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The Employment Code of Conduct – That Can't Get Me Fired, Can It?



Peter Bowal and Ariel Prence

It is important to situate a document like the Code of Conduct in the larger workplace context. Employers have the right to set the ethical, professional and operational standards for their workplaces. Doing so not only falls within an employer's management rights, it also constitutes an integral component of corporate good governance. The workplace is not an employee's home; and employees have no reasonable expectation of privacy in their workplace computers.

Poliquin v. Devon Canada Corporation, 2009 ABCA 216

Introduction

Many employees today use their workplace computers for some personal use, mostly to surf the web, read and send emails, and even do online shopping. Often, employees forward humorous emails of pictures, links and jokes to friends, co-workers and family. To an employee, it may not seem wrong to send such emails and attachments, but the employer and some recipients may not see it the same way. Some messages may be interpreted as racist, obscene, sexist, pornographic or otherwise objectionable by co-workers. And not all recipients, including those monitoring the employer's server, will get the joke.

Likewise, what are employees to do with a business gift offered by a customer, such as a bottle of wine or a seat in the client's corporate box at the hockey game? They would not have been offered these goodies without being in their positions at work, and who knows what integrity and objectivity might be compromised by indulging in these treats. Both inappropriate use of the computer and acceptance of gifts might violate employees' Codes of Conduct, leading to discipline, including termination, by their employers.

Most Canadian companies with a workplace computer policy can track usage, websites visited and key strokes. Their surveillance of these seemingly innocent and commonplace workplace activities can produce evidence of violations of internal employment Codes of Conduct. An employment Code of Conduct or Employee policy manual sets out the private rules of the workplace, including such matters as computer usage policy, agency and signing authority, alcohol and drug use, hiring of family members, abusive interactions such as harassment, receipting and expense accounting, and conflicts of interest around things like gifts and hospitality.

Personal access to blogging at work and to social networking sites like Facebook and Twitter have caught up with people in some high profile cases. The personal use of computers and issues of conflict of interest at work were the focus of a recent Alberta Court of Appeal decision

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The Facts: *Poliquin v. Devon*

Claude Poliquin worked for Devon Canada Corporation (Devon) from 1980 until his termination in late 2006, almost all of that time as a supervisor. He was dismissed for cause arising out of non-compliance with his employer's Code of Conduct. Specifically, he was fired for using Devon's workplace computer equipment to access the Internet to view and transmit pornographic and racist material in violation of the Code of Conduct, and for accepting free landscaping services at his personal residence from Devon's suppliers, all in violation of the employment Code of Conduct and Corporate Policies.

Poliquin sued Devon for wrongful dismissal. Devon felt so strongly about its case that it moved to immediately strike Poliquin's lawsuit. Summary dismissal is rarely granted because it quickly closes

the courtroom doors to parties seeking a remedy. It is final judgment without a trial on the ground that there is “no genuine issue of material fact requiring trial”. Applications for summary dismissal are based on facts disclosed in affidavits and transcripts of cross-examination on them.

Devon argued that Poliquin’s misconduct in breaching its employment Code of Conduct justified immediate termination. The judge found Devon’s case wanting and dismissed the motion. The Alberta Court of Appeal took a different view of the facts and law. It upheld Poliquin’s firing.

Employee Using Workplace Computer For Personal Use

Modest and discreet personal use of computers, telephones and copiers at work usually will not be noticed or attract discipline. Yet many of us take this privilege for granted. When Devon searched Poliquin’s work computer, it found 881 personal pages or files, and many pornographic, obscene or inappropriate photos. All were prohibited under the Code of Conduct.

Poliquin admitted to sending these emails to some of Devon’s suppliers, business contacts and fellow employees. He was aware that using his workplace computer in this way was a violation of the Devon Code of Conduct, which expressly prohibited use of email for “sending ... pornographic, obscene, inappropriate or other objectionable messages or attachments via email to anyone.”

Poliquin had been warned about this in 2001, when it was discovered he had accessed pornographic material on the Internet. He admitted to misusing his workplace computer and promised it would not happen again. He understood “it was not acceptable to use Devon computer equipment to access such sites or to exchange pornographic images.”

