

In the matter of an arbitration

B ETWEEN:

The City of Toronto

'The Employer'

and

The Toronto Professional Fire Fighters' Association, Local 3888

"The Association"

and in the matter of the grievance of Matt Bowman,

Elaine Newman, Arbitrator

Hearings at Toronto, May 21, July 11, October 15, 16, 22, 24, 2014

Appearances:

For the Association	James K. McDonald, Ed Kennedy, Brant Heppell, Neil McKinnon, Dave Holwell, Doug Erwin, Geoff Boisseau,	Counsel Association President Provincial Representative Grievance Chair Grievance Committee Grievance Committee Grievance Committee
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For the Employer	Heather Crisp, Justin Basinger, Matthew Pegg, David Sheen, Janet Ransom,	Counsel Counsel Deputy Fire Chief Division Chief Labour Relations
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A W A R D

The grievor is a firefighter with two and one half years' service. He was terminated from employment on September 16, 2013 for inappropriate off-duty use of his "Twitter" account. The Association grieves termination. There is no challenge to the arbitrability of this grievance, or to the jurisdiction of this Board.

The Association does not dispute that the grievor made a series of comments on his Twitter account, many of which were sexist, misogynist and racist. Some were offensive in their discussion of people with disabilities. Others were offensive in their references to homeless people. One invaded the privacy of others. Many were jokes, juvenile in nature, with sexual themes.

The grievor sent these "tweets" to his "followers", whom he describes as family and friends. He sent tweets to "porn stars", one of whom posts tweets from followers on her website. He sent tweets to a former radio host who circulates misogynist comments to his followers.

The grievor testified that he did not understand that his tweets could be accessed by members of the public. He said he thought he was communicating in private only with people he knew. In one case, he said he thought he was communicating privately with his girlfriend.

The grievor learned that the public could access his remarks when the National Post published an article on August 9, 2013, that featured three of his tweets. The article described a culture among some firefighters that might not be welcoming to women. The newspaper had determined the grievor's status as a firefighter from the Toronto Fire Service recruit list. Both he and the Employer were identified.

The National Post published three messages:

"Reject a woman and she will never let it go. One of the many defects of their kind. Also weak arms."

"I'd never let a woman kick my ass. If she tried I'd be like HEY! You get your bitch ass back in the kitchen and make me some pie."

"The way to a woman's heart is through anal."

The Association does not dispute that there is a work-related connection to the grievor's Twitter activity, at least to the extent that he identified himself as a Toronto firefighter. He posted a

profile page that included a photo of himself in Toronto Fire Service (“TFS”) bunker gear, with the address “@Hero_Matt”. Some of his followers were TFS employees.

When he learned of the publication the grievor immediately closed his Twitter account. He has not re-opened it.

The Employer suspended the grievor with pay pending investigation. In his first interview with the Employer, the grievor produced a letter of apology. It said:

... As you are aware it was three tweets from my Twitter account that formed part of the basis for an article in the National Post which I realized was deeply embarrassing to the TFS and which deeply offended the women firefighters in the Toronto Fire Services. There is simply no excuse for what I wrote. I insulted all female firefighters with what I wrote.

It is no excuse to say that the tweets were intended to be read only by my friends. It doesn't matter who I thought would be reading the tweets – to have written what I wrote was wrong and totally indefensible.

It is very unfortunate for me, and the TFS and the female firefighters in the TFS, that it took this article for me to realize how what I was writing, and what I thought would be funny to those who read it, was deeply demeaning to my fellow firefighters, both male and female, but particularly female. I realize that it is co-workers such as me, and others who might have thought what I was writing was funny, who are making life in the TFS difficult and sometimes unbearable for many of the female firefighters in the TFS. After reading the article, and reflecting on what I had written and what the reporter had written, I came to realize that women will never feel comfortable in the TFS and will never be able to develop their potential as firefighters, until firefighters like me change what we think and what we say and how we treat our co-workers.

And I realize that what I wrote was particularly offensive because a picture of me in TFS gear was with the tweet. I always realized that when I wore that gear publicly, I was representing the TFS. I now realize that whenever I wear that gear, and whenever I say or do anything with the gear on, I am representing the TFS. I am proud to be a firefighter and wear the TFS gear, as I am sure are my fellow female firefighters. I deeply regret that I have tarnished the image of the TFS in this way with what I wrote.

I can only commit to making sure that it never happens again. Not only when I am wearing the TFS gear, or representing the TFS, I will be changing not only by behaviour but also my thinking. I can

only hope that my conduct, and this article, will make other male firefighters reflect on their conduct, as I have been forced to do, and see the error of their ways. The TFS should be a welcoming place to work for all firefighters. I will do what I can to make sure that is what it is.

A second batch of offensive tweets came to the Employer's attention. Some of these were emailed by an individual who identified himself. (There is no evidence regarding source's true or his relationship to any of the parties). Among this batch were the following:

The grievor's response to a question about where he had his phone fixed, *"A paki store in Whitby mall. FM communication. No discrimination intended."* When a follower pointed out that the term was derogatory, he replied *"Nope. This time it's surprisingly accurate"*.

When told by a friend that he had started a landscaping job, the grievor replied, *"you're being paid to work, not tweet. Next time she should hire a Mexican!"*

"... find a homeless person and either (A) ask them for advice since they live with itchy assholes; or B) wipe your ass on them"

"if you were deaf I would rape you and then break your fingers so you can't tell anyone..."

