



Posted on: June 23, 2015

CAN MISCONDUCT FROM AN EMPLOYEE'S PRIVATE LIFE BE CAUSE FOR TERMINATION OF EMPLOYMENT?

Richards Buell Sutton Employment Newsletter

By: H. Scott MacDonald

In today's world of social media and 24-hour news cycles, where cell phone videos are posted on the Internet almost instantaneously, employers are having to respond quickly and decisively to actions of their employees which potentially damage the employer's brand and reputation. Whether it is someone caught on camera rioting in the streets of Vancouver after the Stanley Cup final, a senior executive abusing a dog in a hotel elevator, or a drunken management employee caught laughing at vulgar sexist comments made to a female news reporter, the number of high profile, off duty incidents of employee misconduct being scrutinized by the public, is growing.

Employers are being forced to respond, often without the benefit of a thorough investigation or even legal advice. From a public relations point of view, an employer may consider it more important to respond quickly and decisively than risk the public perception that the employer somehow condones or isn't seriously concerned about the actions of its employee.

Senior employees have a clear fiduciary duty to protect the goodwill and reputation of the employer and not to do anything which may damage the company brand or reputation. Senior management and executives set the tone. They lead by example and are supposed to set the standards for all other employees to follow. It's understandable, in those circumstances, that senior fiduciary employees should be held to a higher standard than ordinary employees.

All employees, however, are subject to an implied duty of good faith and fidelity to their employer. Any conduct by any employee which is prejudicial or likely to be prejudicial to the interests or reputation of the employer may justify disciplinary action, including summary dismissal without notice. The conduct of employees which can damage the reputation of the employer is not limited to workplace conduct but extends to misconduct from an employee's private life.

The notion that misconduct from an employee's private life can be cause for termination without notice is not new. One of the leading English cases on the issue dates back to the late 1800s. What is new today is the increasing frequency of reports in social media and TV and internet news services involving instances of



off-duty misconduct of an employee.

Relevant Factors to Consider

Each case involving private life or off-duty misconduct which may be cause for termination from employment without notice must be decided on its own facts but there are certain criteria that a court or a tribunal will review when asked to determine whether the misconduct constitutes just cause for termination:

1. Does the conduct harm the employer's reputation, goodwill or product?
2. Does the behaviour render the employee unable to perform his duties satisfactorily?
3. Has the incident led to the refusal, reluctance or inability of other employees to work with this employee?
4. Is the employee guilty of a criminal offense which renders that conduct injurious to the general reputation of the employer and its employees?
5. Does the conduct make it difficult for the employer to efficiently manage its business and direct its employees?

Some of the other important factors which will be considered by the courts and tribunals include:

- the nature of the employer's business;
- the employer's notoriety and reputation in the community;
- the role the employee plays in the business;
- whether any of the employer's equipment was used by the employee;
- the nature and degree of the misconduct involved; and
- whether the misconduct breaches an employer's faith in an employee leading to a breakdown of the employment relationship.

Examples of Employee Misconduct Which Constitutes Just Cause for Termination

Often the decision of an employer to dismiss an employee for private life or off-duty misconduct is not challenged by the employee. In cases where the dismissal has been challenged, however, courts and arbitration tribunals have provided some guidance on the circumstances which do justify dismissal. For example, courts and tribunals have upheld an employer's dismissal of an employee in the following cases:

- a university business school lecturer convicted of fraud in connection with a personal insurance claim;
- a bank teller who developed a personal relationship with a bank robber;
- a social worker who became involved with a convicted sexual offender who was taking sexual abuse



counselling through the social worker's employer;

- a psychiatric nurse employed by a hospital who formed a close personal relationship with a recently discharged psychiatric patient;
- a mid-management employee charged with possession of child pornography;
- a stockbroker who brought a prostitute into the workplace after hours, when no other employees were present;
- a Correction Services of Canada employee who was convicted of criminal harassment; and
- an employee who posted offensive and insulting Facebook comments directed at his supervisors.

Practical Advice for Employers

Some employers try to conduct social media background checks on prospective employees before making an offer of employment. If you choose to conduct those sorts of background checks, you should ensure that you have the consent of the prospective employee to do so.

It is good practice to adopt written employment policies which clearly describe the employer's expectations for off-duty conduct by its employees, and which spell out the consequences for any conduct which damages the employers' brand and reputation. Employers who prepare employee codes of conduct or written employment policies should ensure that those codes and policies are incorporated directly into the employment agreements.

Adopting written policies and codes of conduct is not a complete answer, however. Employers should consider annual mandatory refresher courses for all employees.

Finally, in this day and age, employers should consider setting limitations on employee use of social media, not just for professional or business accounts but also for personal accounts where an employer's brand or reputation can be impacted.