WINTER 2016

THE steward

NEWS AND INFORMATION FOR BCGEU STEWARDS

BC GOVERNMENT AND SERVICE EMPLOYEES' UNION bcgeu

Letter from the president

Harmony. We strive for it in our workplaces as we attempt to balance the demands and expectations of our employers and our collective agreement rights. It's not always easy. There will be disagreements with supervisors. As frustrating as it can be, differences can't always be resolved in the moment.

With a few exceptions, workers are required to comply with the employers' instructions and grieve later. Unless you're at risk of injury or it's illegal to follow it, disobeying a direct order from an employer could bring discipline or other consequences. The principle which governs situations like these is known as "work now, grieve later." It's discussed at length in an informative article contained in this issue of *The Steward* for winter 2016.

If you're like me, you've given some thought to the issue of privacy in our cyber-connected world. You may be surprised to discover there are circumstances in labour law where your personal information could be published and available to the public to view. Learn more about the facts in this issue.

Keeping with the theme of the electronic age, there's a growing body of labour law concerning social media and workplace consequences. Be sure to read the comprehensive article we've produced in this issue of *The Steward*. It examines the impacts of social media on hiring and implications for employees at work and away from the office.

I hope you'll also take time to read about a recent Supreme Court of Canada decision on workers' compensation coverage and the articles about sick leave and reporting work-related injuries.

I'm sure you'll find this issue's articles useful in your work as a steward. If there are topics you would like addressed or you have other suggestions, don't hesitate to email us at *steward@bcgeu.ca*

The field of labour relations is forever evolving. The guidelines under which workplaces operate are constantly being reshaped by a growing body of arbitration decisions and labour laws.

Staying on top of the changes is an important function of the BCGEU's advocacy department, which produces The Steward. It's the best vehicle we know of to keep BCGEU stewards informed so they can best represent members in the workplace.

Knowledge is power. Enjoy the winter 2016 issue of *The Steward.*

Stephanie Smith

Stephanie Smith
BCGEU president

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Work/obey now, grieve later unfettered

BY KEN MOONEY
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Life at work isn't always harmonious. Occasionally, employees may find themselves in disagreement with the direction of their supervisors. In such circumstances, employees are generally expected to carry out their duties.

As observed by Arbitrator Shulman in *Ford Motor Co., 3 L.A. 779*, employees may pursue concerns with supervisors' instructions through the grievance procedure:

"…an industrial plant is not a debating society. Its object is production. When a controversy arises, production cannot wait for exhaustion of the grievance procedure. While that procedure is being pursued, production must go on. "

This principle is known as, "obey now, grieve later" or "work now, grieve later." A considerable body of jurisprudence has held that where the rights under the collective agreement are disputed, the employee remains under a duty to perform the work he/she is ordered to do and then grieve the propriety of the order. All collective agreements contain a grievance procedure and most include a process for dealing with complaints.

Employees who fail to comply with the instructions of their supervisors may risk a charge of insubordination. But, there are exceptions to this general rule. While arbitrators recognise the inherent right of employers to manage the work floor, there are circumstances when an employee may be justified in refusing an order to comply with instructions that he or she feels are improper.

An employee is not bound by "work now, grieve later" when his or her health and safety becomes an issue, the most well-known exception to the "work now, grieve later" rule. The right to refuse unsafe work requires employers to immediately investigate and correct unsafe working conditions. This is codified under statutory authority in the *Workers' Compensation Act, Occupational Health and Safety Regulation Section 3.12.* and is well recognized by arbitrators. As noted in *Lake City Casinos Ltd. v. British Columbia Government and Service Employees Union (Caron Grievance) [2003] B.C.C.A.A.A. No. 122* an employee may be justified in refusing to follow instructions and can avoid a charge of insubordination where it would be unsafe to do so:

"In some circumstances, a refusal to work where it would be unsafe or where the employee would be at risk to her physical or mental health, could provide a complete defence to a charge of misconduct."

An employee may also be justified in refusing to follow instructions where compliance would potentially place other individuals at risk. In *John Charters et al 3 C.L.R.B.R. (2d) 253*, three Canada Post drivers were each

suspended on the grounds of insubordination for refusing to drive their trucks through an active picket line. The drivers refused on the grounds that to do so would endanger the safety of the picketers. In each case the drivers exercised their rights under the *Canada Labour Code*. Rather than investigate the complaint as required by the Code, the employer responded by issuing suspensions. In rescinding the suspensions, the Canadian Labour Relations Board found the employer's actions negated the need for any review of whether the right of refusal was warranted:

"CPC did not fulfill its obligation as an employer under section 128(7). It did not carry out an investigation into the circumstances surrounding the refusals with a view to eliminating or reducing any existing danger. What it did was to short-circuit the whole system by immediately disciplining the refusing employees. This is exactly the type of mischief that section 147 of the Code is designed to prevent. When an employer acts like CPC has here, the Board can only presume that the disciplinary measures were taken because the employees had acted in accordance with the Code. In the circumstances, the Board need not even debate whether the employee correctly interpreted or applied the right to refuse provisions of the Code. By the employer's very actions, the contravention of the Code was a "fait accompli."

Another exception is that employees are not bound by "work now, grieve later" when the disputed order is illegal.

In *United Food and Commercial Workers Union, Local 278W v. Canadian Blending & Processing Inc. (Rocheleau Grievance), [2002] O.L.A.A. No. 594 (Lynk)*, an employee was discharged in part by refusing to work overtime in excess of the hours prescribed by the *Ontario Employment Standards Act*. In his ruling, arbitrator Lynk found the employer was not justified in punishing the grievor for his refusal to carry out an illegal order:

"In these circumstances, he was within his rights to insist that the maximum hours ceiling be respected, and he should not be punished for a refusal to carry out an illegal order."

