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WRONGFUL DISMISSAL IN THE AGE OF SOCIAL MEDIA: STANLEY CUP RIOTERS LOSE JOBS

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Digital technology brought all of us face to face with the Stanley Cup rioters. Their images were delivered to our homes, workplaces and smartphones via social networking sites. Employers of the rioters were rightfully outraged, and some rioters lost their jobs because their images were depicted in the melee.

Were these employers succumbing to a witch hunt mentality, or were these terminations justified? The question raises many interesting legal issues. It also gives us an opportunity to consider the power of social media against the backdrop of basic wrongful dismissal law, in particular where employer reputation is at issue. The comments that follow are NOT directed at any specific case arising from the riots. They are intended only as a general discussion of the issues. Some of the riot cases may end up in court and this is not a forum for pre-judgment.

The broad issue is: when does one's "outside the workplace" behaviour constitute grounds for termination? Summary terminations are permitted only where there is "just cause" for the dismissal, and the court will consider various factors to determine if there is just cause, including for our purposes: whether the behaviour is damaging to the employer's reputation, is prejudicial to the employer's business, or is inconsistent with faithful discharge of the employee's service.

Clearly the Courts respect the employer's right to protect its reputation. The interest being protected is often not just the employer's reputation with the outside world, but reputation within its own organization as well.

Arguably, the riots have nothing to do with the workplace. The analysis is more simple when the link exists. Not surprisingly, we have already seen employers successfully defend numerous wrongful dismissal cases where the employee has posted to the internet written comment (think "rant") that is unfairly critical of the employer, its customers, or fellow employees. See for example, a Labour Relations Board case called *Lougheed Imports Ltd. (c.o.b. West Coast Mazda) (Re)*, [2010] B.C.L.R.B.D. No. 190, where the LRB decided

that offensive and insulting Facebook comments, directed by an employee at his supervisors, were grounds for summary termination..

Reprehensible *behaviour*, as opposed to written comment, can also create a nexus with the workplace. In a well publicized case out of Alberta a few years back (see *Whitehouse v. RBC Dominion Securities Inc*., 2006 ABQB 372 – not a social media case) a successful stockbroker sued his employer after being terminated for bringing a prostitute to the workplace after hours, when no one was present. The broker lost his wrongful dismissal case. Although the court found no evidence the employer's public reputation was at all harmed, great concern was expressed about the workplace reputation, where the incident was widely known and embarrassing for female employees in particular. The court stated:

It was important for management to restore order quickly and to re-define clearly the permissible limits on employee conduct. Any lesser response would undermine the confidence of both employees and clients in the competence of management.

It is interesting to think how *Whitehouse* would have been decided if the broker's transgression had not taken place in the office and not been leaked to anyone outside of management. Would preservation of employer reputation still be part of the legal analysis?

Of course, in *Whitehouse*, there was a tangible link with the office. In an older decision out of New Brunswick (see *Buchanan v. Continental Bank of Canada* (1984), 58 N.B.R. (2d) 333 – also not a social media case), there was no such link, and the court would not make one. In *Buchanan*, a drunken banker smashed the windshield of a taxi when re realized he had forgotten his keys. The incident was written up in a local paper where his superior at the bank learned of it and fired him. The employee was not named in the news report, but apparently would have been identifiable to readers who knew him. The court ruled in favour of the employee, stating:

This is an isolated act, and in any event one which I do not find in any way reflected on the image or integrity of the defendant employer. In fact I am rather doubtful that the customers who the plaintiff would be meeting and dealing with in the roles which I have set out above would be particularly concerned one way or another had they in fact had knowledge of this particular incident. I have no problem in finding that there was no misconduct inconsistent with the due and faithful discharge of the plaintiff's duties with the defendant bank.

Here one wonders: if this vandalism of a taxi had taken place today, been caught on video and gained some notoriety on Facebook, would we have had a different result? Does social media create a greater capacity for greater damage to employer reputation, whether in the eyes of the public or other employees at the

workplace? The answer must be yes (notwithstanding the fact that most of us – and certainly this writer – would not be able to pick even the most notorious Stanley Cup rioter out of a line-up, or recognize him if our teenage daughter brought him home for dinner.)

It will be interesting to see how the two sides to a "riot termination" case present their arguments, should any wind up on court. Both sides will need to take positions on the passionate response of the community to the rioting. Employers will argue that they acted to protect the well-being and integrity of the work place, and preserve employer reputation. And they may look beyond public reputation. They could argue that asking co-workers to continue working alongside Joe Bloggs, who had been watched by thousands on Facebook torch a vehicle and dance around fire, would put the employer's workplace reputation at risk and call the employer's judgment into question. Likely they will point to the massive negative public reaction to the riots as a measure of the morally corrupt nature of the rioting, and as a worthy motive for decisive disciplinary action. Employees, on the other hand, will characterize riot related terminations as clumsy, knee jerk reactions that wholly ignore the circumstances of the individuals involved. At the end of the day, the degree of bahaviour will quite rightly be the deciding factor. Grinning by-standers should not be equated with incendiary toting thugs.

Following the riots, social media gave an enraged community a tool to focus its rage. No doubt the public's immediate access to thousands of crystal clear images increased the rage. For terminated employees, the link from that digital imagery back to workplace was also crystal clear, and hard hitting. But how clearly the principles of wrongful dismissal law support that link is another question altogether.