MANAGEMENT
COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

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Ontario Arbitrator Finds Employer has Duty to Protect Workers from Harassment Through Social Media

Under occupational health and safety law, an employer has a duty to protect workers from harm and harassment in the workplace. In a new twist on this concept, an arbitrator recently found the Toronto Transit Commission ("TTC") could have taken additional steps to protect its workers from harassment through a Twitter account the TTC controlled.

What happened?

TTC has two Twitter accounts: @TTCnotices provides information to customers about service issues and updates, and @TTChelps through which customers can ask questions and leave comments. TTC's Customer Service Centre monitors and responds to tweets posted to @TTChelps.

Tweets posted to @TTChelps include a combination of compliments and complaints about TTC service, including feedback about individual workers. When a customer complains TTC's response is often conciliatory, recognising the customer's frustration, and may include "we are sorry to hear that" or "that's not good".

Occasionally, complaints are aggressive, profane, and derogatory and include language which could be considered harassing. To these types of tweets, TTC customarily tweets a response either ignoring the offensive language and providing the complaint-line contact information, or stating, "we understand your concerns however please refrain from personal attacks against employees", or "can you please refrain from using vulgarity and elaborate on what happened?", or "TTC does not condone abusive, profane, derogatory or offensive comments".

If a customer continues to make offensive comments @TTChelps blocks the user or ignores further tweets. Where serious threats of violence are made against a worker, TTC contacts the police or its transit enforcement branch.

The grievance

ATU, Local 113 (the union representing TTC workers) filed a grievance against TTC alleging its operation of @TTChelps fails to provide a harassment-free workplace in violation of the *Human Rights Code* (Ontario), *Occupational Health and Safety Act* (Ontario), collective agreement between TTC and union, and TTC's own Workplace Harassment Policy. Among other things, the union requested an order requiring TTC to shut down the @TTChelps account.

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The arbitration decision

While he declined to order the shutting down of @TTChelps, Arbitrator Howe found TTC failed to take all reasonable and practical measures to protect bargaining unit workers from harassment, contrary to the law and collective agreement. Arbitrator Howe set out the steps TTC ought to take in these circumstances:

> To deter people from sending such tweets, @TTChelps should not only indicate that the TTC does not condone abusive, profane, derogatory or offensive comments, but should go on to request the tweeters to immediately delete the offensive tweets and to advise them that if they do not do so they will be blocked. If that response does not result in an offensive tweet being deleted forthwith, @TTChelps should proceed to block the tweeter. It may also be appropriate to seek the assistance of Twitter in having offensive tweets deleted. If Twitter is unwilling to provide such assistance, this may be a relevant factor for consideration in determining whether the TTC should continue to be permitted to use @TTChelps.

Arbitrator Howe also expressed concern that the empathy voiced by @TTChelps in response to customer complaints was not in keeping with the complaints process in the collective agreement. Responses such as "we are sorry to hear that", he said, suggest TTC is validating the customer's version of events prior to an investigation taking place. Instead, he said, the customer could be advised how to make a complaint, but TTC should not respond in an apologetic or empathic way. Arbitrator Howe also ordered the creation of a social media policy to assist TTC to minimize the potential an offensive tweet could be made or remain online.

Lessons for employers

This decision is both clarifying and problematic for employers.

On the one hand, the decision clarifies the idea the workplace is not merely a physical location but can also be virtual. Once harassment is identified, steps should be taken to address the harassing activity, including warning against the use of abusive, profane, derogatory or offensive language, and requesting tweets be immediately deleted, failing which the user should be blocked. In some cases it may also be appropriate to seek the assistance of the social networking service, and if that doesn't work, to close down the social media account altogether.

On the other hand, the arbitrator's harsh evaluation of TTC's empathetic responses to customer complaints seems unreasonable. The idea that recognizing and apologizing for customer frustration ("I'm sorry to hear that") is inappropriate condonation of the customer's version of events is, in our view, impractical and overly-legalistic and fails to strike an appropriate balance between the parties' varying interests. Nevertheless, this decision is now public and may be relied upon by employee advocates in the future.

Once harassment is identified, steps should be taken to address the harassing activity, including warning against the use of abusive, profane, derogatory or offensive comments, and requesting tweets be immediately deleted, failing which the user should be blocked. In some cases it may also be appropriate to seek the assistance of the social media host, and if that doesn't work, to close down the social media account altogether.

What does this mean for employers? First, it means every employer should proactively review language in existing workplace policies and/or collective agreements (if applicable) regarding how and when the employer may respond to a complaint. In this decision, Arbitrator Howe interpreted the requirement to investigate a complaint in a way that restricted TTC's ability to communicate with its own customers. Second, ensure the workplace has a social media policy that is not only consistent with the law, but also advances the employer's business objectives (*e.g.*, customer relations). Not all policies are alike. They should be tailored to the workplace and reviewed periodically to ensure ongoing legal compliance and practical application. By using a standard template rather than a tailored document an employer may forego an important opportunity to protect and advance its business.

For more information and for assistance designing a social media policy tailored to your workplace, contact the employment and labour law experts at Sherrard Kuzz LLP.

DID YOU KNOW?

In Ontario, Alberta and New Brunswick, if an employee works on a public holiday and receives premium pay for that day (*i.e.*, does not take a substitute day off at a later date) the hours worked are not taken into consideration for the purpose of determining if the employee has met the overtime threshold under the respective employment standards legislation. Different rules apply in each of the other Canadian jurisdictions.

To learn more, contact a member of Sherrard Kuzz LLP.

