Cumulative Cause.2

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Introduction

The constitutional freedom of expression that Canadians enjoy does not extend to private workplaces. What are employee limits on speaking out against private employers?

The last Employment Law column narrated the story of Ms. Kim, a media specialist in the position of Senior Communications Manager employed by the International Triathlon Union ("ITU"). Kim was the ITU's voice, responsible for all its messaging, including all website content. Communication was at the core of Kim's employment. She was well aware of the importance and accuracy of the written word, not to mention objectivity and discretion. Nevertheless, she posted numerous derogatory and unprofessional comments about her work, employer and supervisor on social media.

Some of her Facebook and Twitter posts could be interpreted as coming from someone who was fed up with her job or felt harassed in it. She mentioned "propaganda" as a product of her organization and implied ITU had "no values or morals, we just go wherever the money is." Kim was warned many times by ITU that her style and tone of communication was not acceptable. Her supervisor spoke to Kim "many times, to the point of exhaustion."

The warnings went unheeded. In her blog, Kim published a nasty, rambling tirade comparing her supervisor to her abusive mother. International contacts working with ITU complained about her communications and petulant behaviour.

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At the end of the last column, the question was raised whether these public unprofessional, far-reaching communications made by ITU's Senior Communications Manager had irreparably harmed the trust inherent in the employment relationship. Were Kim's actions incompatible with continued employment with ITU? Did they comprise sufficient legal grounds for ITU to fire Kim [http://www.lawnow.org/cumulative-cause-1/]?

Judicial Decision

The Senior Communications Manager challenged her firing by ITU. In *Kim v. International Triathlon Union*, 2014 BCSC 2151 [http://canlii.ca/t/gfbm4], the trial judge used context to determine whether Kim's misconduct constituted sufficient cause. The severity of an employee's misconduct must be proportional to the firing (which is considered the capital punishment of employment).

Only in exceptional circumstances will a single act of misconduct justify summary dismissal. The employee misconduct must be serious and incompatible with the employee's duties and prejudicial to the employer, or irreparably harm the relationship between employer and employee. You might think: this looks like ITU had sufficient cause.

Not so fast. The judge observed that ITU did not rely on a *single act* of Kim's misconduct to justify her dismissal for cause. But had ITU proven *cumulative cause* to fire Kim?

What is cumulative cause? If there has been patient, documented, progressive discipline culminating in a clear "final warning" which was then answered by a final act of misconduct, ITU could rely on cumulative cause as a legal basis for firing Kim.

In this case, the judge rejected cumulative cause. ITU had not progressively disciplined Kim. Discussions with Kim about her communication style were not disciplinary warnings. Nor had ITU issued Kim a "final warning." The judge wrote:

> [219] . . . no written or oral warning was given to the plaintiff that the impugned social media posts were inappropriate and unacceptable and that if she did not cease and desist from such performance and change her ways that her continued employment was in jeopardy.
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> [220] . . . [her supervisor] never reprimanded, disciplined or criticized the plaintiff specifically regarding the content of the social media posts relied upon by ITU for cumulative cause, notwithstanding her insistence that she found them troubling, offensive, and … shocking. In the result, I find that [the supervisor's] discussions with the plaintiff about her communication style are not tantamount to, nor qualify as a warning, or warnings to the plaintiff in accordance with the established law on this point.
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> [221] . . . I find that ITU cannot rely upon cumulative cause as a ground for the plaintiff's termination because ITU did not give the plaintiff an "express and clear" warning about her performance relating to the social media posts, and a reasonable opportunity to improve her performance after warning her.

The judge referenced *Lowery v. Calgary*, 2002 ABCA 237 [http://canlii.ca/t/5grk], the leading case on cumulative cause:

> Where the employer alleges cumulative cause for such dismissal, it must prove . . .

1. The employee was given express and clear warnings about his performance;
2. The employee was given a reasonable opportunity to improve his performance after the warning was issued;
3. Notwithstanding the foregoing, the employee failed to improve his performance; and
4. The cumulative failings "would prejudice the proper conduct of the employer's business".

The judge found ITU's firing of Kim to be wrongful and awarded Kim damages in the amount of five months of wages and benefits on the basis of 22 months of employment. This amounted to about $30,000.

What We Learn from this Case

It is risky for employees to express their exasperation at work. It is even more risky to broadcast it to the world on social media.

What is cumulative cause? If there has been patient, documented, progressive

Employers need to have a social media and Internet use policy. If employers use Facebook and other forms of social media, they also can

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expect their employees to do so. Kim said her work and communication style was casual which reflected her workplace. She claimed that in the absence of a formal written policy, these social media behaviours outside of work would be acceptable to her employer.

Sometimes employers and bosses believe their employees who demonstrate an insolent attitude or are otherwise underperforming must obviously know they are courting dismissal. Yet they say nothing. This supervisor's warnings to Kim about her inappropriate communications ultimately bore no legal effect. Employers must be specific about what performance is required and what behaviour will not be tolerated, and in a "last chance" or "final warning" letter clearly stipulate that a failure to improve will lead to firing. In other words, the employer must document behaviours and progressive discipline and emphasize the ultimatum. The employer must *confront* the errant employee.

For Kim, five months of reasonable notice period damages under the common law was generous but winning it came at a high cost. When she was fired, Kim was offered five weeks of pay. She refused and went to court. Her out-of-pocket costs of hiring two lawyers to run the five-day trial in 2014 probably exceeded any net proceeds from this legal victory, even after some indemnity from ITU.

There were no winners in this case.

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