Not all policies and rules enjoy the same status. Some are more important than others and many are not monitored or enforced. Can companies fire an employee, especially a supervisor with long service, because he used his work computer and Internet access to view and pass on “objectionable” messages?

A panel of three Alberta Court of Appeal judges agreed: it is possible for an employee to be fired for certain breaches of a Code of Conduct after a warning has issued, even where no palpable physical or financial harm has occurred. Employers have the prerogative to set the ethical, professional and operational standards for their workplaces, which promotes good corporate governance. An employer’s reputation can be seriously harmed by such acts, especially from an employee with supervisory status. The Court of Appeal noted that, today, email can be sent to many recipients inside and outside organizations with the click of a mouse. Employers may not only prohibit use of its equipment and systems to protect against pornography and racism, but they may also monitor employees’ use of their equipment and resources to ensure compliance.

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Employee Solicitation of Services From Employer's Suppliers

A supervisory position at a company brings more familiarity with suppliers or business partners of the employers due to control over contracts. Soliciting goods or services from these suppliers without paying for them, is dishonest and may lead to termination.

Poliquin solicited and received free landscaping services at his personal residence from Devon's suppliers. One supplier, which furnished free landscaping services, admitted it did so because Poliquin was not only a friend but also a business associate. It felt pressured to provide the freebie services because of Poliquin's supervisory position.

Accepting a secret commission or benefit raises issues of both dishonesty and conflict of interest. Does this constitute sufficient legal cause for firing? According to the *McKinley* principles, a judge will consider whether the employee violated an essential condition of the employment contract, breached the faith inherent in the work relationship, or acted fundamentally or directly contrary to the employee's obligations to the employer. This test focuses upon the employment contract, including the Code of Conduct. Employees are expected to render loyal and faithful service to the employer, and that obligation increases with the level of responsibility attached to the employee's position.

Again, Devon's Code of Conduct admonished employees to avoid behaviour that even potentially creates a conflict between their obligations to Devon and their personal interests. The Code stated: "Employees must avoid the direct or indirect receipt or solicitation of ... gifts ... or other favours from ... firms that exceed what is generally considered nominally valued, common-courtesy items usually associated with ethical business practices."

Outcome

The Alberta Court of Appeal took into account the cumulative effect of Poliquin's misconduct and determined that his summary dismissal was justified. Poliquin was a senior supervisor who was expected to model professional service to others. The misconduct of a senior supervisor will be viewed more seriously.

While no person had complained about Poliquin's pornographic and racist emails, the Court of Appeal "presumed harm from the polluting of Devon's workplace with pornography regardless of whether anyone complained." The Court of Appeal concluded that "after taking into account all circumstances and considering Poliquin's misconduct cumulatively ... there is no genuine issue of material fact requiring trial ... it is plain and obvious that Poliquin's wrongful dismissal action cannot succeed."

An employee's acceptance of a perk or benefit for his own personal advantage, particularly when the employee is in a responsible position, makes the employer "hostage to a potential contractor." Poliquin's solicitation and receipt of landscaping services from Devon suppliers amounted to

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misconduct which alone justified dismissal for cause. Any material diversion to an employee's personal benefit can lead to a loss of employer confidence and legal grounds for summary termination.

A company may reasonably expect its employees, and especially supervisors, to exercise sound judgment in dealings with co-workers and suppliers, including compliance with the workplace Code of Conduct which contains such standards. Poliquin had trampled and abused that trust.

Lessons Learned

This case demonstrates how a Code of Conduct is an enforceable piece of the employment contract. The law will permit employers to monitor use of its computer equipment for legitimate business objectives. Companies might even block certain websites from view.

Employers should keep their Codes of Conduct up to date and in front of their workforce from orientation onward. They should conduct regular reviews where employees sign off that they have read and understood them. Relatively few rules will warrant summary dismissal when breached, so employers should warn non-compliant employees and give them an opportunity to fall into line. Employers should be even-handed and fair when enforcing the Code. And finally, the *Poliquin* case reminds us that customers and suppliers are assets of the employer, not the employees, even supervisors. Employees should never deliberately insert themselves into a situation where their personal interests conflict with their employer's interests.

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