In *Thermal Ceramics v. United Steelworkers of America, Local 16506 (Gosselin Grievance) [2005] O.L.A.A. No. 565* an employee was issued a five-day suspension for insubordination when he went to his own physician after being directed to report to a hospital. Section 33(1) of the *Ontario Workplace Safety and Insurance Act* provides that an employee who sustains an injury is entitled to make the initial choice of health care professional. In weighing the factors of the case, arbitrator Gorsky found the consideration of illegality was more than technical in nature:

"This is not a case where the policy decisions made by the employer to compel an injured employee to attend the emergency department outweigh the considerations of illegality which are more than technical in nature."

It was held that the employer's attempt to compel the grievor to go to a hospital instead of his own doctor violated the grievor's rights under section 33(1). The arbitrator further noted that if the grievor had followed the work now, grieve later rule, he would not have been able to obtain a remedy through the grievance procedure:

"In the case before me, obeying the order and resorting to the grievance procedure could not have produced a remedy that would give the grievor adequate redress for the lost opportunity to obtain the medical treatment of his choice that he was entitled to."

In the result, the grievance was allowed and the grievor was compensated for their suspension.

As noted by arbitrator Gorsky above, the issue of redress will attract serious consideration from arbitrators and tribunals. Employees are not bound by the general principle when adequate redress cannot be secured through the grievance and arbitration process (see Brown and Beatty, at 7:3610 and 7:3620):

"However, as a corollary of the premises on which the rule is based, arbitrators have also consistently held that employees are not bound by the principle when adequate redress cannot be secured through the grievance and arbitration process.

…When the grievance and arbitration process cannot provide adequate relief to employees who obey orders that turn out to be unlawful or illegitimate in some way, the general principle of "obey now/grieve later" has no application."

In *Auto Haulaway Ltd. and Teamsters Union, Loc. 938 (Fletcher) [1994] C.L.A.D. No. 1233*, an employee was suspended for failing to report for work in excess of the hours provided by the collective agreement. In assessing the circumstances, arbitrator Rayner noted the employee had the right to refuse to report for work because the collective agreement expressly set out the maximum number of hours that could be worked but also considered that adequate redress would not have been available through the grievance procedure:

Arbitrator Rayner also cited with approval from arbitrator Adams ruling in *Adams Cliff Mines*, unreported, February, 1974, where it was observed:

"Where an employee has a legitimate right to refuse to come to work, it would seem to the board that it would be unreasonable to require the employee to appear at work and then grieve. No award of the board could make the employee whole in that situation. Those hours have been irretrievably lost by the employee."

Another notable exception to the "work now, grieve later" rule can arise from disputes involving the exchange of medical information. In *Canada Post Corporation and Canadian Union of Postal Workers (Matheson Grievance, CUPW 846-07-02656) [2011] C.L.A.D. No. 349*, arbitrator Joan Gordon reinstated an employee who was discharged for failing to attend an employer-directed independent medical examination. The employee had furnished the employer's occupational medical consultant with medical information to substantiate her physical limitations but found herself being directed to attend an examination by a physician selected by the employer without clarification of what was lacking in the information that had already been provided. In her ruling, arbitrator Gordon held that under the circumstances the employee was not required to "work now, grieve later."

Where, as here, her privacy interests are at stake, she is not obliged to "obey now, grieve later" as long as she satisfies her part in terms of communications.

In cases involving medical disputes, an employee's privacy rights must always be balanced with an

employer's right to satisfy itself regarding the fitness of its employees. It is important to proceed with caution. Employees should be prepared to cooperate with any legitimate medical inquiries. At the same time, employers must respect an employee's right of privacy by clearly identifying perceived deficiencies before resorting to a third-party medical examination.

When faced with a directive to attend a third-party medical examination, it is important to be in an informed position before making any decisions. A steward can provide valuable assistance in such situations.

As a general rule, employees are expected to comply with the lawful instructions of their supervisors. But, when faced with directives that are illegal, immoral or which raise the issue of an employee's health and/or safety, an employee may well be justified in disobeying those instructions. It is important in such circumstances to communicate the reasons for the refusal, with consideration to the nature of the order, the degree of its reasonableness and whether adequate redress could be obtained through the grievance procedure by working now and grieving later.

In some circumstances, a refusal to work where it would be unsafe or where the employee would be at risk to her physical or mental health, could provide a complete defence to a charge of misconduct.

steward updates

What you can do while on sick leave: a practical guide

BY JENNIFER ARNOLD
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It is generally understood that there are limitations for employees who are disabled from their work. For example, if an employee is receiving short-term and long-term disability benefits, there are restrictions on having other earnings.

Additionally, employees who are unable to work and are receiving disability benefits from their employer are constrained from a range of activities, including: running a business, volunteering, participation in political activities, travelling, going to school, attending training, workshops, conferences and conventions.

This list of limitations, while not exhaustive, may seem onerous and unreasonable, especially since some of the activities do not provide earnings. However, as has been recognized at arbitration, the purpose of disability benefits is to compensate employees while they are disabled from work, and to get employees back working as soon as possible.

So what do you do if you find yourself in a position where you are on disability benefits, but you want to participate in one of these restricted activities? Practically speaking, what can you do while receiving disability benefits, and what are the consequences if you engage in one of these restricted activities?

The activities you can do during your sick leave largely depend on why you are on sick leave. If you have a broken arm and your job involves you lifting heavy boxes, you may be able to participate in activities that do not impact your physical limitations, such as attending a conference or training workshop. Moreover, if you are disabled from work for mental health reasons, you may face different restrictions. You may not be able to attend that same conference as the person with the broken arm because the reasons you are unable to work are different.

More significantly, if you tell the employer you are unable to work, but participate in activities that are inconsistent with your reported limitations and restrictions, the employer may question the legitimacy of your disability. If you participate in restricted activities while on sick leave, you risk your benefits being cut off. More seriously, the employer may determine you are not being truthful about your disability, and accuse you of making a fraudulent claim for benefits. These circumstances not only result in termination of disability benefits, but also may lead to discipline. Regardless of how enjoyable a workshop or volunteer activity is, these are most unpleasant consequences, and are best to be avoided.

