

Boughton Employment & Labour Line Winter 2011

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Fired for Facebook?

Lougheed Imports Ltd. (West Coast Mazda) v. United Food and Commercial Workers International Union, Local 1518, BCLRB No. B190/2010

Facebook. Friendster. LinkedIn. LiveJournal. Twitter. These are the new office water coolers – but their reach is global. Stories about people fired for postings on Facebook or other social media sites abound. Even the clergy isn't immune. Calls for the discipline of a London bishop recently arose after he gave Prince William and Kate Middleton's upcoming marriage 7 years on his Facebook page. But how have the courts and tribunals considered such matters? Have these firings been upheld? If you call your employer a "f*in' joke" and your managers "a bunch of greedy, %#&@\$@ low life scumbags" on Facebook, is that proper cause for termination? In *Lougheed Imports Ltd. (West Coast Mazda) v. UFCWIU*, the answer was a resounding "yes". Two car detailers posted these comments, among others, on their Facebook pages during and after a union certification drive. When West Coast Mazda terminated their employment, the union alleged, among other things, that there was no proper cause for the terminations. The Vice-Chair disagreed and upheld the dismissals. Key considerations in the Vice-Chair's decision included:

1. The offensive and egregious nature of the comments;
2. The fact that the employees, other employees, former employees, and managers were all "friends" on Facebook made the comments akin to statements made on a shop floor; and
3. A finding that the employees' comments were likely to damage West Coast's reputation and business interests given the employees' extensive networks on the website.

“ Facebook. Friendster. LinkedIn. LiveJournal. Twitter. These are the new office water coolers – but their reach is global. ”

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Disclosure of Employee's Personal Information by Employers - When is it ok?

Under private sector privacy laws, information can only be collected, used or disclosed by an employer with the consent of the employee, unless there is an exemption.

Employers must ask themselves, before any information can be collected, used or disclosed without consent, "does this information fall into the category of personal information?" and if the answer is yes, the next question will be "is there an exception or exemption that allows or requires me to collect, use or disclose the information without the consent of the employee?"

Obviously, an employer has to obtain and use certain personal information from an employee in order to hire and pay that person. For that reason, there is an exemption in the law that permits such collection, use and disclosure of information for purposes of establishing, managing or terminating the employer-employee relationship. There is a further exemption for the contact particulars of an employee, but only the business contact information. It is not ok, for example, for an employer to give out an employee's home address, e-mail or phone number unless the employee has specifically consented. A third exemption is for personal information that is the "work product" of the employee.

It should be made clear that just because the employer has consent to collect information, it does not automatically follow that there is also consent to use or disclose the information, unless consent to such use or disclosure can be implied. For example, the employer will be obligated to disclose to Canada Revenue Agency that the employee is now on payroll, and may do so without express consent from the employee.

The issue of the disclosure of work product sometimes arises where reports are written by employees as part of the job. Such reports might contain negative comments about others, for example, and the writers might not want to be "caught in the middle." The Privacy Commissioner has dealt with this by saying that such reports may be disclosed with the writer's name, because the reports, although written by them, are not about them.

The prohibition against using or disclosing employee's personal information extends to other employees, so it is vital that employers keep employee files locked up and accessible only to those staff members with a need for access to establish, manage or terminate the employer-employee relationship.

Even something as simple as telling one employee that another employee had no more paid vacation time remaining for the year, can put an employer off-side.



Maria T. Holman
Associate Counsel

P: 604.605.8337

E: mholman@boughton.ca

How Far is Too Far ?

Phoenix Restorations Ltd. v. Brownlee, 2010 BCSC 1749

Employers are often surprised when departed employees start to solicit their customers for a new employer. The legal advice often given is that employers should require employees to sign restrictive covenants to prevent this. The recent judgment in *Phoenix Restorations Ltd. v. Brownlee* provides a caution to employers to ensure that restrictive covenants contain only restrictions that are legitimately necessary to protect their business interests and go no further.