Ontario Securities Commission Anti-Reprisal Legislation for Employee Whistleblowers Now In Force

On July 14, 2016, the Ontario Securities Commission ("OSC") launched the Office of the Whistleblower, the first paid whistleblower program by a securities regulator in Canada. The program is intended to encourage individuals to report to the OSC information on serious securities-related misconduct, with a view to preventing or limiting harm to investors. An individual who meets certain eligibility criteria and voluntarily submits information to the OSC may be eligible for a whistleblower award of up to $5 million.

Anti-reprisal provisions have also been added to the *Securities Act* (Ontario), allowing the OSC to take enforcement action against an employer (reporting issuer) that retaliates against a whistleblower, and to nullify any contractual provision that precludes whistleblowing activity by a current or former employee. The anti-reprisal provisions read, in part, as follows:

No reprisals

121.5 (1) No person or company, or person acting on behalf of a person or company, shall take a reprisal against an employee … because the employee has,

(a) sought advice about providing information, expressed an intention to provide information, or provided information … about an act of the person or company, … that has occurred, is ongoing or is about to occur, and that the employee reasonably believes is contrary to Ontario securities law …

(2) … [A] reprisal is any measure taken against an employee that adversely affects his or her employment and includes but is not limited to,

(a) ending or threatening to end the employee's employment;

(b) demoting, disciplining or suspending, or threatening to demote, discipline or suspend an employee;

(c) imposing or threatening to impose a penalty related to the employment of the employee; or

(d) intimidating or coercing an employee in relation to his or her employment...

Prohibition re agreements

(3) A provision in an agreement, including a confidentiality agreement, between a person or company and an employee … is void to the extent that it precludes or purports to preclude the employee from [the activities noted above]…

The OSC program is new, so time will tell how, and the extent to which, these anti-reprisal provisions will be enforced. For insight, employers can look to the Securities and Exchange Commission ("SEC") whistleblower program in the United States, which is similar to the OSC program.

The SEC Experience

In August 2016, the SEC issued two enforcement decisions under its whistleblower program. In each case, the employer included a provision in its severance agreement requiring the departing employee to waive any right to a monetary reward from the SEC, in exchange for which the employer would receive severance payments and benefits.

Each employer was found by the SEC to have violated the whistleblower rules. Said the SEC:

[B]y requiring its departing employees to forgo any monetary recovery in connection with providing information to the Commission, [company] removed the critically important financial incentives that are intended to encourage persons to communicate directly with the Commission staff about possible securities law violations.

The severance agreement in one case also included a provision requiring the departing employee to notify the employer's legal department in the event the employee believed he or she was required to disclose confidential information. The SEC found this provision to further undermine the purpose of the whistleblower program:

… [employer] raised impediments to participation by its employees in the SEC's whistleblower program. By requiring departing employees to notify the company's Legal Department prior to disclosure of any financial or business information to any third parties, without expressly exempting the Commission from the scope of this restriction, [company] forced these employees to choose between identifying themselves to the company as whistleblowers or potentially losing their severance pay and benefits. [emphasis added]

Both employers were required to amend their severance agreements to include express recognition of an employee's right to disclose information to government and regulatory agencies, including the SEC, without notice to the employer and without adverse monetary impact.

Lessons for employers

Canadian employment agreements, severance agreements, restrictive covenants and codes of conduct often contain a provision restricting the use of confidential information to business purposes and prohibiting disclosure. Usually these provisions include a general exception for disclosure "required by law". Such an exception would include disclosure under the OSC's whistleblower program.

The recent SEC decisions appear to push employers one step further, requiring an express exemption of information disclosed to the SEC or other regulatory body, and an express statement disclosure may be made without notice to the employer and will be made without monetary reprisal. It remains to be seen whether the OSC will similarly require such express language in employment-related documents, or whether the general "as required by law" exemption will suffice.

Sherrard Kuzz LLP will monitor developments in this area of employment law and keep our readers apprised. Meanwhile, Ontario employers may wish to review their current employment-related agreements to assess whether provisions could be considered contrary to the OSC's whistleblowing program and, if so, to modify those agreements accordingly.

To learn more, and for assistance, contact the employment law experts at Sherrard Kuzz LLP.

MANAGEMENT COUNSEL

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

What a Difference a Year Makes!

Lessons from 2016 & Tips for 2017!

This session is a "must attend" for any organization planning to enter 2017 up-to-speed on the most important employment and labour matters and best practices. Join us!

1. **Bill 132:** September 8, 2016 ushered in new requirements and obligations to address and respond to workplace harassment. Are you aware? Is your organization ready?
2. **Drugs and Alcohol:** The latest on drug and alcohol testing, and how to deal with (not in!) medicinal marijuana in the workplace.
3. **Family Status Accommodation**: Recent case law has clarified the duty to accommodate child and elder care obligations. What does this mean for employers?
4. **Accessibility for Ontarians with Disabilities Act:** New and expanded obligations took effect on January 1, 2016. Is your organization compliant? Learn what should be done.
5. **Changing Workplaces Review:** Unprecedented and seismic! The Changing Workplaces Review will fundamentally alter the way Ontario employers do business. Learn what has transpired since our May HReview Seminar, and what employers can still do to advocate for their interests!

DATE: **Tuesday December 6, 2016; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: **Mississauga Convention Centre - 75 Derry Road West, Mississauga**

COST: Complimentary

RSVP: **By Monday November 21, 2016 at www.sherrardkuzz.com/seminars.php**

Law Society of Upper Canada CPD Hours: This seminar may be applied toward general CPD hours.

HRPA CHRP designated members should inquire at www.hrpa.ca for eligibility guidelines regarding this *HReview Seminar*.

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