So how can you gauge what you should and should not do while disabled from working? Should you avoid all restricted activities? Our best advice is to ask first. Before you sign up for that convention or agree to take

that shift at the SPCA, have a conversation with your doctor as to whether the activity is consistent with your limitations and whether it will help or hurt your recovery.

Remember, it is the employer paying your disability benefits, with the goal of getting you back to work, and that must be your goal as well. Secondly, after you have spoken with your doctor, contact your employer and let them know the activity you want to participate in, and how the activity impacts (or doesn't impact) your medical limitations.

Bottom line is if both your doctor and your employer give you the okay to participate, before you actually participate in the activity, then you are good to go and you can probably participate in the activity while disabled from work. If you do not get agreement from your doctor and the employer prior to participating in a restricted activity while on sick leave, you run the risk of being cut off benefits, returning to work before you are medically ready, or worse, being accused of fraudulently claiming disability benefits.

One final word about union members and activists. Disabled members and activists should not be excluded from participating in union activities. However – whether a social event or a training opportunity – when deciding to participate in a particular event one should take into consideration the same cautions.

Remember, the purpose of disability benefits is to compensate employees while they are disabled from work and to get employees back working as soon as possible.

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steward updates

Breast cancer court ruling has wide-ranging implications

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On June 24, 2016, the Supreme Court of Canada released an important decision: *British Columbia (Workers' Compensation Appeal Tribunal) v Fraser Health Authority, 2016 SCC 25* related to workplace conditions causing breast cancer.

The Supreme Court confirmed the decision of the *B.C. Workers' Compensation Appeal Tribunal* (WCAT) that, more likely than not, breast cancer contracted by three laboratory employees had been caused while working at Mission Memorial Hospital. The decision stated these workers are entitled to workers' compensation coverage. The employer, the Fraser Health Authority, fought against these claims for more than a decade. Two of the workers were members of the Health Sciences Association of BC (HSA) and one a member of the Hospital Employees' Union (HEU).

The heart of the matter was the role and authority of administrative tribunals like the WCAT and whether courts ought to be able to dismiss the specialized subject expertise of tribunals in re-weighing evidence.

The case was complex. It involved expert opinion evidence which did not point to a definitive cause of the workers' cancers. However, WCAT took into account an investigation indicating a cancer cluster in the laboratory showing the incidence of breast cancer to be eight times the rate of breast cancer in B.C.

The Supreme Court of Canada ruling is significant not just for the three workers involved, but for all B.C. workers, due to the court's affirmation that:

"The presence or absence of opinion evidence from an expert positing or refuting a causal link is not determinative of causation. Causation can be inferred—even in the face of inconclusive or contrary expert evidence—from other evidence, including merely circumstantial evidence. Subject to the applicable standard of review, the task of weighing evidence rests with the trier of fact. In the instant case, the Tribunal's original decision cannot be said to have been patently unreasonable. ***While the record on which that decision was based did not include confirmatory expert evidence, the Tribunal nonetheless relied upon other evidence which, viewed reasonably, was capable of supporting its finding of a causal link between the workers' breast cancers and workplace conditions." [Emphasis added]***

The court also took notice of the provisions of section 250(4) of the *Workers Compensation Act* (Act) which requires that where *"…the evidence supporting different findings on an issue is evenly weighted in that case, the appeal tribunal must resolve that issue in a manner that favours the worker."* The same provision applies to the *Workers Compensation Board* (WorkSafeBC) as set out in section 99 of the Act.

This case shows that for a compensation claim to be accepted, there must always be some evidence to support a causal relationship between the employment and a work injury or occupational disease. At the same time, it is not necessary that all evidence point to the employment as the sole cause. There simply must be sufficient evidence to show, on a balance of possibilities, that the employment had causative significance in producing the injury or disease at that time.

Retaining the standard of "patently unreasonable" on review by a court also underscores the historical compromise upon which workers' compensation is based.

Under workers' compensation legislation, injured workers gave up the right to sue their employers in court in return for a no-fault scheme that provides income payments and health care. The stricter evidentiary standards and rules applied by the court do not apply to claims for workers' compensation benefits.

Nevertheless, the workers' compensation scheme in B.C. remains complex.

Workers and stewards should know that it is important, as a first step, to report an injury as soon as practicable to their supervisor, or another representative of the employer. Evidence of such reporting is essential in establishing a claim for workers' compensation. Not reporting promptly may well lead to unnecessary and unwanted complications for an injured worker.

While the record on which that decision was based did not include confirmatory expert evidence, the Tribunal nonetheless relied upon other evidence which, viewed reasonably, was capable of supporting its finding of a causal link between the workers' breast cancer and workplace conditions.

steward updates

Being charged criminally for alleged misconduct outside of work

BY ERIK HOIBAK
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Being charged criminally for conduct alleged to have taken place outside of work brings a lot of uncertainty. What happens to the accused's job when he/she is awaiting trial, before they have been found guilty and are still presumed innocent?

Often, employers will suspend the employee until the outcome of their criminal proceedings. That means the employee will sit unemployed for months or years with no source of income, awaiting their day in court, with little or no prospect of finding alternative employment in the meantime.

It is a difficult situation. That's why arbitrators have stated it is only appropriate to suspend an employee who has been charged criminally in particular circumstances.

The leading case on this subject is *Phillips Cables Ltd. v. United Steelworkers of America, Local 7276 (Nicolosi Grievance), [1974] O.L.A.A. No. 13*. In that case, arbitrator Adams acknowledged there may be legitimate reasons an employer may feel they should suspend an employee pending the outcome of their criminal charges, but that there also are the:

"...competing interests of the innocent employee who is tragically and mistakenly the victim of a criminal charge. To await the outcome of a criminal charge in the courts without benefit of employment in the interim can often render a subsequent acquittal quite meaningless."

