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Borden Ladner Gervais

Social Media Account is a "Workplace"

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In a recent 35-page Ontario labour arbitration award that is likely to echo in other Canadian jurisdictions, *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, Arbitrator Robert D. Howe found that the Toronto Transit Commission (the "TTC") had failed to protect its employees from discrimination and harassment with regards to numerous posts from customers and the public on its Twitter account.

According to Arbitrator Howe, in light of the Ontario *Human Rights Code* (the "HRC"), the Ontario *Occupational Health and Safety Act* (the "OHSA") and the provisions of the relevant collective agreement, employees were entitled to a workplace free from discrimination and harassment.

By operating a social media account supporting two-way exchanges between itself and the public (as opposed to a one-way broadcast social media account) and by publicly answering customers' complaints through "tweets" with regards to its employees' alleged behaviour while on duty, the TTC's social media account could be "*considered to constitute part of the workplace for purposes of determining whether the HRC, the* [*collective*] *agreement, and TTC policies* [*were*] *contravened as a result of harassment.*"

A reminder that modern employers using social media to connect with their customers and the public should not only enforce clear and consistent social media policies for their employees to follow, but also for themselves.

Facts and Parties' Submissions

In February of 2012 the TTC, the third largest public transit agency in North America, created a Twitter account — @TTChelps — in order to respond to passengers' questions and concerns by way of tweets.

In April 2013, the Amalgamated Transit Union, Local 113 (the "Union") filed a grievance against the TTC seeking, along with several other remedies, that the TTC's Twitter account be permanently shut down.

Evidence adduced during the hearing showed that as of late January 2015, the TTC's Twitter account had about 16,000 followers and had posted about 82,000 tweets. The Union identified roughly 1,500 problematic tweets which, in its opinion, were breaching workers' privacy and affecting their safety in the workplace, the argument being that the TTC's Twitter account became a platform for customers and the public to harass, demean and belittle TTC employees (drivers, fare collectors, etc.). At the hearing, the Union filed hundreds of profane, abusive, racist, threatening, violent, homophobic and discriminatory tweets, some of which contained pictures of TTC employees or reference to their badge numbers, along with responses sent to these tweets by the TTC. Three TTC employees (also Union members) testified for the Union and explained what negative impacts some tweets – some of which contained pictures of them – had on their personal and professional life. They also explained how the TTC's responses to these problematic tweets contributed to the problem rather than resolving the issue.

The Union argued that by responding to these tweets and by stating it did not condone them while failing to take any further action to have them removed, the employer was in fact condoning and encouraging these tweets to continue. Moreover, the Union argued that by

tweeting responses such as “sorry to hear that” or “sorry for the experience” to tweets alleging employee misconduct, the TTC was giving the impression that what the customer complained about actually happened and that the TTC validated that the employee had done something wrong, thereby prioritizing the public’s perceptions over its employees’ perceptions.

The TTC’s defence was based on several grounds: the impossibility for the TTC to regulate the dialogue taking place on social media and to prevent all behaviour that amounts to harassment or discrimination towards its employees; the TTC’s limited ability to anticipate and control such behaviour from its customers and the public; since January 2014, the TTC’s Twitter protocol had evolved in light of the Union’s concerns and the TTC was no longer accepting complaints via Twitter, the tweeting complainant being directed to the complaint process; the TTC’s objective to de-escalate situations by responding to tweets and addressing its customers concerns.

Most importantly the TTC argued, through the testimony of public sector media use expert, that in today’s world “*the use of social media is a necessary and beneficial component of contemporary public sector communications and citizen engagement strategies*”. With regards to the risks associated with social media use, the TTC argued that social media’s usefulness offsets them where said risks are properly addressed by the employer. As the TTC’s expert put it herself: “*These risks come along with that so you just need to develop appropriate policies to mitigate them.*” However, with regards to the TTC experts’ testimony on cross-examination, Arbitrator Howe reported the following:

“[*O*]*ne of the risks of creating a public social media platform is that the government agency opens itself up to highly critical public criticism.* ***She also indicated that government agencies that use Twitter should and generally do have policies regarding the use of social media, including how to respond to complaints received through it. She further indicated that government agencies seek to align those policies with their privacy obligations or other obligations to which they may be subject. […] It would be out of the norm for a public service provider to have a Twitter account without having such a policy***.” [emphasis added]

Although the TTC did not, in fact, have a specific social media policy addressing its use of social media, it argued that “*its existing policies* [*were*] *sufficiently broad and robust to address any employee concerns* [*and*] [*t*]*herefore*, *it* [*was*] *not necessary to have a separate social media policy.*” The TTC concluded its defence by admitting the possibility of being ordered to supplement its current policies, but stressed that there was no basis for Arbitrator Howe to order it to shut down its Twitter account.

Decision

Arbitrator Howe upheld the Union’s grievance, but refused to order the TTC to shut down its Twitter account. In his conclusions, Arbitrator Howe agreed with the TTC’s contention that there were advantages to operating a Twitter account. He explicitly accepted the expert’s testimony in respect to TTC’s public sector media use in that “*social media usage has grown rapidly in Canada at the municipal government level and has become an accepted mainstream practice* […]”; “*use of social media, including Twitter, is a necessary and beneficial component of contemporary public sector communications and citizen engagement strategies for various reasons, including the fact that citizens want public service providers to use it*”; “[*i*]*n addressing the question of whether a public service provider should engage directly with the public through social media rather than merely providing information,* […] *the literature on public sector social media use tends to frame one-way information provision as being more basic and primitive than uses which support two-way*

exchanges, with the latter being viewed as a more developed, mature, and beneficial use of social media."

