Edge of Acceptable

Terminating employees who post in poor taste

BY BARBARA GREEN AND DEREK KIM

For many employers, the British Columbia Supreme Court's recent decision of *Kim v. International Triathlon Union* will make them think twice about terminating an employee for his or her questionable use of social media.

The employee in question was a senior manager of communications at the International Triathlon Union (ITU) before she was terminated for a number of unprofessional and insubordinate social postings on social media. She argued she was wrongfully dismissed without cause or reasonable notice.

ITU noted the employee's online behaviour in the months leading up to her termination. On the employee's social media accounts, she posted negative tweets about her work and, on her personal blog, compared her interactions with her boss to psychological and physical abuses by her mother. Although readily accessible to the public, the employee argued that her posts were written in a joking manner to reflect her sense of humour:

1. "Surprisingly fun congress after-party last night. probably the only time I'll see so many Eboard members hungover & lamenting those tequila shots."
2. "I wonder if other IF congresses have as much propaganda as ours…"
3. "Just like when I was a kid, this person that I stupidly thought cared doesn't give a sh*t and just wants to beat my head in."

Since the employee was responsible for managing ITU's communications and to serve as its "voice," the employer argued that she was properly terminated for cause. The court disagreed. In arriving at this conclusion, it outlined legal requirements for establishing a cumulative cause for termination:

1. The employee was given express and clear warnings about his/her performance;
2. The employee was given a reasonable opportunity to improve performance after the warning was issued;
3. (Despite this), the employee failed to improve his/her performance; and
4. The cumulative failings prejudiced the proper conduct of the employer's business.

The court applied this test and found that ITU had failed to give the employee "express and clear warnings" that her social media posts were unacceptable, and that her employment was jeopardy if she continued. Instead, the employee received an increase in her compensation, maintained her role throughout the course of her postings and was merely notified that her communication style did not align with ITU at the time of her dismissal. The case turned on the fact that she had never been reprimanded or disciplined for the posts.

The court awarded her damages equal to five months' notice of termination (less any mitigation), taking into account her length of service, age and the availability of other comparable employment opportunities.

Based on this case, employers should consider adopting a social media policy and take active steps to provide employees with express and clear warnings if conduct is viewed as inappropriate. General remarks about communication style do not suffice. Further, prior to termination, an employer should consider if a single instance of misconduct sufficiently justifies termination. And, as always, they should seek legal advice prior to an employee's termination. **OHB**

BARBARA GREEN *is a partner of Robins Appleby LLP.* **DEREK KIM** *is a summer student at Robins Appleby LLP.*