Arbitrator Adams went on to conclude that in situations such as these:

"The employee cannot be treated as if he has committed the offense. Rather, he is labouring, under the risk of his guilt, and so may be his employer and fellow employees. Accordingly, the company must establish that this risk of guilt presents a substantial and immediate hardship to itself or to its workers, and that this hardship cannot practicably be met by anything other than the suspension of the employee."

Over the years, labour arbitrators have further developed this area of the law. They have stated that with suspensions of this nature, an employer doesn't actually have to establish the employee has done anything wrong. Instead, the employer must demonstrate that, given the nature of the charges against the employee, the risk of keeping them in the workplace is too high. To find this, employers must first investigate the charges to the best of their ability and determine what kind of risks are posed by continuing to have the employee at the worksite.

For employers to find the risk is too great to keep the employee in their position, they must show, given the nature of the charges, there is a reasonable risk:

a) to the safety of co-workers or customers;

b) to the employer's property; and/or

c) to the employer's business interests or reputation.

Even where employers can show the risk is too high, they must explore whether they can mitigate the risk through greater supervision of the employee at their current position, or through transferring the employee to another position.

Employers must also continue to assess the situation should new information come to their attention that might support putting a suspended employee back to work. If employers can't show they have done all of this and prove the risk of having the employee at the worksite is too high, then the arbitrator is unlikely to uphold a suspension.

...the employer must demonstrate that, given the nature of the charges against the employee, the risk of keeping them in the workplace is too high.

steward updates

Will personal information become publicly available if you take your grievance to arbitration?

BY EMILY LUTHER
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Imagine this scenario. An employer has disciplined a member for alleged misconduct. The union has filed a grievance disputing the discipline. Settlement discussions are occurring, but have not yet produced results. The grievor and the union need to decide whether to advance the grievance to arbitration.

The decision involves the weighing of many factors. One factor that needs to be considered is what will be communicated out, regardless of the outcome. Arbitration findings that are published will most likely contain the grievor's full name, along with personal information, such as their employment and disciplinary history. As well, facts relating to the current grievance will be made known.

Hence, once the award is published, an internet search of the grievor's name will disclose that the person was once accused of this misconduct, even if he/she is ultimately exonerated. When deciding whether arbitration is the right choice, the grievor should consider what impact this publically available information could have on their reputation and future employment prospects.

Publication of arbitration awards

Pursuant to Section 96 of the *Labour Relations Code*, all labour arbitration awards are filed with the Director of the Arbitration Bureau, who must make them available to the public upon request. Currently, labour arbitration awards are made available to the public through online services, such as Quicklaw and CanLII. They are also published in written journals, such as Labour Arbitration Cases, which are available at libraries and online.

None of these publicly available sources typically redact the name of or personal information about the grievor.

Legal basis for publication of personal information

The legal authority of arbitrators to disclose personal information in their awards was examined directly in *Sunrise Poultry Processors, [2013] BCCAAA No 142,* an arbitration award that was upheld by the Court of Appeal (2015 BCCA 354).

Sunrise involved a grievor who was terminated from his job as a truck driver for improperly signing company invoices when delivering goods for the employer. Aside from arguing the dismissal was an excessive response in the circumstances, the union also argued that the arbitrator, Stan Lanyon, should anonymize the names of the grievor and witnesses in his award, by using initials rather than names.

The union argued that, pursuant to the *Personal Information Protection Act* (PIPA), arbitrators are not allowed to disclose grievors' personal information in their awards without consent. In the alternative, the

union argued full names should not be published as a matter of labour relations policy, especially considering the widespread online availability of arbitration awards.

Arbitrator Lanyon allowed the grievance and reinstated the grievor. On the issue of anonymizing names, he initially referred the matter to the *Labour Relations Board* under Section 98 of the Code. However, the board declined to decide the issue and referred it back to the arbitrator.

In his subsequent award, Arbitrator Lanyon discussed at length the interplay between PIPA, the Code, and the "Open Court Principle," the idea that justice generally requires public access to judicial and quasi-judicial proceedings. He decided PIPA does not apply to arbitrators, and that alternatively, if PIPA did apply to arbitrators, it permitted arbitrators to disclose personal information in their awards without consent.

The union appealed Lanyon's award to the Court of Appeal. The court upheld the original decision, but disagreed with some of the arbitrator's findings. It also ruled PIPA applies to arbitrators, but that arbitrators have discretion when it comes to disclosing personal information in their awards. This is due to an exception in PIPA that allows the disclosure of personal information without consent, if it is "authorized by law." The court reasoned disclosure of personal information in awards is authorized by Section 98 of the Code, which says awards must be made available to the public.

Exceptions

Even though the arbitrator and the court in Sunrise held that privacy legislation permits arbitrators to disclose grievors' personal information in their awards, both also made clear arbitrators have the discretion to anonymize names by using initials to protect privacy.

Arbitrator Lanyon's award discusses in detail some specific situations where arbitrators should generally avoid publishing personal information.

For example, birth dates, social insurance numbers, and financial information should never be published. Less direct personal information, such as names of family members, marital status, sexual orientation, or religion should generally not be published if the information is not essential to the award. If these details must be published, then anonymization of names should be considered.

Lanyon also noted grievors' names should generally be anonymized in awards that contain personal medical information or information about physical or sexual abuse.

Also, according to Lanyon, a higher onus for anonymization should be placed on grievors accused of serious disciplinary offences.

Conclusion

If an arbitration involves particularly sensitive subject matter, such as personal medical information, it is a good idea to seek the agreement of the parties to have the grievor's identity anonymized in the award. If the employer will not agree, an application to the arbitrator may be made. Depending on the sensitivity of the information and other circumstances, the application may or may not be granted.

