefore find that the College's decision to terminate Mr. Hipsz' employment was not excessive in all the circumstances.

Union Communications and Discipline

Arbitrators have held that Union officials and representatives are generally protected from discipline in respect of communications made in carrying out their duties representing and advocating for employees in the bargaining unit. This protection has been described as a "relative immunity" from employer disciplinary power.

Arbitrator Picher in *Burns Meats Ltd. And Canadian Food & Allied Workers, Local P139* (1980), 26 L.A.C. (2d) 379, described the duties of union stewards as follows:

> If union stewards are to have the freedom to discharge their responsibilities in an adversarial collective bargaining system, they must not be muzzled into quiet complacency by the threat of discipline at the hands of their employer.

In *Interforest Ltd. V. I.W.A. 1-500*, 1990 CarswellOnt 5538, the Union President posted a notice to the Union boards suggesting that supervisors were incompetent. The Employer removed the notice and issued a disciplinary letter to the President. While the collective agreement provided for immediate termination for "gross disrespect of a Supervisor", it also provided an unqualified right to the Union to post notices on Union boards.

The Arbitrator determined that no discipline warranted, on the basis that Union officials must be granted considerable latitude in expressing their views in criticizing the employer. He cited from the decision in *Re Robertshaw Controls Canada Inc. and U.E.W., Loc. 512* (1982), 5 L.A.C. (3d) 142 (Egan) for the following comments:

> The first thing to remember in dealing with this assertion and indeed in viewing the whole of the document, is that in the field of labour relations, labour and management are cast in adversarial roles, and that their inherent antagonisms are recognized and virtually sanctioned by law. This inbred conflict between the interests of management and labour is a recognized source of the hyperbole and exaggeration that is part of the language of industrial relations, particularly in moments where the exercise of managerial functions, such as the lay-offs and shut-down in this case, seriously affect the job security of employees.

The Arbitrator upheld the grievance and removed the disciplinary penalty from the President's record, explaining:

> 23 Mr. Graham [the Union President], at all material times, was the president of the local union. I am satisfied, on the evidence, that he posted the notice in response to a situation which he believed to be contrary to the interests of his members. His actions must be viewed in the context of a union official

> performing the legitimate duties of his office. It is widely accepted that union officials must be granted considerable latitude in expressing their views. As the board put it in *Samson v. Canada Post Corp*., supra, at p. 14,459:
>
> > "The board also accepts the position adopted by other arbitrators that union officials have somewhat wider latitude in permissible speech than other employees when they are acting in their capacity as union officers."

This general protection of Union officers' communications is not absolute.

The right of a Union official to vigorously push the Union's point of view in dealings with the employer must be balanced against the latter's right to conduct its business free of harassment and abuse. As a result, union officials will be liable to discipline, like any other employee, for statements that are:

1. malicious, in the sense that they are knowingly or recklessly false;
2. threaten or intimidate;
3. publicly attack their employers or a member of management; or
4. outside the normal scope or range of union responsibilities.

Liability for Union Communications

***Civeo Corp. and UNITE-HERE, Local 40 (Employer Defamation), Re*, [2022] B.C.C.A.A.A. No 39**

The Employer operated a workforce accommodation facility. The parties entered into a Letter of Understanding (the "LOU") in 2018 which was negotiated to govern the terms and conditions of employment. The LOU included terms respecting hiring local qualified workers including regional indigenous peoples. In 2021, the Union indicated it was not happy with the terms of the LOU, specifically in reference to wages, and sought to renegotiate it. However, the Employer was not open to renegotiating the terms of the LOU. The Union posted a banner on its website which included the following statement:

> Civeo's broken promises to First Nations people:
>
> - Low wages.
> - Decrease in hiring of Indigenous workers over the past two years.

> This means that Civeo has not showed commitment to improving the living standards of Indigenous workers and their families.

The Employer asserted that the statement was false, harmful to the employer's reputation and widely distributed. Further, the Employer claimed that the message deliberately associated the Employer's conduct with the unsavory history of broken promises by governments. The Employer brought a grievance seeking damages and other remedies regarding the alleged defamatory statement.

Arbitrator Glass held that the statement was indeed defamatory. The Union's conduct, taken as a whole, was in breach of its duty of good faith in the administration, application and performance of the collective agreement. There was no factual basis for the statement and the implication was that Civeo's conduct was analogous or comparable to the historically unethical and negative treatment of Indigenous people. They stated:

> 18 An ordinary well informed Canadian reader would take from the website image a message that Civeo had broken its promises to First Nations people. Closer examination of the small print would reveal the message that Civeo had promised higher wages and delivered lower wages. It had promised a certain level of hiring and delivered something less. Further, I find that the message delivered by the impugned words was not just that Civeo had failed to make good on its promises but had cynically and deliberately provided something less.
>
> 19 I find there was an additional "sting" in the allegation, recognizable by the averagely well informed Canadian reader, which associates the employer's conduct with the history of broken promises at a government level, which aggravates the defamatory meaning of the words used, and amplifies the degree of harm, and therefore damages if no defence is successful, caused to the employer's reputation by association with this unfortunate history.
>
> 20 I expand on this in the section of the award below addressing one of the factors set out in Hill v. Church of Scientology of Toronto,1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) applicable to assessment of damages. (Found at page 69, *XI B (2) ii*: "The nature and seriousness of the defamatory statements".)
>
> 21 To this should be added that the impugned banner headline specifically identifies the "Broken Promises" of Civeo as promises made to "First Nations People" not just anyone. This connection, as well as the deliberate and pronounced prominence of the headline make it very clear as to what the union's message was intended to convey. The message deliberately associates and links Civeo's conduct to the historical undercurrent of broken promises to First Nations.

> Added to that is the fact that among the intended recipients of this message were indigenous people in the region and beyond, who of course were especially sensitive to this history.
>
> 22 In summary, taking the objective common-sense approach referred to above, I find that the impugned statement is defamatory in its natural and ordinary meaning.

Arbitrator Glass next turned to the issue of remedies. They ordered that the Union pay $400,000 in general damages and $100,000 in pecuniary damages. He also ordered the Union to retract the statement.

The Union sought review under section 99 of British Columbia's *Labour Relations Code*. The application was dismissed on March 14, 2023 (see *CIVEO Corp. and UNITE-HERE, Local 40, Re*, 2023 BCLRB 37). The Union also applied under section 141 of British Columbia's *Labour Relations Code* for leave and reconsideration. The Union's application for reconsideration was dismissed on September 1, 2023 (see *Civeo Corporation*, 2023 BCLRB 141).