"I'm bored at work. No calls and trying to fill time"

In this batch are also photos that were re-tweeted by the grievor. There is a photograph of an Asian man who appears to suffer from Down Syndrome, conducting music, with a caption that says, "and-a one and a-four and a ching chong potato", and a pornographic photo of a female.

A third batch of offensive tweets was provided by the grievor after his termination. These include more derogatory references to homeless people, tweets sent to two porn stars, tweets sent to a former radio host that contain derogatory comments about women, photographs intended to be sexualized depictions of food, a photo taken by the grievor of three women attending a play whom he refers to as "cougars", derogatory comments about women to someone who circulates misogynist messages, messages containing derogatory references to gay people, derogatory comments about police officers, and a number of remarks such as:

"if we really think about it, vaginas are gross",

“just beat an Asian at ping pong”,

“The Easy Bake oven – teaching girls their place since 1963”,

The grievor also commented on the size of the breasts of a woman appearing in a television baseball audience.

A fourth series of offensive tweets became available to the Employer following termination, in the course of preparation for this hearing. These include derogatory references to women and gay people.

The Reason for Termination

The grievor was terminated because he violated City of Toronto and Toronto Fire Services policies and guidelines and because he harmed the reputation of Toronto Fire Service. He was not terminated for his thoughts or for his private activities.

The letter of termination states:

Toronto Fire Services has completed its investigation regarding your inappropriate use of Twitter reported in the National Post article on August 10, 2013, entitled “Toronto Fire, not the best place for women”, and other inappropriate tweets subsequently brought to our attention. This letter summarizes our findings and our decision regarding your employment status.

In the article, you were quoted about “weak arms” on women as “one of the many defects of their kind” as well as “the way to a woman’s heart is through anal”. Your Twitter account was noted as presenting your photo in the Toronto Fire Services uniform.

On August 19, 2013 we met with you and representatives of the Toronto professional Firefighters Association, Local 3888 to investigate the Twitter comments attributed to you in the National Post article. In attendance for the Association were Dave Holwell, Neil MacKinnon and Damian Walsh. At a follow up meeting on August 26, 2013, the Association was represented by Ed Kennedy, Dave Holwell, Damian Walsh and Neil MacKinnon.

At the first meeting, you acknowledged familiarity with the policies concerning human rights and conflict of interest, as well as the Human Rights Code. You admitted making the tweets quoted in

the article, but denied making any other similar tweets. You agreed that the tweets had harmed the reputation of Toronto Fire Services, and provided a letter of apology co-written with the Association.

Following the first meeting, Toronto Fire Services became aware of additional tweets that been posted by you over a 2 year period which were overtly racist, or were demeaning to women, ethnic minorities, and homeless persons. You admitted posting these other tweets, at our second meeting with you.

We have carefully reviewed all the documentation obtained through our investigation, including the National Post article, your tweets, your responses at our meetings, and your letter of apology.

Your tweeted comments are not only inappropriate but contrary to the City of Toronto and Fire Services policies and guidelines, including the policies concerning discrimination and dignity in the treatment of other persons (Human Rights and Anti-Harassment Policy, Standard Operating Policy "Rules and Regulations, s. 15) conflict of interest (Conflict of Interest Policy, Standard Operating Policy "Conflict of Interest"), and use of social media (Application of City Policies and Social Media Use, Standard Operating Guideline "Personal Use of Social Media").

Your conduct has harmed Toronto Fire Services' reputation and by extension that of the City of Toronto. Your tweets have undermined Toronto Fire Services' efforts to foster a diverse and welcoming workplace, and eroded the strong bonds of trust and respect within the workplace and in the community we serve, that are essential to firefighting work in life and death situations.

Regrettably, Toronto Fire Services has no alternative but to terminate your employment..

The Employer has abandoned reliance on the Conflict of Interest Policy.

Position of the Association

The position of the Association is that the grievor was guilty of misconduct. There was, it concedes, a work-related connection to the off-duty conduct, because the grievor identified his status as an employee of the Toronto Fire Service. Some of his followers were co-workers. He did engage in Twitter communications during working hours, while on shift in the station. However,

the Association argues that the content of the messages was never reflected in the grievor's behaviour. He has now been through a course of sensitivity training, and is not likely to re-offend.

The Association argues that the penalty of discharge is excessive in the circumstances:

The number of tweets involved is not large. The grievor sent an average of about one tweet per day. He had only 29 followers. Compared with the habits of other users, this is not a large number;

The grievor had no intention of publicly embarrassing or harming the reputation of his Employer – he thought his communications were limited to his followers, all of whom he could identify. The grievor's use of social media was reckless, but he did not use it as a weapon;

The grievor explained that the first three tweets that were the subject of the National Post article did not reflect his own mindset – the first two were quotations from popular television shows, and the third was something he had read on the internet. In fact the third tweet, which refers to anal intercourse, the grievor says he intended to send as a private tweet, only to his girlfriend;

Although the National Post article reports a climate in the workplace which is not welcoming to females, this problem is not directly attributable to the grievor. No co-worker or member of the public complained about the grievor, either in respect of his Twitter content or his professional activity. There is no complaint of harassment from any co-worker. There was no prior complaint about his work as a firefighter;

The matter came to light not as the result of any specific co-worker complaint, but because one individual disclosed to the press that which was intended to be limited to the grievor's social circle. There is no evidence that the individual was a co-worker;

Unlike most of the reported cases of social media abuse, this is not a case in which the grievor is accused of having targeted or identified anyone in the workplace in his communications;

The grievor has committed no crime and no intentional violation of any rules, guidelines, or policies. He was reckless in his use of social media, but had no intent to tarnish the reputation of the Employer.