In most cases, it is very likely the arbitrator will include full names in the award, and the award will be available online to the public. This is something that should be factored into every decision on whether or not to advance a grievance to arbitration.

steward updates

Workers' compensation: taking charge of your claim

BY KAREN O'CONNOR-COULTER
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The BCGEU encourages all members to report an incident to their employer and to WorkSafeBC whenever they are injured at work. An injury at work includes both visible injuries resulting from an incident/accident and gradual onset of symptoms resulting from performing certain actions on the job.

Advocacy staff at the BCGEU often see workers who have not reported injuries promptly. One reason is that members with short-term or long-term disability benefits may prefer to access these benefits because they view them as easier to obtain. Other workers who know workers' compensation benefits may be lower than regular wages will opt for light duties to maintain their income levels.

Both of these approaches can lead to problems down the road. The following are examples of circumstances that cannot necessarily be remedied on appeal:

1) Miles is a community health worker. He notices lower back pain since being assigned to care for a bed-ridden, obese client. He decides he will stop accepting assignments with that client for a few weeks until his back is better. He doesn't tell his employer about his symptoms. Consequently, he has been working reduced hours by the time he learns he has a herniated disc and will require extensive time off work. At that point, he decides to inform his employer and make a claim.

The *Workers' Compensation Act* requires workers to report an injury as soon as practicable. Miles' employer may take the position that he delayed reporting his back injury and protest his claim. Alternatively, WorkSafeBC may deny the claim on its own initiative because of this reporting delay.

2) Melissa is a clerical worker with the provincial government. She has noticed increasing pain and numbness in her right hand and arm since the adoption of a new data management system. She is able to continue working but has had to take time off from her part-time job teaching pilates. Melissa's symptoms continue to worsen and her doctor diagnoses a repetitive strain injury (RSI).

Workers' compensation benefits are based upon a worker's earnings at the time of injury. Melissa's income was significantly reduced because she gave up her part-time job. Now, she will need to convince WorkSafeBC she gave up her pilates job because of her compensable injury.

Some workers avoid reporting what they perceive to be small injuries because they don't want to appear to be whiners. However, as Miles and Melissa learned, you don't always know when an injury is more serious than you thought.

If you are injured at work, make sure your employer knows about it, even if you do not miss a day of work.

There is no such thing as a whiner where workplace injuries are concerned.

Calculation of benefits:

Wage loss benefits and permanent disability benefits are based upon a worker's income from all sources at the time of injury. WorkSafeBC will pay 90 percent of a worker's average earnings over the three months prior to injury for the first six weeks of disability. This is known as the compensation wage rate. After 10 weeks of disability, WorkSafeBC will create a long-term compensation wage rate based on the worker's average earnings over the 12-month period before the date of injury.

This long-term compensation wage rate will also be used to calculate a worker's permanent disability award if he/she does not recover completely from the injury.

The maximum annual income which WorkSafeBC insures is $80,600. So, regardless of how much you were earning prior to your injury, the maximum wage loss WorkSafeBC will pay you is $1074.62 per week.

Because of the delay in reporting her injury, Melissa, from our example, may have difficulty persuading WorkSafeBC to include her part-time earnings in her wage rate.

Communicating with a doctor:

It is important for the member to see a doctor promptly when injured at work. Here is what the member needs to know. Advise the physician the injuries are work-related and describe the incident or activity believed responsible for the symptoms. Medical practitioners are required to provide reports to WorkSafeBC on all consultations concerning work-related injuries. Seeing a doctor promptly ensures there is a record of the injury.

It is also important to inform the doctor if symptoms change over time. If symptoms begin to improve, be clear that, while they may be better than they were, they have not completely healed and specify what the ongoing problems are. Too often doctors will simply write "better" on their report. WorkSafeBC may rely on the report to terminate benefits, and send the worker back to work.

If WorkSafeBC requests a copy of the file from the doctor, be sure to specifically authorize the doctor only to disclose material relevant to the work-related injury. All material disclosed will go on a WorkSafeBC file and be disclosed to the employer in the event of an appeal. Neither WorkSafeBC nor the employer has any right to information about an unrelated medical issue, such as problems with conception, mental health issues (unless the claim is for a mental disorder – more on that below) or any other such personal matter.

Psychological injuries:

WorkSafeBC refers to psychological injuries as mental disorders. They may arise either as a consequence of a physical injury, or independently, as a reaction to either a traumatic event or a significant work-related stressor.

Some members are reluctant to disclose they are suffering from a psychological condition. They delay reporting it to the employer or seeking treatment. They may feel such injuries reveal weakness on their part. These injuries are not a reflection on the individual worker. It is not at all uncommon for a strong, resilient person to experience depression and/or other psychological consequences of long-term disability and chronic pain. These consequences are a work-related injury and you are entitled to be compensated for them. (see article in Fall 2015 issue of *The Steward* entitled, "The mental disorder WCB system", for more information on WorkSafeBC and mental disorders)

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Light duties:

Both WorkSafeBC and the employer have an interest in getting employees back to work as soon as possible. It saves money. If WorkSafeBC deems a worker capable of returning to light duties, it is important to be sure those duties are appropriate for them given the circumstances of their particular disability. The worker should review and discuss the proposed light duties with their doctor.

Here is an example. Aidan is a court reporter who has been offered light duties following surgery for a knee injury. The duties will not place any strain on his knee. However, he will need to climb a flight of stairs multiple times a day in order to carry them out.

WorkSafeBC will usually ask a treating physician about the appropriateness of a return to work plan. Aidan needs to make his doctor aware of the necessity to climb stairs. This is so WorkSafeBC can be advised of Aidan's ability to do the job, in light of his continuing limitations.

Communication is key. If an employee's doctor deems a return to work placement unsuitable and the employee elects to follow the doctor's advice, the person will be in a better position to appeal WorkSafeBC's decision.

Accommodation:

The same guidelines apply when WorkSafeBC requires a member to return to an accommodated position.

At some point after a work-related injury, a person will either recover completely, or the injury will reach maximum recovery, leaving some degree of permanent disability.

