

Off-duty conduct of an employee may constitute just cause for dismissal

Can an employer discipline or terminate an employee for cause for her off-duty conduct? This question, no doubt, was at the forefront of some employers' thoughts after the Stanley Cup riot in Vancouver, particularly after viewing their employees pictures in the local newspapers or police website or seeing them prominently featured on live or taped videos on local news shows and You Tube.¹

In some cases, employers were bombarded with emails from potential consumers threatening to boycott their businesses after the media identified their employees as participants in the riot. In the case of one car dealership whose employee was reported to have allegedly looted during the riot, the employer terminated her employment after receiving angry emails about her from consumers.²

Whether the off-duty conduct of an employee involves participating in a riot or other offensive activity, can an employer discipline or dismiss an employee for cause? In *Re Emergency Health Services Commission -and- CUPE, Local 873*³, arbitrator Black referred to two Canadian labour arbitration decisions delineating principles, which guide arbitrators in such a situation. The cases are *Re U.A.W., Local 195 and Huron Steel Products Co. Ltd*⁴ and *Re Millhaven Fibres Ltd., Millhaven Works, and Oil, Chemical & Atomic Workers Int'l Union, Local 9-670*⁵. From the former, Arbitrator Black referred to the following oft-quoted passage:

It has been held in many arbitration cases that under normal circumstances an employer is only properly concerned with an employee's due and faithful observance of his duties on the job. However, no hard and fast rule can be laid down, and in each case the determination of three questions of fact will determine the issue. These are:

- (1) Was the employee's conduct sufficiently injurious to the interests of the employer?
- (2) Did the employee act in a manner incompatible with the due and faithful discharge of his duty?
- (3) Did the employee do anything prejudicial or likely to be prejudicial to the reputation of the employer?...

If one or more of the above questions must be answered in the affirmative on all the evidence, then the company is properly concerned with the employee's conduct regardless of whether it occurred on or off the company property or in or out of working hours, and depending on the gravity of that conduct, the company will be justified in taking appropriate disciplinary action.

From the latter decision, Arbitrator Black referred to the following passage:

...if the discharge is to be sustained on the basis of a justifiable reason arising out of conduct away from the place of work, there is an onus on the Company to show that:--

- (1) the conduct of the grievor harms the Company'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 Company and its employees
- (5) places difficulty in the way of the Company properly carrying out its function of efficiently managing its Works and efficiently directing its working forces.

The onus is on the employer, in disciplining or terminating the employment of its employee for off-duty conduct, to show that there is a connection between the off-duty conduct of the employee and harm or injury to its business. As indicated by Arbitrator Black, the employer need not adduce evidence of an affirmative answer to each of the questions delineated in the *Re Air Canada* or the *Huron Steel Products* decisions. Further, whether off-duty conduct of the employee warrants termination of her employment or some lesser discipline will depend on the degree of impact on the employer or the employer's business. In the case of the dealership referred to above, if the alleged conduct of the employee resulted in threats of boycott to the employer's business and it is established, on a balance of probabilities, that the employee indeed was involved in the alleged conduct then the dealership may be able to justify its conduct in dismissing the employee.

Having said this, it should be noted that employers should be careful in considering dismissing an employee because of a criminal conviction arising from off-duty conduct. Section 13(1) of the B.C. *Human Rights Code* prohibits employers from both refusing to employ and refusing to continue to employ a person because of a criminal or a summary conviction offence that is *unrelated* to the employment or intended employment of that person. For example, if a sales employee of a clothing shop is convicted of drinking and driving off-duty, the employer will not be able to justify termination of her employment.



Shafik Bhalloo has been a partner of Kornfeld Mackoff Silber LLP since 2000. His practice is focused on labour and employment law, and on commercial and civil litigation. He is also an Adjudicator on the Employment Standards Tribunal and an Adjunct Professor in the Faculty of Business Administration at Simon Fraser University.

 sbhalloo@kmslawyers.com

 <http://www.kmslawyers.com/vcard/sbhalloo.vcf>

 **604.331.8308**

¹ At the time of writing this blog, the police had recommended at least 129 charges to the Crown and 43 individuals have been charged with a criminal code offence. The first of the reported convictions occurred in early January 2012.

² <http://www.cbc.ca/news/canada/british-columbia/story/2011/06/22/bc-rioter-fired.html>

³ (1988), 35 LAC (3d) 400

⁴ (1964), 15 L.A.C. 288 (Reville)

⁵ (1967) (quoted in *Re Air Canada and Int'l Assoc. of Machinists, Lodge 148* (1973), 5 L.A.C. (2d) 7 (Andrews))