The grievor immediately closed his account and apologized for the embarrassment caused to the Employer, and to co-workers, for the impact of the National Post article;

The grievor had not appreciated the harmful effects of discriminatory humour. He grew up in a small town, in a “jock culture”, and had little exposure to people who identify themselves as members of diverse groups. He thought the tweets were funny, or that some of his followers would find them funny. But he has had his eyes opened as a result of these events, and has participated in sensitivity training which eliminates the likelihood of future incidents. He testified that both his thinking and his behaviour have changed;

The grievor had no specific training in respect of the Employer’s policy on Personal Use of Social Media;

Although the Employer planned cultural sensitivity training, that training was not implemented before the time of these incidents;

There is no evidence that the misconduct here described will have any impact upon the grievor’s ability to perform the work of a firefighter;

The grievor is a young man, 27 years of age, who had only one ambition in life. He wanted to be a Toronto Firefighter. He had a short but clear service record;

In its investigation process, the Employer did not have regard to the grievor’s record of service, and did not ask his supervisors or co-workers about the extent to which, if at all, the grievor’s Twitter activity reflected his workplace conduct.

The Position of the Employer

The grievor disregarded a number of policies that inform all recruits of their responsibilities. These violations are serious. They caused actual harm to the Employer.

The Toronto Fire Service had recently launched a program entitled “Pathway to Diversity”, through which it intends to increase the recruitment of firefighters who are female and who represent the diversity of Toronto’s population. The grievor’s actions impaired its ability to effectively implement that program. The consequences of his actions, if only reckless and not intentional, have damaged the reputation of the TFS in this important respect. The matter drew media attention, not only in the National Post, but in a variety of mainstream and internet-based media outlets. The grievor enabled this event.

The Employer argues that the grievor was not co-operative with its investigation, and was not candid in his disclosures. It argues a lack of acceptance of responsibility and genuine learning in his sensitivity training.

The Employer asserts that reinstatement is untenable in the circumstances.

Analysis and Conclusions

The Test

A concise statement that governs the appropriate analysis of a case of off-duty conduct is found in the case of *Ottawa-Carleton District School Board and O.S.S.T.F., District 25*, (Cobb), [2006] 154 L.A.C. (4th) 387 (Goodfellow). The analysis begins with the restatement of the test established in *Re Millhaven Fibres Ltd. v. Atomic Workers Int'l Union, Local 9-670*, [1967] O.L.A.A. No.4:

...if the discharge is to be sustained on the basis of a justifiable reasons arising out of conduct away from the place of work, there is an onus on the Company to show that:

- (1) the conduct of the grievor harms the Company's reputation or product;*
- (2) the grievor's behaviour renders the employee unable to perform his duties satisfactorily;*
- (3) the grievor's behaviour leads to refusal, reluctance or inability of the other employees to work with him;*
- (4) The grievor has been guilty of a serious breach of the Criminal Code and thus rendering his conduct injurious to the general reputation of the Company and its employees;*
- (5) Places difficulty in the way of the Company properly carrying out its function of efficiently managing its Works and efficiently directing its working forces*

The test has been adopted consistently over the decades since 1967. It has been held to require an employer to prove that any one of these criteria has been met. As said in *Workers Int'l Association of Machinists, Lodge 148* (1973), 5 L.A.C. (2d) 7 (Andrews):

... the general consensus among arbitrators is that it is not necessary for an employer to show that all criteria exist, but rather that, depending on the degree of impact of the offence, any one of the consequences may warrant the discipline or discharge.

The difficulty with that approach, as pointed out by the Association here, is that the first element of the *Millhaven* test can be interpreted so broadly that any trifling damage to an employer's reputation may be said to satisfy the test. This would have the unintended effect of, in the words of the Nova Scotia Court of Appeal, "swallowing the 4th *Millhaven* test and rendering it meaningless". (See *Cape Breton-Victoria Regional School Board v. Canadian Union of Public Employees, Local 5050, (2011) NSCA 9*). Therefore, the arbitral jurisprudence adopts a method of applying the test that incorporates consideration of mitigating circumstances.