If an ongoing disability does not allow a return to work in their pre-injury position, WorkSafeBC will first attempt to identify another position which suits the employee's limitations with the pre-injury employer.

Under the *B.C. Human Rights Code*, an employer has a legal obligation to accommodate a disabled worker, whether the injury happened at work or not. Arbitrators and the courts have also decided employers must absorb some degree of hardship in order to assist people with disabilities to return to work.

It is important to seek an opinion from a doctor as to whether the identified position is suitable in light of the employee's permanent physical limitations. The union staff representative can assist in identifying suitable positions and reminding the employer of their duty to accommodate.

Every effort should be made to find a suitable position with the member's existing employer. Very few people who are required to look beyond their current employer for work are able to obtain a position in another unionized workplace. WorkSafeBC compensates workers for lost wages, but does not compensate for other benefits provided under a collective agreement.

If you are injured at work, make sure your employer knows about it, even if you do not miss a day of work. There is no such thing as a whiner where workplace injuries are concerned.

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Workplace consequences in the electronic age

BY ANDREA DAVIS
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The use of a variety of electronic devices, from computers to cell phones to tablets, largely arose out of technological demands and advances in the workplace. Now they are commonplace and an accepted part of our daily personal and professional lives. We are all attached to the use of these devices and the social connections they allow.

Whether we are using our own devices or those of our employers, whether the use is on work or personal time, inappropriate social media behaviour can lead to serious implications for our employment.

The misuse of social media is but one of the issues arising in many disciplinary proceedings nowadays. It provides a telling example of how we are attracting problems at work in this electronic age. In a recent survey of social media users between the ages of 18 and 34, 21 per cent indicated they had removed or taken down a photo or posting because they feared it could lead to repercussions at work.

In that same survey, 29 per cent of users said they believe a photo or comment they had posted might cause a prospective employer to turn them down for a job or a current employer to fire them. The vast and detailed history of our web browser use, or the email or texting trail we leave behind, can be an employee's undoing when confronted with misuse of their electronic devices. We will briefly examine troublesome areas for employees in the use and misuse of electronic devices.

Hiring:

Some authors estimate 90 per cent of employment recruiters use search engines to research potential employees. This means any information accessible on your social media accounts or the internet may be uncovered and considered as part of your application, whether you are aware of it or not.

In some instances, prospective employees are being asked to provide their social media passwords to potential employers. Employers want to ensure that they are not hiring high risk employees. They may elect to review social media accounts as a way of assessing an applicant's judgement and behaviour to determine if the applicant fits with their corporate identity. If a prospective employer asks for your social media password during a job interview and you decline, chances are that will be viewed as a strike against you. There are, however, some protections for prospective employees.

Section 13 of the *B.C. Human Rights Code* provides that an employer cannot refuse to employ a person because of the *"…race, colour, ancestry, place of origin, political beliefs, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity*

or expression or age of that person…". If your social media account indicates some aspect or affiliation arising in your personal life that a prospective employer finds undesirable, your employment prospects may be scuttled and you may never know why. In these circumstances, raising a human rights claim would be challenging.

Similarly, B.C.'s *Freedom of Information and Protection of Privacy Act* (for public bodies) and the *Personal Information Protection Act* (for non-public bodies) and their federal counterparts, protect individuals from the collection, use and disclosure of personal information in certain circumstances. In 2011, the Office of the Privacy Commissioner was involved in investigating the appropriateness of the NDP seeking Facebook passwords from prospective candidates for the upcoming election. The commissioner held that requesting passwords was not appropriate due to the large amount of outdated, irrelevant and inaccurate data that could be gathered, the possibility of the collection of personal information from unaware third parties, as well as concerns about the highly personal and sensitive nature of passwords. Like the provisions of the *Human Rights Code*, these protections may ultimately be unhelpful in undoing the damage done and the prospects of you being hired or promoted when you either decline to provide a password or if your social media accounts or internet information are found to be problematic from the employer's perspective.

The best way to ensure you are not eliminated from being hired or promoted based on social media or internet information deemed to be undesirable, is to consider your social media accounts as an extension of your resume. Never assume your privacy settings are adequate to ensure complete privacy. Once information is shared with one person, control over its distribution is lost. It can be passed on exponentially without your knowledge.

Implications for employees at work:

Employers have reasonable management rights within the workplace. These include the right to monitor and control business operations. In the social media and internet context, these rights are most commonly exercised by employers when they have concerns about employee productivity, theft of time, bullying and harassment, confidentiality breaches, inappropriate use of devices, and more. Video surveillance, GPS, drones, data scanning software, email and text searches, or other tracking systems can be used in certain circumstances, even though their use may infringe on an individual's privacy.

Arbitrators have consistently recognized the right of employees to privacy. But, they have also acknowledged these rights have limits. This is in keeping with the evolution of the law in the criminal context.

The Supreme Court of Canada confirmed in *R. v. Cole* that employees do have a reasonable expectation of privacy with respect to personal information contained on workplace computers. The court found the nature of one's internet browsing history is highly personal and creates a privacy interest in both the actual browsing history and what it might reveal about your personal predilections and choices. In Cole, there was evidence of nude photos of a student being seized by school officials from a teacher's school-issued computer and provided without warrant to the police. This evidence was found to be inadmissible on appeal, because the accused had a reasonable expectation of privacy over the content on the computer vis-a-vis a police investigation.

In overturning the Court of Appeal decision to admit that evidence, the Supreme Court of Canada concluded the balancing of the accused's constitutional right to be free from unreasonable search and seizure and his reasonable expectation of privacy in these circumstances, made the admission of the evidence permissible. It must be noted, however, there was never any question at any level of court about the legitimacy of the employer relying on the evidence obtained in its own search of the computer in disciplining the teacher. The school, through their explicit internet usage policy, retained the right to access information from employee-issued computers.

