

The off-duty conduct debate



By Lisa M. Bolton & Andrew Ebejer

The dismissal of Jian Ghomeshi from the Canadian Broadcasting Corporation in late 2014 and the unexpected resignation of Leslie Roberts from Global News in early 2015 have made off-duty conduct one of the most talked-about workplace issues this year. The question many employers are asking is: When does an employee's private life become a workplace issue? The answer is: When the employee's conduct negatively impacts the employer's legitimate business interests.

When can employee private life become employer business?

Courts and labour arbitrators have traditionally drawn a line between an employee's work and private life; declining to uphold discipline for "off-duty" conduct where there is no clear connection to the workplace.

However, it is an implied term of every employment relationship that the employee faithfully perform his or her duties. When an employee acts in a manner contrary to this obligation, whether on or off duty, and the conduct negatively impacts or is likely to negatively impact the employer's legitimate business interests, the employer may discipline the employee up to and including dismissal.

Generally speaking, conduct is likely to

be considered detrimental to an employer's business interests in any of the following circumstances: the nature of the conduct prevents the employee from continuing to perform his or her duties (e.g., loss of credibility or confidence where the employee is in a position of trust); co-workers have refused or are reluctant to continue to work with the employee as a result of learning about his or her conduct (often related to violence or harassment); there is a risk of injury to co-workers or members of the public; the employee has been guilty of a serious breach of the Criminal Code for which the employee has not been granted a pardon; or the conduct has harmed or will harm the employer's reputation or brand.

Reputational or brand damage

Courts and labour arbitrators will uphold discipline for "off-duty" conduct which may cause reputational or brand injury when the damage or potential damage is considered to be substantial in the eyes of a regular member of the public:

...where the interest asserted by the employer...is in its public reputation and in its ability to be able to successfully carry out its works, the concern must be both substantial and warranted. The test, so far as possible, is an objective one: what would a reasonable and fair-minded member of the public...think if apprised of all the relevant facts? Would the continued employment of the [employee], in all the circumstances, so damage the reputation of the employer as to render that employment impossible or untenable? (Ottawa-Carlton District School Board and OSSTF, District 25 (2006).

Not surprisingly, this analysis is highly contextual and depends on both the nature of the employer's business and the alleged misconduct. Some off-duty conduct is easy

to condemn (e.g., serious criminal conduct). Other conduct is not as easy to categorize including, for example, where the conduct is not illegal per se, but may nonetheless undermine the employer's business interests (e.g., private racist remarks).

When assessing potential reputational harm, two preliminary questions should be considered: (1) Is the employee an important representative of the organization (not necessarily the key representative); and (2) Is the employee's conduct inconsistent with and harmful to the employer's reputation?

By way of example, think back to 2009 when Kellogg's declined to renew Michael Phelps' sponsorship after a photo of him smoking marijuana at a college party went viral, or the numerous sponsors Tiger Woods lost when his infidelity became public.

Final thoughts for employers

Before disciplining an employee for off-duty conduct, undertake a thorough investigation and carefully consider the potential impact of the employee's alleged misconduct. If the conduct is likely to have a substantial negative impact on the employer's business, a disciplinary response may be warranted. However, acting without fully considering the issues can expose an employer to liability and additional unwanted public attention if the discipline is later found to be unjustified. For these reasons, prior consultation with expert employment law counsel will help an employer appropriately respond to off-duty conduct, and minimize unnecessary risk.

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