With that said, although Arbitrator Howe agreed that it would be difficult, if not impossible, for the TTC to regulate dialogue on social media platforms like Twitter, this reality should **NOT** prevent it from complying with its duty to prevent and address workplace discrimination or harassment.

The tweets adduced as evidence by the Union constituted harassment and discrimination on grounds prohibited by the OHSA and the HRC, as well as situations the TTC was required to address in light of the provisions of the collective agreement. In light of the evidence, Arbitrator Howe concluded it was clear that through its responses to abusive tweets from its customers and the public, the TTC had failed to take all reasonable and practical measures required by the HRC, the collective agreement and the Workplace Harassment Policy to protect its employees from harassment.

Arbitrator Howe's rationale with regards to the TTC's duties and responsibilities towards its employees can be summarized as follows:

1. In case of harassment or discrimination of its employees by third parties, such as customers or the public, an employer has a duty to intervene effectively to stop harassment since it exercises the greatest control over workplace conditions;
2. Where an employer uses social media as a two-way exchange means of communication with its customers and the public in general, and where the latter make abusive or discriminatory remarks with regards to its employees, the employer's duty to address harassment and discrimination in the workplace can extend to social media platforms;
3. While an employer may not be able to prevent or control a third party's speech on social media, the employer does have control over how it responds to abusive language directed at its employees through its social media accounts and it has the responsibility to respond diligently and take reasonable steps to prevent harassment or discrimination by third parties;
4. An employer that does not take reasonable steps to prevent harassment or discrimination directed towards its employees through its social media accounts may be liable under occupational health and safety legislation, anti-discrimination legislation, the employer's anti-discrimination and anti-harassment policies and, in the case of unionized workplaces, the applicable collective agreement.

Given the absence of a specific social media policy governing the TTC's use of its Twitter account to respond to inappropriate tweets from customers or the public and directed towards its employees, Arbitrator Howe invited the TTC to create such a policy and invited the parties to work together in establishing said policy. With that said, in his findings, Arbitrator Howe provided the following guidelines with regards to what should be included in such a policy in order to comply with the applicable legislation and the terms of the collective agreement:

1. To deter people from sending inappropriate tweets, the TTC's responses to such tweets "*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*";

2. "*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*";
3. The approach suggested above should also apply in cases where customers or members of the public post pictures of TTC employees in their tweets, regardless of whether inappropriate comments are posted with the picture;
4. "[*W*]*hen @TTChelps receives a tweet alleging misconduct by a TTC employee its response should simply be that complaints cannot be filed through Twitter and that customers wishing to file a complaint can do so by* [*placing a call at a specific phone number or consulting a specific website*]"; inappropriate tweets allege misconduct on the basis of an obvious misperception from the customer or the member of the public, which might usefully be corrected through a templated response;
5. When inappropriate tweets allege misconduct on the basis of an obvious misperception from the customer or the member of the public concerning the behaviour or responsibilities of an employee while on duty, it may be useful for TTC employees responsible for monitoring TTC's Twitter account and responding to such tweets to use templated responses. In doing so, they should refrain from including "*inappropriate editiorialising*" such as the inclusion of words like "*unfortunately*" (e.g. "*unfortunately, operators are not required to assist a mother in getting her stroller onto a streetcar*");

Far-Reaching Implications of This Arbitration Award in Other Canadian Jurisdictions

In a world where social media is becoming an essential component of employers' business activities, both in the public and in the private sectors, this case may very well be the first of numerous cases to address the extent of employers' responsibilities and liabilities with regards to social media use in the context of legislation aimed at protecting employees from abusive behaviour from customers or the public in general.

Although Arbitrator Howe's decision was rendered in the context of specific Ontario statutory provisions – the Ontario HRC and OHSA preventing discrimination and harassment in the workplace – as well as on the terms of the collective agreement between TTC and the Union, the principles discussed in this case would likely be in tune with anti-harassment and anti-discrimination legislation currently in force in other jurisdictions. For example, the duties and responsibilities of Ontario employers in light of the anti-discrimination and anti-harassment provisions of the Ontario HRC and OHSA at issue in this arbitration award are similar to the duties and responsibilities of Québec employers under the Québec *Charter of Human Rights and Freedoms* and the *Act Respecting Labour Standards.*

For the time being, employers who are active in social media through company or institutional accounts should carefully and regularly monitor postings from customers and the general public and take the time to address any issue regarding derogatory or discriminatory comments and/or posting of pictures of their employees. Although an employer may be tempted to ignore such issues altogether, they should bear in mind that Arbitrator Howe's findings in *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission* suggest that inaction may lead to liability where harassment or discrimination towards employees occurs though the employer's social media account. Also, employers should take care to implement or update social media policies in order to properly standardize applicable procedures when responding to derogatory postings concerning their employees or postings containing pictures of their employees, as such policies may very well soon become an

integral part of their workplace policies, along with anti-harassment and anti-discrimination policies.

AUTHOR

Alexis Renaud
T 514.954.3109
ARenaud@blg.com

Borden Ladner Gervais

BLG OFFICES

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T +1.403.232.9500
F +1.403.266.1395

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T +1.514.954.2555
F +1.514.879.9015

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T +1.613.237.5160
F +1.613.230.8842

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

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