The facts in Phoenix were relatively simple. Phoenix was in the commercial and residential restoration business. Unlike its competitors, it did not get most of its business from insurance companies or adjusters. Instead it specialized in providing services to property management companies.

Brownlee entered into a written employment agreement with Phoenix, which contained both non-competition and non-solicitation restrictive covenants which were to last for 2 years after the end of his employment and applied in the Lower Mainland area.

Brownlee resigned his employment with Phoenix and began to work for a competitor and to solicit two of Phoenix's main customers. Phoenix sued Brownlee and the competitor claiming breach of the restrictive covenants. Phoenix then sought an injunction against Brownlee until the dispute could be decided at trial.

Phoenix failed to get the injunction. The judge noted that the courts will enforce a covenant imposing post-employment restraint of trade if it is reasonable. But, the judge had concerns about the reasonableness of both restrictive covenants.

He found the non-competition provision to be much broader than necessary to protect Phoenix's legitimate proprietary interest because it prevented Brownlee from working for anyone in the restoration business even though Phoenix was only a niche part of that business. It also prevented him from working in a substantially similar business even if the similar business was not a competitor of Phoenix.

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Labour Relations Board 2010 Round - Up

In 2001 the Liberal government made significant changes to the Labour Relations Code ("Code") making it much harder for unions to organize. While union density has fallen, unions remain a significant force in BC. Employers, both union and non union, have a stake in keeping current on the proceedings of the Labour Relations Board ("LRB"). Here are two significant cases from 2010.

Non Union employer + Union employer = Non union operation

Maxxam Analytics International Corporation v. BCGEU, BCLRB No. B202/2010

“ While union density has fallen, unions remain a significant force in BC. ”

If you operated a non union company and had the opportunity to buy a smaller, struggling unionized operation would you do it? The risk of course is that your business might automatically become unionized or subject to a certification vote. A recent decision of the LRB has clarified this issue in favour of employers.

The case involved the merger of a large non union employer (220 employees) with a union operation (58 employees). The original panel ordered a vote despite the disparity in numbers. The employees voted in favour of the union. The employer appealed and the LRB review panel overturned the original panel.

The LRB held that where there is a merger such that the bargaining unit is no longer appropriate then the test is the level of union support in the merged operation. If the number of unionized employees is greater than 50% then the union will be the bargaining agent for the intermingled unit without a vote. If the union has "about" 1/3 support a vote will be held. However, as here, where the union's support is just 21%, no vote will be held and the merged operation will continue non union.

The bad news for this employer was the LRB relied on the results of the vote [that should not have been held] and upheld the union's certification—battle won; war lost. But at least the precedent will allow non-union businesses to purchase certain union businesses without the fear of the merged operation being unionized. The "about" 1/3 bright line test is certainly welcome. It is moreover consistent with the Duties section of the Code and the economic realities of our day.

LRB imposed Collective Agreement causes Employer to contract out entire operation

Osprey Care Inc. v. HEU, BCLRB No. B217/2010

The harsh realities of unionization of a business are seen in a recent case involving a complex care and assisted living facility in Kamloops. The employer was unionized and the LRB imposed a first collective agreement that the employer could not afford. The employer then gave notice to the union that it intended to contract out almost all of its operations and the employees would be permanently laid off. The union asked if the employer would keep the work in house if it achieved sufficient cost savings. While these discussions were taking place the union filed an unfair labour practices complaint asking the LRB for orders that the terminations were null and void and prohibiting the employer from contracting out during the term of the agreement. The case was settled as a result of the discussions for concessions and an extended term.

This case demonstrates the difficulties any employer faces when it becomes unionized. Elizabeth Reid and I have recently helped a number of clients successfully win certification votes and stay non union. But no employer should run the risk of turning over control of its operations and its employees' job security to the vagaries of the ballot box. This case is a reminder that preventative measures should be considered before the union arrives on your doorstep.



Mike Weiler
Leader of the Employment & Labour Group
P: 604.647.5521
E: mweiler@boughton.ca

Don't Miss Out

If you would like to ensure you receive this newsletter on a regular basis, please contact **Dari Gilham**, Legal Assistant to the Employment and Labour Group by phone **604.647.4141** or email at **dgilham@boughton.ca**.