Those circumstances are discussed in the *Ottawa Carleton* case. It is the reputation of the employer that forms the focus of the analysis when any public servant is the subject inquiry into their off-duty conduct. So, in the *Ottawa-Carleton* matter, Arbitrator Goodfellow noted that the school board in question had the right to protect its reputation in the eyes of those for whom it provides service – the students and the parents of its community. Importantly, however, the Arbitrator adds this critical observation which must temper the analysis:

This does not mean, however, that the School Board, unlike other employers, is entitled to be the "custodian of the grievor's personal character or conduct": See e.g. Re Port Moody (City) and C.U.P.E. LOC. 825 (1997), 63 L.A.C. 94th) 203 (Laing). Employees of school boards, like other employees, do not surrender their personal autonomy when they commence the employment relationship. In order for an employee's off-duty conduct to provide grounds for discipline or discharge, it must have a real and material connection to the workplace, in the manner described above. And, where the interests asserted by the employer, as it is here, is in its public reputation and its ability to be able to successfully carry out its works, the concern must be both substantial and warranted. The test, so far as possible, is an objective one: what would a reasonable and fair-minded member of the public (in this case, the school community) think if apprised of all of the relevant facts. Would the continued employment of the grievor, in all of the circumstances, so damage the reputation of the employer as to render that employment impossible or untenable?

When I turn to the *Millhaven* test for assessing off-duty conduct, I note that the fourth element of the test asks if the individual has committed a "serious breach of the Criminal Code and thus rendering his conduct injurious to the general reputation of the Company and its employees".

When that test was devised, in 1967, a serious breach of the Criminal Code would have seemed, to a reasonable and fair-minded member of the public, injurious to the general reputation of the Company and its employees. I don't think that has changed in the forty-seven years since the *Millhaven* decision was published.

But it is obvious that cultural awareness and sensitivity has grown over that time, along with the diversification of our communities and our workplaces. I am confident that in 2014, a serious breach of the Employer's Human Rights and Anti-Harassment and Discrimination policy, or a serious breach of the Human Rights Code, would, to that same reasonable and fair minded member of the public, seem just as damaging to the Employer's general reputation as would a serious violation of the Criminal Code. In Canada in 2014, that reasonable person, in my view, would consider human rights violations to be very serious misconduct, injurious to the Employer's reputation.

The fourth branch of the *Millhaven* test, I suggest, might be revised in light of that diversification. It might now read, "Has the grievor been guilty of a serious breach of the Criminal Code or of a Human Rights Policy or Code, thus rendering his or her conduct injurious to the reputation of the Company and its employees?"

With that modernization of the fourth element of the *Millhaven* test, I adopt the thrust of the arbitral jurisprudence on point, and agree that the question is this: Would a reasonable and fair-minded member of the public, if apprised of all the facts, consider that the grievor's continued employment would so damage the reputation of the Employer as to render that employment untenable?

The Grievor's Apology and Candour

The grievor immediately apologized when the first three tweets were published in the print media. On the advice of the Association, and with its assistance, the grievor wrote a fulsome letter of apology. He was asked at hearing if the content of the letter reflects his genuine feelings, and he answered that it did. The Association asserts that the grievor was co-operative and candid in the Employer's investigation.

The letter of apology is an important piece of evidence. It is not, as the City would have it, diminished in value because of the Association's involvement in its editing or polishing. If this Board is satisfied that the apology is sincere, it becomes a significant mitigating factor in the assessment of penalty.

There are, however, reasons to question whether the letter does constitute a genuine assumption of responsibility and apology. These arise from several inconsistencies between the content of the letter and the grievor's testimony.

Referring to the three tweets that appeared in the National Post, the grievor's letter states that "there is simply no excuse" for what he wrote, "that it is not an excuse to say that they were intended to be read only by his friends", and that what he wrote was "wrong and totally indefensible". But in evidence, he tried to excuse, minimize and rationalize his conduct.

The grievor testified that he never turned his mind to the fact that the communications were made in a social media environment that has, as its primary function, the ability to publish comments to a world-wide audience. He testified that he thought only his followers, who were his friends and family, were receiving his messages.

He also testified that he thought, when he sent a message to an address that is prefaced with the "@" sign, that this was a private message, which would only be received and read by the single individual to whom it was addressed.

The Twitter Privacy Policy States:

What you say on Twitter may be viewed around the world instantly...

Our Services are primarily designed to help you share information with the world. Most of the information you provide us is information you are asking us to make public.

Professor Greg Elmer, Professor of Communication and Culture at Ryerson University, testified that the grievor's assumptions were incorrect. Anyone who reads the rules published by Twitter quickly learns that Twitter is an internet-based publication system that enables instant dissemination of messages to a world-wide audience. Use of the @username prefix, he explained, directs a message to one individual, but is public and is seen by one's followers. The rules include other mechanisms for specifically blocking and limiting the dissemination of messages, and for direct messages from one user privately to another.

Professor Elmer advised that there is research to demonstrate that most Twitter users don't bother reading the rules; they sign up on line and follow the prompts. When asked if they accept the Twitter rules, they simply click on the "accept" box and move on.

The grievor testified that he never read the Twitter rules. His friends helped him sign up with Twitter, and taught him how to use it. He downloaded the system and followed the prompts.

There are three problems with the Association's position regarding the grievor's belief that his messages were private. First, the arbitral jurisprudence proposes that "where the internet is used

to display commentary or opinion, the individual doing so must be assumed to have known that there is potential for virtually world-wide access to those statements". (*Wasaya Airlines LP and A.L.P.A., (2010) 195 L.A.C. (4th) 1 (Marcotte)*).

I agree with that reasoning. We may all be guilty of using services and devices without thoroughly reviewing the lengthy terms, rules, and conditions of service. But when engaging in social media use, it is my view that the user must accept responsibility when the content of his or her communications is disseminated in exactly the manner promoted by the social media provider. This is what social media is intended to do. Once we use these devices, once we load that gun, it is potentially dangerous.

