IN FACT AND IN LAW

JANUARY 2012

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Labour and Employment

DISCIPLINARY MEASURES RELATING TO THE USE OF COMPUTER EQUIPMENT: *COCA-COLA* IS FORCED TO REINSTATE AN EMPLOYEE

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THE COMMISSION DES RELATIONS DU TRAVAIL (THE "COMMISSION") RECENTLY RULED ON THE WAY IN WHICH AN EMPLOYER PROCEEDED TO IMPOSE A DISCIPLINARY MEASURE ON AN EMPLOYEE DUE TO HIS USE OF COMPUTER EQUIPMENT BELONGING TO THE EMPLOYER.

ON OCTOBER 11, 2011, THE COMMISSION ALLOWED THE COMPLAINT FILED BY THE EMPLOYEE UNDER SECTION 124 OF THE *LABOUR STANDARDS ACT*[1] ALLEGING THAT HIS EMPLOYER HAD DISMISSED HIM WITHOUT JUST CAUSE.

THE CONTEXT

In *Caron* v. *Compagnie Rafraîchissements Coca-Cola Canada*[2], the employer had reproached the complainant for having made inappropriate use of computer equipment put at his disposal, having navigated on the Internet for personal purposes during his working hours (theft of time), and having downloaded and stored pornographic images on his computer, the whole in contravention of the policies and code of ethics in force in the business.

The employer invoked a breach of the relationship of trust and the seriousness of the complainant's actions as the particular reason for its decision to dismiss him. At the time of his dismissal, the complainant had been a distribution supervisor at the warehouse for more than two years and an employee for more than 25 years.

The employer had carried out a routine inspection of its server and discovered by chance pornographic files saved in a folder placed on the hard disk of the complainant's computer. His work station had been put under surveillance during a period of five months, following which the employer concluded that the complainant had downloaded and saved in his computer some 250 pornographic images and visited more than 15,000 Internet sites for personal purposes during his working hours.

The complainant had been summoned to a meeting during which his superiors informed him of general criticisms. In reply, the complainant denied having visited pornographic sites or downloaded pornographic videos on his server. The employer dismissed him a short time later.

THE COMPLAINANT'S CLAIMS

At the hearing, the complainant claimed that he had not downloaded the files from the Internet, but rather he had copied them from emails received by other employees of the business, including certain ones that came from his regional directors. The complainant declared that he used the computer equipment only during his break periods and after his shift. He felt that the sanction imposed was too severe, taking into account the fact that there was no written policy or code of conduct in existence that clearly established the rules that apply concerning the use of computer equipment. Furthermore, he declared that he had never been notified that he ran the risk of being dismissed if he kept pornographic images on his computer and that he had not been given an opportunity to mend his ways. Lastly, he mentioned that a corporate culture that was permissive until that time had led him to believe that such activities were harmless and without consequences.

[1] R.S.Q., c. N-1.1.

[2] 2011 QCCRT 0470 (C.R.T.).

THE COMMISSION'S DECISION

The Commission confirmed that no written policy or code of ethics had been in existence at the employer's establishment concerning the rights or obligations of employees regarding the use of computer equipment at work. It noted that its case law is to the effect that, in such a context, in the absence of a clear policy, it will refuse to maintain a dismissal. However, it conceded to the employer that the adoption of such a policy is not necessary to make employees understand that theft of time is unacceptable, like it is in the case of distribution of pornographic material.

The Commission was nevertheless of the view that the employer had not proved the number of hours that the complainant had "stolen". No number was put forward and the Commission did not have the benefit of any summary of the data filed by the employer. The employer could not prove that the videos recorded in the complainant's folder had been downloaded directly from the Internet and not copied from emails, as claimed by the complainant.

As regards the pornographic emails and videos, the Commission emphasized that the complainant had admitted to it that saving such files was not appropriate, but claimed that he could not have reached the same conclusion at the time of the actions for which he was reproached, when "everyone was doing it".

Moreover, this statement by the complainant was corroborated by testimony confirming that in the past several employees of the business frequently exchanged obscene emails as a joke. As for warnings given by the employer concerning the use of its computer equipment, only two verbal notices had been given, including one after the incident involving the complainant.

In its assessment of the appropriate kind of sanction, the Commission noted the existence of a permissive culture and general laxity on the part of the employer regarding the use of computer equipment.

The Commission felt that the seriousness of the complainant's inappropriate conduct was mitigated by his belief that such conduct had been tolerated for many years.

As mitigating factors, the Commission also considered the complainant's clean disciplinary file, his positive performance, the fact that he had not been given a chance to mend his ways, the fact that no disciplinary measures had been taken with respect to the other employees who had engaged in similar conduct, the absence of any repercussions as regards customers, the absence of consequences for the other employees and the fact that the use of the material for personal purposes had been tolerated.

Furthermore, the employer had based itself on only one data statement produced by the manager of the computer system based in the United States, without carefully examining it and trying to understand its real impact. The Commission emphasized that this omission had resulted in the complainant being accused of much more serious misconduct than that in fact committed.

The Commission was of the opinion that the employer had not considered the real seriousness of the complainant's conduct, but rather the urgency or necessity of sending a clear message to all its employees that it intended to start applying its new "zero tolerance policy". As mentioned by the employer during the hearings before the Commission, the sending of obscene emails and the storing of images constituted a phenomenon to be eliminated from the business and it had wanted to make an example out of the case of the complainant. Therefore, the sanction imposed on him was discriminatory.

Lastly, the Commission mentioned that even if the policy had been written and distributed, it would not have been sufficient for the employer to invoke the breach of the relationship of trust to justify a dismissal.

The complainant's denial of the employer's allegations had contributed in large part to the latter's conclusion that there had been a breach of the relationship of trust. However, the employer had not given the data statement to the employee. If it had done so, that would have enabled the employee to know exactly what he was accused of doing. Considering the inaccurate information received by the complainant, he was justified in denying the theft of time of which he was accused.

Therefore, the sanction was not only discriminatory but also disproportionate to the actual misconduct. The Commission cancelled the dismissal, substituted a suspension without pay for two weeks and ordered the reinstatement of the complainant.

COMMENTS

This decision provides guidance as to what investigations and other steps a careful employer should plan to carry out in similar circumstances before dismissing an employee.

Before invoking a "zero tolerance" policy, an employer should, most importantly, make sure that it is distributed, known and applied in a uniform manner within the business.

Such a policy must respect certain conditions in order to be valid: it must be clear, unequivocal and reasonable, and be known by the employees, both in its scope and as to the consequences of failure to comply with it, before it comes into force, and lastly it must be applied in a uniform manner from the time when it comes into force. In a unionized environment, the policy must not conflict with the collective agreement in force. In addition, like any policy, it must be updated regularly.

Furthermore, it is important to reiterate the scope of the obligation of every employer to act fairly and, accordingly, not to act in a manner that is unjust or discriminatory when imposing disciplinary measures. In order to comply with this obligation, the employer must sanction the same behaviour in the same manner and maintain a certain consistency in the exercise of disciplinary power. In the case discussed above, the employer had shown itself to be tolerant regarding the sending of jokes and obscene emails between employees. Having done so, the employer could not impose the most severe sanction on the complainant when it had failed to sanction all of the similar previous behaviour.

The more and more frequent use by employees of computer equipment, cellular phones and social media or networks, must be managed by employers; they should think ahead and clarify their requirements concerning such use. To the extent that they authorize such use, employers should adopt clear policies in order to enable employees to know the limits of their employer's tolerance. Although the adoption of a written policy is not obligatory, a written policy facilitates sound management of disciplinary measures and can avoid many difficulties.

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