In a similar case with a different outcome, a labour union employer was investigating allegations from the Ministry of Corrections and the police that its employee was affiliated with a biker gang. The employee was suspended from accessing correctional facilities as a result of the allegations. In conducting its investigation, the employer searched the employee's work emails, including a number of personal emails between himself and his wife. These included incriminating photographs, which tended to support the claim that he did, in fact, have gang affiliations. The employer had a very explicit network usage policy indicating all messages were the property of the employer. But, the arbitrator found there were alternative investigatory measures short of reading personal emails between a husband and wife that could have been explored. The arbitrator found the employer's actions were a violation of the employee's reasonable expectation of privacy between husband and wife.

Not unlike the balancing of Charter interests in Cole and other cases, in labour law, arbitrators have applied a simple test from I*WA, Local 1-357 v. Doman Forest Products, 13 L.A.C. (4th) 275 (Vickers)*, in assessing the appropriate balance between an employee's privacy interests and an employer's right to obtain relevant employment information. That test is as follows:

1. Did the employer have a reasonable basis to gather the information obtained (i.e., emails, texts, video surveillance, etc.)?

2. Was the means used to gather the information conducted in a reasonable manner?

3. Or were there other less intrusive means available to the employer?

It would likely be reasonable for an employer to search your emails for pornographic images if the employer had evidence you had shared such images with others on your workplace device. It would most likely be unreasonable for an employer to randomly screen all of your emails for inappropriate images if there was no suggestion that you had engaged in such conduct.

If you are using a workplace-assigned computer, tablet, cell phone, etc., you likely signed a usage agreement setting out the employer's expectations around the use of the device. It may limit how and when you can access the internet or social media. It may forbid accessing certain sites (i.e., gambling or sexually explicit sites). Be familiar with those rules. Ensure you are only using the device for its intended purpose. If you are permitted to use a device for work and personal use, remember, it remains an employer device and your expectation of privacy around your usage is diminished. In all likelihood, if the employer has a valid basis to review your usage (i.e., allegations of time theft, inappropriate site access, etc.) or to search your texts or emails (i.e., allegations of bullying or harassment, sharing of inappropriate material), then, as long as the employer's methods were reasonable, the results of any search will likely be admissible in disciplinary proceedings.

Away from work:

Generally, an employer is not entitled to discipline an employee for conduct that occurs outside of the workplace. In certain circumstances, however, discipline can arise from off-duty conduct. This most commonly occurs when an employee shares unfavourable information about their employer or place of employment on social media. Another example is when an employee engages in offensive conduct outside the workplace that is shared with the employer or the world, as in those instances where recordings go viral.

The test for when off-duty conduct may lead to discipline is set out in *Millhaven Fibres Ltd. v. Oil Chemical & Atomic Workers Int'l Union (Local 9-670), [1967] O.L.A.A. No. 4.* If any one of the following conditions is established, discipline can follow:

1. The conduct harms the employer's reputation or product;

2. The conduct renders the employee unable to perform his/her employment obligation;

3. The conduct leads to a refusal, reluctance or an inability of co-workers to work with the employee;

4. The conduct is a serious breach of the *Criminal Code*; or

5. The conduct inhibits the employer's ability to efficiently manage and direct the workforce.

It is important to note that arbitrators have interpreted the meaning of "harm" to an employer very broadly. It can involve simple public controversy or negative publicity. There is no requirement to prove that publication or dissemination of the harmful information was widespread. The mere fact that the impugned information was posted to limited "friends" or "followers" is considered adequate publication, sufficient to establish harm to the employer.

Further, direct evidence of harm is not required and potential harm to an employer's reputation or business is a sufficient basis for discipline.

Making criticisms of a co-worker or manager's performance, disparaging the workplace, disclosing confidential information, threatening a co-worker or manager on a social media site, in emails, or on a blog, are all actions that can and have led to disciplinary responses from employers. More often than not, discipline has been upheld by arbitrators.

Sometimes even expressing your own opinions which are not directly related to your employment can lead to discipline when those comments are not in keeping with the values or image of your employer. For example, making racist or sexist comments led to the dismissal of two employees because the expressions made conflicted with the values of the employer: *E.V. Logistics, supra, and Toronto (City) v. Toronto Professional Fire Fighters' Assn.*, supra.

Consequences have arisen for individuals who have made poor choices about their public conduct that led to video footage going viral and bringing public pressure on their employers to respond. Desmond Hague, the CEO of Centreplate Corp., abused a puppy in the elevator of a downtown Vancouver hotel. He lost his job and paid a significant financial donation to the SPCA when video of his conduct was released online and the public conveyed their outrage.

Shawn Simoes, a Hydro One employee, was fired after being filmed at a soccer match in Toronto espousing sexually harassing comments made to a female sports reporter at the event. While Simoes' union was able to get him reinstated, the public embarrassment

and disgust over his comments undoubtedly had a profound effect on him. (For more information, see "Off duty conduct can lead to termination" in the Fall 2015 issue of *The Steward*).

In this day and age everyone has a camera in a mobile device. You should be prudent and don't risk being caught misbehaving on video. The consequences can be catastrophic.

Conclusion:

To protect yourself from employment consequence related to the use of electronic devices, social media and the internet, read the employer's usage policies and agreements. Be aware of the limitations and restrictions on usage at work and elsewhere. Even if your employer allows some personal use of employer-issued devices, consider maintaining a separate personal device that does not utilize the employer's network or memory.

Use social media responsibly and ensure you have your privacy settings maximized. Don't assume they are fail proof. Use the same level of discretion and professionalism on social media and the internet as you would with your in-person conduct. Guide your off duty conduct with the knowledge that someone is or could be watching.

Be smart. That pit in your stomach before you hit send is a great survival instinct.

It would most likely be unreasonable for an employer to randomly screen all of your emails for inappropriate images if there was no suggestion that you had engaged in such conduct.