The second problem is that flows from the grievor's evidence relates to his understanding of how Twitter works. I have no reason to doubt, and there is no evidence to contradict the grievor's insistence that he did not appreciate that his entire Twitter activity was available to the public, or that his Twitter activity was accessible by anyone who searched his name or used the software designed to allow Twitter history searches. I accept that the penny dropped the day the National Post published his tweets. He learned that all of his Twitter communications were publicly accessible. In this respect, I find the grievor to have been reckless in his use of the Twitter account, and responsible for the consequences of his Twitter communications.

Of greater concern is the fact that the grievor says that he thought using the @username prefix made his messages private. The evidence demonstrates that the grievor had exchanges with Twitter followers in which he used the @username prefix to send a message. One example is an exchange that took place between the grievor and a follower regarding the store at which the grievor had his phone fixed, and to which he refers with a derogatory racial expression. The grievor says he intended to send this message to only one follower. But the message chain reflects that a third person received the message, and replied to it. This third person pointed out to the grievor that his use of language was derogatory.

The grievor had at least this much experience of sending a message to one individual, and receiving a reply from a third person. It is obvious that the @username prefix was not a means to send a private message. The grievor did not have to read the lengthy twitter rules to learn that fact. His own experience made that clear.

I do not find the grievor's evidence credible when he testifies that he thought the @username prefix rendered his messages private, and limited their distribution to the single individual to whom it was sent. His own Twitter history denies that assertion.

When asked about this point, the grievor admits that his Twitter history taught him that a message so directed would go to the individual, and if the addressee and a third person were followers of each other, that third person would also receive the message.

This is significant when considering the grievor's evidence that he thought he was sending the third published tweet, ("the way to a woman's heart is through anal") only to his girlfriend. The grievor's evidence is that he knew the message would go at least to the addressee, and to anyone who was a follower of both of them. There is no evidence of how wide this circle was, or how many times the message was re-circulated by any of their followers.

The third problem arises from the public character of the grievor's recipients. The grievor admits that he followed and sent tweets to a former radio host, whose show was taken off the air when he broadcasted homophobic remarks. The person circulates offensive messages on Twitter, and the grievor followed him. The grievor inserted himself into a conversation between that man and a woman (who the grievor did not know), sending gender-derogatory comments to them both. He sent his message into the Twitter public, without limiting access to the message, and without knowing what the radio host, or the woman, would do with it.

These people were not the grievor's followers. Anyone searching the radio host's communications would see this material. Anyone searching the woman's communications would have seen it. These people were not "close friends and family of the grievor", as he had initially described his followers. They were members of the public.

The grievor also sent messages to two porn stars. He admitted that he was familiar with the website of one of these people, but denies that he knew she posts some of her followers' messages on that website. I find the grievor's denial of this knowledge to be improbable. He sent both of them messages, not knowing what they would do with them. But he did have reason to believe that one might post his message on her website.

The letter of apology also states that it was "unfortunate that it took the publication of the three tweets to for [him] to realize that what he thought had been funny was in fact demeaning to his fellow firefighters, particularly those who are female". He said the first two messages reported by the National Post were quotes from television shows, thus making an effort to deflect responsibility for their offensive content. The third, he says, was "just something he read on the internet".

It is my view that circulating and disseminating slurs, derogatory comments, insults, in the form of jokes, even if created by someone else, constitute serious acts of discrimination.

I have no difficulty accepting the grievor's assertion that he is embarrassed and regretful that the National Post published his comments. However, in light of his evidence, I do not accept the letter of apology as a genuine reflection of his own complete and genuine acceptance of responsibility for the content or dissemination of the messages. The value of the letter of apology is eroded by the grievor's effort to diminish and deflect responsibility for his actions.

Nor does the evidence support the assertion that the grievor was candid and cooperative with the Employer in the investigation. Rather, it supports the conclusion that he tried to appear forthcoming, but in fact was not. He disclosed information selectively, and was not fulsome in many of the responses he provided.

In his first interview with the Employer following the National Post publication, the grievor was asked who his followers were, and who he followed on Twitter. He answered that his "closest friends and family follow him, and that he follows various sports players". In evidence had added that he used Twitter "to keep in touch with [his] friends, to get news from sports players. [He] used it for inspirational quotes, and ... there were various picture accounts where they would send you pictures every day." He said, "I used it to send things between my friends and my family".

He did not disclose at that first interview that he followed the radio host who disseminated misogynist messages, or that he followed the porn stars.

The grievor's sexual interests are private and irrelevant. However, his Twitter communications did enter the public domain through these contacts. That is a fact relevant to the investigation and ought to have been disclosed at the time of the first interview.

At the first investigation meeting with the Employer, the grievor was asked if any of his followers were female firefighters. He answered, "It's possible but I don't know for sure". He admits, however, that checked his list of followers from time to time. He said that there was no one on that list who he did not know. I consider his response to that question to have been evasive. Whether any female co-workers were on his list of followers was a relevant fact, and ought to have been disclosed in the first interview.

The grievor was asked, at the first interview, whether he had made any other comments, similar to the three that had been published by the National Post. His answer was "No, sir". He was asked again in the same interview, whether there were "any other tweets of a similar nature [he] wished

to make [the Employer] aware of. He answered “No”. But the grievor was immediately confronted with an additional message that he had sent to the former radio host, which was gender-derogatory. The grievor said he hadn’t remembered that one.

