

HILL ADVISORY NEWS

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Was Employer Justified in Dismissing 6 Employees for Distributing 'Sexually Explicit' Material by E-mail ??

**HOT
MAIL**

- * A Provincial government department discovered that some of their employees in the workplace were distributing 'sexually explicit' material by e-mail. Each time an employee logged on to their computer a warning appeared stating that 'unauthorized use of the computer system was prohibited.' There was also a 'zero tolerance' policy in effect with respect to discrimination and harassment in the workplace.
- * The employer subsequently began a lengthy investigation and as they reviewed the initial accounts they became aware of several other employees who had also either sent or received 'inappropriate' e-mail. Consequently, as this review continued and additional employees were revealed, they were also investigated.
- * As part of the evidence gathering process, a summary sheet for each employee was created. This sheet identified a particular employee, his or her position and some basic information about the material found in each employee's account. This basic information included: date; who the material was received from and/or sent to; the subject and content of each item; and whether it had been deleted. Once the evidence was compiled it was reviewed to determine the type of images found, the number of images or text, and the frequency and/or volume of the exchange or receipt of material.
- * A total of 189 employees' accounts were reviewed in the investigation. The employees were divided into 2 groups. The first group referred to as the 'A-List' included employees who appeared to have engaged in serious contravention of the company's policies regarding Workplace Discrimination and Harassment Prevention (WDHP Policy) and the Operating Procedure on Usage of I.T. Resources (IT Policy).
- * The second group referred to as the 'B-List' included those employees who had less than 5 'mild' images on their e-mail account and had received questionable material, but did not distribute it. The employees on the 'B-List' were required to attend formal meetings with their managers but were not disciplined. The employees on the 'A-List' were interviewed by their senior manager and given the opportunity to respond to the allegations against them.
- * This gave them the chance to explain their conduct and to identify 'mitigating' factors. After the meetings with the employees each individual manager decided what penalty, if any, to impose on them. Almost all of the allegations against the employees on the 'A-List' were substantiated. They subsequently received letters advising them they were found to have violated the company's 'WDHP' and 'IT' policies.
- * Of the 90 employees on the 'A-List' 16 were in management and 74 were bargaining unit employees. The employer disciplined 66 employees ranging from letters of reprimand and suspensions of varying lengths to the discharge of 6 employees. *The union subsequently filed a grievance on behalf of the discharged employees stating that while the employer had cause to discipline the employees, the penalty of discharge was excessive considering the circumstances.*
- * The union argued that the mere receipt and deletion of 'inappropriate' material could not subject an employee to discipline on the theory that an employee cannot be responsible for the actions of others. They also stated it was important to note *'No employee had complained to management about receiving the offensive material; there was no evidence to establish that the distribution of the inappropriate material in the workplace created a poisoned work environment; and that the grievors did not intend to harass other employees.'*
- * The arbitrator felt the receipt and distribution of material by e-mail in the workplace which objectifies, denigrates and depicts acts of violence against women and which is objectionable in other aspects from a human rights perspective poisons the workplace. In his view this created an *'unwelcome, oppressive and hostile environment for women and others'* and served to lower the status of women. In addition, he noted *"The absence of a complaint did not alter the nature of the activity engaged in by the grievors and the other employees who were disciplined."*
- * The arbitrator stated that just as the nature of activity for each disciplined employee varied, there were differences with respect to the level of *'offensiveness.'*

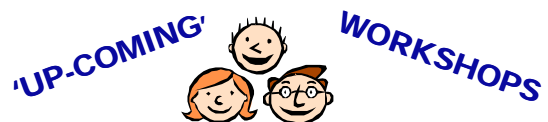
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- * The arbitrator noted that some of the *'inappropriate'* material was quite *'mild'* while some of the images and videos would be considered very *'offensive'* by any objective standard. He stated *"The inappropriate material forwarded by the 6 grievors contributed greatly to a poisoned workplace and it was far more serious than the conduct of the other individuals who received suspensions."* The arbitrator felt for the most part, it appeared many employees sent and received the material with the view the material was *'humorous.'* He determined the grievors were not engaged in a passive activity when they received and then deleted *'offensive'* items and they explicitly, and in some cases implicitly, invited the receipt of *'inappropriate'* material. At no time, he stated, did they advise the sender not to send such material again.
- * The arbitrator found that many of the employees investigated appeared to believe the *'electronic transmission of offensive material to persons who wished to receive it'* was not as serious as the *'physical display of such material in the workplace'* because they felt that sending the *'offensive'* material electronically was private. He stated this was not the case as some employees saw *'inappropriate'* material on monitors next to them and the sender had no control over what the recipient did with it once they received it.
- * The union had argued there was a *'rush to judgment'* and the employer had not given *'appropriate consideration to mitigating factors.'* The arbitrator felt there had been no *'rush to judgment.'* However, he agreed that during the investigation/disciplinary process, the employer had given very little consideration to the fact that the managers had *'condoned'* the grievors' behaviour. He noted this was a significant *'mitigating'* factor.
- * The arbitrator acknowledged that the *'involvement of managers in the sending and receiving of offensive e-mails'* gave the grievors the impression the employer *'condoned'* such conduct and that such conduct was not that serious. However, he felt that it did not entirely absolve them of responsibility.
- * The union also submitted there was nothing unique about the conduct of the grievors that would make it *'inappropriate'* to apply the principle of progressive discipline. The arbitrator agreed that all of the grievors had a *'discipline free'* record and even though some of the grievors had a short length of service and the offence committed was serious, it was still appropriate to take into account their *'discipline free'* records.
- * The arbitrator stated *"It is trite to observe that the purpose of discipline is to correct inappropriate employee behaviour. Arbitrators have held that discharge should not only fit the offence, but also that it should only be utilized where it is unlikely a lesser penalty would be sufficient to correct the inappropriate behaviour."* He indicated *"My view is the matter of a discipline free record is deserving of more weight than the employer gave it."*
- * The arbitrator noted the grievors acknowledged that what they did was wrong and did not deny responsibility for the *'inappropriate'* e-mails. They expressed remorse and indicated they would not engage in such conduct in the workplace again. He believed the grievors were sincere and felt they did not testify in this way only because it was convenient to do so.
- * The arbitrator felt the grievors did come to appreciate how the presence of *'offensive'* material sent and received by e-mail could contribute to a *'poisoned work environment'* and there was every likelihood that this conduct would not be repeated by them. In addition, the arbitrator noted that none of the grievors were accused of engaging in *'inappropriate'* e-mail activity when they should have been working.
- * The arbitrator concluded that the *'employment relationship had not been irrevocably damaged'* and there was no indication that the grievors could not return to the workplace. While conceding that the employer had cause to discipline the grievors, he determined that *'discharge was inappropriate'* and substituted the discharges with suspensions of varying lengths from 2 to 8 months.

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