Fired for Facebook? Continued...

In contrast, in an Australian arbitration decision, *Fitzgerald v. Dianna Smith t/as Escape Hair Design* [2010] FWA 7358 (24 September 2010), the following rant posted on Facebook did not justify dismissal: "Xmas "bonus" along side a job warning, followed by no holiday pay!!! Whooooo! The Hairdressing Industry rocks man!!! Awsome!!!! [sic]". The arbitrator wryly observed that "it would be foolish of employees to think they may say as they wish on their Facebook page with total immunity from any consequences", but overall determined that Ms. Fitzgerald's posts did not justify termination. First, the comments did not specifically identify the salon where she worked, nor were they such that they would adversely affect the industry as a whole or the salon specifically. In addition, Ms. Fitzgerald's employer did not raise the issue of the posts with Ms. Fitzgerald immediately, but only complained about them well after she was terminated.

“*Have a social media policy emphasizing that employee comments on Facebook can have repercussions.*”

So what should an employer do? First, have a social media policy emphasizing that employee comments on Facebook can have repercussions for their employment. Second, deal with inappropriate postings as soon as you become aware of them. Thirdly, consult legal counsel to assist you in determining whether specific comments justify termination.

Beyond wrongful dismissal, statements made on social networking sites can be relevant to other employment issues. For example, they can affect factual determinations of whether persons are employees or independent contractors and whether employees are truly suffering from disabilities. They can also lead to defamation and invasion of privacy suits. Input "Facebook" as a key word in one of our major case law databases and you get the following results: 2007 – 5 hits, 2008 – 35 hits, 2009 – 88 hits, 2010 – 162 hits. *Are you ready?*

Elizabeth A. Reid
Associate

P: 604.647.4173
E: ereid@boughton.ca



How Far is Too Far? Continued...

The judge also found that Phoenix did not have a strong case for enforcement of the non-solicitation provision. The judge noted that protection of actual or actively sought prospective clients was a legitimate proprietary interest. However, he refused to issue an injunction to prevent the solicitation because he thought the restriction on Brownlee was too broad as it restricted Brownlee from soliciting even those clients of Phoenix with whom he had never had business dealings.

Whether the restrictive covenants will ultimately be found to be enforceable by Phoenix at trial is still to be seen. However, had the restrictive covenants been less broadly drafted and more focused on Phoenix's actual proprietary interests that needed to be protected, the injunction would have likely been granted.

With the injunction, Phoenix would have been able to protect its exposed client base pending trial and would have a better chance of ultimately preserving the benefit of the restrictions it thought it had on departing employees. Now, Phoenix must wait until trial to find out if the restrictive covenants will be upheld and suffer the costs of trial. The lesson to be learned is that a restrictive covenant should go no further than is absolutely necessary to protect an employer's legitimate interests rather than trying to prevent all possible damage that could occur if an employee left. Do your restrictive covenants achieve only the protection your business actually needs?

The content in this newsletter is for your general information and should not be taken as legal advice. If you have a specific problem, please contact one of our lawyers to discuss your situation.

Paul R. Miller
Shareholder

P: 604.647.4102
E: pmiller@boughton.ca



Noteworthy News

Mike Weiler presented a paper entitled "Advising First Nations on Human Rights" at the Human Rights Continuing Legal Education Conference on November 5, 2010. Note that the SCC decided the constitutional issue subsequent to the paper in *NIL/TU, O Child Family Services Society v. BCGEU*, 2010 SCC 45.

Mike also presented "New Best Practices" at the Centre for Labour Management on December 2, 2010.

E-Bulletins

Look for our new E-Bulletins on important new releases between editions of our newsletter.

Seminars

The spring seminar series will be continued out of house. If you are interested in having a seminar at your operation for your staff or clients, please contact Mike Weiler at 604 647 5521 or by email: mweiler@boughton.ca