In the first interview, the grievor was asked if he tweeted while he was at work. He answered, “No, sir”.

In that first meeting the grievor was also confronted with a fifth tweet that was demeaning to women. He stated that the last message was not his, and indeed was subsequently able to prove through contact with Twitter that the message had been fraudulently posted under his name after he had closed the account.

At the grievor’s second meeting with the Employer on August 26, 2013, the grievor corrected his responses. He admitted that he had used his Twitter account while at work, and had sent some messages while on shift.

He was reminded that he had been asked for disclosure of any similar tweets. He was asked, “is it still your position that beside the ones presented, you have not made other inappropriate tweets? The grievor answered, “I might have said things before but nothing I can think of off the top of my head, Sir.” The grievor was then confronted with the series of offensive messages that had been delivered to the Employer by a third party. These are racist, misogynist, demeaning of homeless people, and demeaning of people with disabilities.

The grievor said in evidence that it was not his intention to withhold information. His explanation is that the process has been one of gradual learning for him. He did not appreciate at the start of things that his communications were offensive. He did not know what “similar tweets” might have been. His awareness had not been fully awakened. He considered these tweets to have been momentary exchanges between friends, inconsequential off-the-cuff remarks, and he couldn’t think of any similar tweets at the time.

His explanation for the denial of Twitter use at work was that he forgot.

The grievor was asked if he made other tweets similar to those that had been published. That was a straightforward question. He knew there was at least one tweet that he had forgotten about. When he contacted Twitter to complain about the fraudulent posting, he had opportunity to inquire into the availability of his Twitter history, to revisit his own history, and to make immediate and complete disclosure of similar tweets. He did not.

The grievor did disclose a record of some similar tweets to the Employer after his termination. They did not, however, represent all of his similar tweets. In his post termination sensitivity training, the grievor worked on an analysis of his Twitter comments. This evidence includes more offensive messages that had not been disclosed to the Employer.

In a post termination letter to the Employer, the Association offered to provide the grievor's complete Twitter history. This offer was not taken up by the Employer. It is not alleged that the failure to take up that offer indicates an incomplete investigation that would have produced a different outcome.

My assessment of the grievor's conduct during investigation is that he was neither candid nor co-operative.

The Severity of the Conduct

The Association argues that the conduct is not in the serious range of off-duty conduct. There is no criminal act, such as there was in the case of *Toronto District School Board v. CUPE Local 4400*, (2009) 1363 (Luborsky). There was no intentional dissemination of hate or racism as there was in the case of *Ross v. Board of School Trustees, District No. 5*, [1996] 1 S.C.R. 825. There was no individual co-worker or member of management who was the target of internet harassment as there was in *Canada Post Corporation v. CUPW*, (2010) 216 L.A.C. (4th) 207. There was no intention to disparage the Employer, as there was in *Barrick Gold Corp. V. Lophandia* (2004), CanLii 12938. There was no intention to lash out against an entire community that the Employer serves, such as was described in *Wasaya Airways and A.L.P.A.*, (2010) 195 L.A.C. (4th) 1.

The Association's point is well made. The arbitral jurisprudence has been consistent in upholding discharge in cases of off-duty conduct only in situations in which that conduct has been very serious. In *Ottawa-Carleton District School Board DISTRICT 25, and O.S.T.F. matter*, [2006] 154 L.A.C. (4th) 387, the grievor was chief custodian at an elementary school who robbed a bank during his lunch break. In *Bell Technical Solutions and CEP*, [2012] 224 L.A.C. (4th) 287, the grievors were technicians who had posted and widely disseminated derogatory Facebook postings that were directed towards the Employer and its managers. One grievor was reinstated, the other was terminated. In *Corner Brook Pulp and Paper Ltd and CEP, Local 64*, [2013] 239 L.A.C. (4th) 87, the

grievor posted offensive, harassing and threatening remarks about his supervisors. His discharge was upheld.

In this case, the grievor's Twitter comments violate a number of fundamental workplace policies. Standard Operating Policy October 8, 2008 states:

All personnel are responsible for reading, becoming familiar with and abiding by all rules and regulations.

12.0 Conduct

12.01 All members shall conduct themselves in a manner which will not bring discredit to the good reputation of the Toronto Fire Services or its members.

12.02 Under no circumstances shall members be allowed to publicly express malicious opinions or make public comments in bad faith by tarnishing the reputation of Toronto Fire Services, its policies, or members, collectively or individually.

15.0 Discrimination

15.01 It is strictly forbidden for members to discriminate against any person either by word, act, writing, diffusion or literature, or any other means.

15.02 All members shall conduct themselves in a dignified and respectful manner in their relations with fellow members and with the public, always seeking to build and maintain a good reputation for the Toronto Fire Services.

15.03 Toronto Fire Services staff shall not engage in physical altercations, threatening behaviour, or harassment, or cause same in the workplace.

15.04 All members shall conduct themselves in conformance with the City of Toronto Human Rights Policy, the Ontario Human Rights Code and the collective agreement.

44.0 Uniforms

When wearing the uniform of the Toronto Fire Services, there is a responsibility to ensure that the appearance and deportment of the wearer are worthy of the respect that the uniform inspires.