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Why Google searches lead people astray: remedies for termination in the unionized context

BY SHEILA TEMPLE
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When members are disciplined or terminated, they naturally want to learn as much as they can about their situation. Many people turn to the Internet for information. Unfortunately, a google search can lead people astray by providing information from other jurisdictions or from a non-unionized context.

The right to reinstatement:

Many people don't realize reinstatement is an extraordinary remedy that is, for the most part, available only in unionized environments. It means you keep your job, your pay, your health benefits, your pension. In non-unionized environments, the only remedy is monetary compensation and it is limited.

The *B.C. Labour Relations Code* requires all collective agreements to contain a "just cause" provision for matters of discipline. It is this just cause provision that provides every employee working under a collective agreement enhanced job security and the right to fair discipline.

Just cause does not mean an employee can never be terminated, but it does mean that an employer has to demonstrate that it has followed the law before their termination will be upheld by an arbitrator. This is what gives union members enhanced job security. If an employer cannot provide an arbitrator with just cause that the employee engaged in behaviour that warrants discipline and that the proper penalty is termination then the employee is entitled to be reinstated. In certain circumstances, the arbitrator may also order the grievor "to be made whole." This means the grievor may be compensated for lost wages and other out of pocket expenses. This type of remedy is not awarded in all cases. Grievors, while they may be reinstated to their position, may sometimes recover all, some or none of their lost wages.

Remedies in non-unionized environments:

In contrast to a unionized worksite, employees can be terminated immediately for cause within a non-unionized environment. Alternatively, an employer can end the employment relationship by giving the employee notice or money in lieu of notice. The amount of notice depends on a number of factors, such as length of employment, age, and ability to find work in that sector. When a non-unionized employee wants to challenge the employer's decision to terminate, the action is referred to as wrongful dismissal. Wrongful dismissal cases go to court, not the labour board or an arbitrator, and generally involve situations where an employee challenges a dismissal for cause. If the court finds an employer did not have proper cause, then damages are awarded. These damages are assessed on what would have been the appropriate notice period based on the factors listed above.

Even when it is proven an employer did not have cause, it must be remembered there is NO opportunity

for an employee to be reinstated in a non-unionized environment. A former employee is awarded damages based on what would have been an appropriate notice period only. Hence, they lose the opportunity to keep working, to keep their health benefits if they had them or to keep accruing pension, if they had it. This is the major difference. Unionized employees are in a position to retain, not just their job, but all their benefits if it is found the employer acted improperly. Non-unionized employees simply get compensated through an amount of money that equals the appropriate notice period. Then they have to look for another job.

Sometimes, the courts will award what are called aggravated damages. These are awarded when an employer has acted in a particularly inappropriate manner during a person's course of employment or during the termination process itself. Of course, most people believe that in their circumstances the employer has acted outrageously. However, it is very hard to get aggravated damages awarded. The types of behaviour that might warrant aggravated damages are public humiliation, harassment or discrimination (based on the *Human Rights Code* factors). To be awarded aggravated damages, someone would have to prove the offending behaviour took place — this is not simply someone saying it did — and that they suffered emotional distress that is out of the ordinary. This too must be proved. The normal stress one feels when they lose a job is not enough to warrant aggravated damages; nor are hurt feelings. Often medical evidence is required to prove the distress felt by the plaintiff is something more than ordinary. It is very difficult to prove a case warrants aggravated damages. They are often claimed, but rarely ordered in wrongful dismissal cases.

Please note that aggravated damages are very rarely awarded at arbitration, much less than in the courts. Again, the union would have to prove, not only that the conduct took place, but the effect of the conduct on the grievor was beyond the norm. It likely would also have to be a case where reinstatement was not being sought.

Damages in lieu of reinstatement:

Since 2007 and a Supreme Court of Canada decision called *AUPE v. University of Lethbridge*, a new remedy emerged in the unionized sector. It is called "damages in lieu of reinstatement." These damages are rare. For them to be awarded, the arbitrator would have to be convinced the employment relationship between the employee and employer was beyond the point of repair. Unions argue against this remedy because it places their members in a similar position to non-unionized employees. It means employees lose not only their jobs but their benefits and pensions as well. Further, from a union perspective this remedy is seen as eroding the enhanced job security unions achieved through just cause provisions and the remedy of reinstatement. Employers have been arguing for this remedy more and more often in termination cases. Once they have terminated an employee, they simply do not want him or her back in their workplace, and this is a means to do so.

Some employees believe the word damages means they will be entitled to a large sum of money if an arbitrator finds in their favour. This would not be the case, even where the employer is found to not have just cause and where it would be inappropriate to reinstate an employee due to the employer and employee relationship being beyond repair.

When damages in lieu of reinstatement are awarded, arbitrators calculate those damages in a specific way. In the case of BCGEU members, what follows are the cases that arbitrators will pay attention to when assessing damages given in place of reinstatement.

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In 2009, the case of *B.C. Government v. BCGEU (Kambo)* was handed down. Arbitrator Steeves issued an award that found that damages were the appropriate remedy, rather than reinstatement. To calculate damages, he referred to the severance provisions in the collective agreement. In this case, the collective agreement allowed for three weeks of pay for every year of service. Nothing else was taken into account. There was no payment awarded for loss of other benefits within the collective agreement. There were no additional damages awarded. What employees would be entitled to only are the severance provisions under the collective agreement.

Subsequent BCGEU cases have followed the Kambo decision. It is likely arbitrators will follow suit for other BCGEU collective agreements.

While people may perform an Internet search, and conclude that their termination will lead to a big damages award, remember the impact the Kambo decision has in these circumstances. Damages in lieu of reinstatement are based on the severance provisions of the collective agreement. If a grievor is not reinstated at arbitration, they not only lose their job but also benefits. Damages in lieu of reinstatement do not fully compensate people for losing access to benefits, such as extended health and pension plan.

With this in mind, it is best to advise grievors that reinstatement is always the better option, and that google searches can lead you down the wrong path.