The City of Toronto policy on Human Rights and Anti-Harassment/Discrimination, approved December 18, 1998, last amended July 17, 2013, states, in part:

This policy applies to all City of Toronto employees... and to all aspects of the employment relationship. Toronto Public Service staff are expected to abide by this policy, the Ontario Human Rights Code ... and any other relevant City Policy and legislation.

The policy is broad, and covers all manner of offensive conduct. In particular, it expressly prohibits employees from engaging in behaviour that would constitute discrimination or harassment towards members of the public and co-workers. Harassment, it says, includes making slurs, derogatory remarks, or inappropriate jokes.

The policy prohibits the display of pornography or racist, homophobic or other offensive materials. It prohibits employees from invading the privacy of others. It prohibits the use of electronic communications such as the internet and email to harass. It prohibits making communications that are demeaning, insulting, humiliating or mocking.

The policy prohibits racial slurs or jokes, ridicule, insults or different treatment because of racial identity. It prohibits posting or emailing cartoons or pictures that denigrate persons of a particular racial group, name-calling because of a person's race, colour, citizenship, place or origin, ancestry, ethnic background or creed.

The policy prohibits sexualizing the workplace by posting or circulating sexist jokes or other objectifying images.

The Toronto Fire Service Standard Operating Guideline on Public Relations, December 1, 2008, teaches employee that:

Toronto Fire Service performs public relations every time its personnel are in the public eye. It takes a concerted effort to maintain a positive stature. The high level of trust that the profession and TFS have earned is worth protecting.

All personnel shall conduct themselves in a manner well reflected in the public eye.

The Toronto Fire Service Standard Operating Guideline on Personal Use of Social Media, which the grievor had not noticed until he reviewed policies on his last day of work, states, in part:

Employees are reminded that even though they are using social media for personal purposes, some City policies apply to off-duty conduct.

These include the Human Rights and Anti-Harassment Policy.

The policy reminds employees that they may be identified as a City employee by the posting of their name, their place or work, their photograph, or by the content they post.

There is no dispute that the grievor was trained in all of these policies, except the Personal Use of Social Media Policy. He knew and understood his obligation to read all City and Toronto Fire Service Policies, to be familiar with them, and to be bound by them. The Association does not challenge the validity or the importance of any Employer policies.

The grievor testified that he was not familiar with the policy on the Personal Use of Social Media. This was not a policy included in his training, and he had not taken notice of it until after his suspension. It was not put to him by the Employer until the final investigation meeting, at which termination was imposed. There is no evidence contradicting this assertion, and I accept it as fact. It does not, however, detract from his obligation to have read it, become familiar with it, and to have governed his actions in accordance with it.

It is the grievor's violation of the Human Rights policy that specifically reflects the seriousness of the misconduct. His comments denigrated women, ethnic minorities, disabled people, and people of different sexual orientations. By his disregard of the Human Rights policy, he promoted these forms of discrimination and harassment by circulating his comments, photographs and inappropriate jokes. He did this, with intention, among his followers. These included co-workers. He sent messages to at least three members of the public. He did, through recklessness, make this promotion of discrimination available to the general public.

The conduct was not an isolated incident. This was a course of conduct that took place over a period of about two years – slightly less than the duration of the grievor's employment with the Toronto Fire Service. It was aggravated by the fact that the content, at its worst, tended toward the violent. The comment about "raping a deaf person and breaking their fingers so they could not tell" is, perhaps, the most unfortunate example of the extent to which the grievor's awareness eluded him.

I consider this to have been very serious misconduct.

What Damage, if any, has the off-duty conduct caused the Employer?

In *Wasaya Airways LP and A.L.P.A. (Wyndels)*, (2010) 195 L.A.C. (4th) 1, (Marcotte), it was said that "actual harm to reputation need not be proven through direct evidence of negative press scrutiny and /or public controversy. Rather, the potential for such damage is the relevant consideration". In that case, the fact that the employee chose a public venue for his comments was

sufficient support for the conclusion that the grievor must be assumed to have been responsible for actual damage to reputation.

In the instant case, details are in evidence of the many media outlets that reported the grievor's comments, as are some social media responses to the news that the grievor had been suspended, and then terminated from employment. Consistent with the reasoning of the *Wasaya* award, I agree that where an employer suffers both widespread negative press scrutiny and public controversy, actual damage may be presumed. That would, in my view, be true of any Employer that sought to maintain a good reputation. It is particularly true of one in the public service.

The Association here has conceded that the grievor's tweets have caused damage to the general reputation of Toronto Fire Service. However, it is critical to the Association's position that the damage reported by the National Post – that the Toronto Fire Service may not be a welcoming workplace for women - is not directly attributable to the grievor's conduct. Nor has evidence been brought to establish that the conduct has had or will have any direct impact upon the ability of the Toronto Fire Service to perform the services of operational firefighting.

The Employer has established through the evidence of Division Chief David Sheen that the work of a firefighter regularly includes first responder attendance at scenes of medical emergency. Firefighters attend when individuals face the danger of fire, or when they require emergency medical intervention for serious illness, injury or childbirth. The nature of the work is intimate. Members of the public must be able to hold members of the Toronto Fire Service in some esteem, as they admit them into their homes in moments of crisis, and expose the intimacies of their lives and their bodies to them, while in their most vulnerable states. Members of the public must be able to trust their firefighters. They must have confidence that they will act professionally, interact with them appropriately, hold their interactions in confidence, and serve them and their loved ones with dignity.

The Toronto Fire Services faces a challenge in attracting women and members of minority groups to service. It had embarked upon an initiative to encourage recruits from the demographics that are not well represented. It is true, as the Association argues, there is no direct evidence that the grievor's misadventure had a direct negative impact upon the ability of the Employer's ability to attract recruits from minority groups or from females. But I am prepared to draw the inference that an individual from one of these groups who had some interest in the recruitment program might

well be put off from the media reports of this firefighters' comments. He or she might fear that the environment would be fraught with discrimination, and might not be welcoming.

I am prepared to conclude that actual damage to the Employer's reputation was caused by the National Post articles and their fallout. I am also prepared to conclude that potential damage has been caused to the Employer's ability to carry out its work, which work includes implementation of its diversity initiative.

There was no individual complaint from any co-worker, or from any member of the public. I do not draw any positive inference from that fact. Nor do I draw any negative inference from the absence of any witness who came forward, as co-worker, member of the public, or potential firefighter recruit, to testify to the fact that publication of the grievor's conduct had no impact on their opinion of the TFS.

The evidence leads to the conclusion that there was actual, as well as potential damage to the reputation of the Employer.

Is discharge an appropriate penalty?

The Association seeks this Board's understanding that the grievor is young, that he was raised in a small town in Ontario where he had no exposure to members of minority groups, and where he grew up in a "jock culture" in which there was a lack of appreciation for the impact of the sort of humour exhibited in the grievor's tweets.

The Association has taken care to assist this grievor to understand the seriousness of his conduct. It has taken a dignified and substantive approach to maximizing his efforts to pursue reinstatement. It arranged for him to undertake a program of sensitivity training with Sherril Murray, a well-respected member of the labour relations community, and brought her to testify in this proceeding.

Ms Murray testifies that she took the grievor through a course of sensitivity training. She encouraged him to explore why he thought the messages he was sending were funny. She assisted him in exploring how these offend. Ms Murray met with the grievor twice. The first meeting was for an assessment that lasted about four hours. She gave him assignments that included reviewing his tweets, considering why they would be offensive to members of the groups he offended, and

defining the language that enables meaningful communication of discrimination. She assigned him a book to read on the power of the spoken word.

They met a second time for about three hours. She taught him that the things that he thought were funny, or that he circulated because his friends would find them funny, could be taken as offensive by people he had no intention to hurt.

Ms Murray was satisfied, through her experience with the grievor, that he has learned a great deal, now has insight into his own behaviour, and is unlikely to repeat his behaviour. She explains that his tweets, although juvenile and offensive, were not intended to hurt. The grievor, she said, is naive; one of those people unaffected by the torments of discrimination. She described him as a “compartmentalized” thinker, who drew no connection between the tweets he circulated, and the fact that they could be seen as offensive. She said she felt that the grievor didn’t have a mean bone in his body. He wrongly believed he was just engaging in inconsequential banter with his friends. Ms Murray said that the grievor was not mindful of the fact that what he was tweeting was offensive. But importantly, she felt that the grievor’s comments did not reflect his thought process, or his behaviours.

Ms Murray concluded that the grievor, through his sensitivity training with her, and through the experience of having been terminated, has become mindful, and aware of the impact of his comments. There was nothing to prevent the grievor from returning to the workplace, and performing the duties of a firefighter. She did not feel, for example, that he would favour one victim over another in a rescue scenario, due to a discriminatory impulse.

The Association relies upon her testimony, which I found sensible and reasonable, to argue that this grievor may be reinstated to the Toronto Fire Service without fear that he will re-offend. Her testimony carries weight with this Board.

Ms Murray’s report, prepared for this Board, is dated May 12, 2014. She concluded:

...although [the grievor] had some difficulty articulating why he found these tweets humorous, it was apparent that he had not envisioned them being viewed by anyone who would interpret them out of the context in which he had placed them. They came from no intent of malice, oppression or to demean or discriminate. To him, they represent bantering exchanges, insults, and teasing among a group of friends.

At the conclusion of our work, [the grievor] demonstrated a good working understanding of how others may perceive communications and illustrations and the fact that some may find them offensive. He has appropriate understanding of the application of the employer's policies that we reviewed.

But after the report was written, Ms Murray considered it necessary to take another step to emphasize with the grievor how serious his conduct was, and to encourage him to maintain the mindfulness that he was learning. Her last email to him said:

To be honest, I was nervous about writing the report. I am concerned that you still don't appreciate just how racist some of your attitudes really are. For instance, I get teasing [your friend] by comparing him to a Mexican labourer, but what it also says (and many, many people would see it this way) is the failure to recognize the oppressive, demeaning slur on the Mexican labourer. Likewise some of the comments about women. I get that a person who doesn't particularly love to cook, is really happy to find a person that does. But it is not alright to expect the gender to dictate the role. Any time you rely on stereotyping to convey humour, it has the potential to show you up as thinking of yourself as better or more important than another person.

I hope you truly take this to heart.

What got me thinking about this was when you said, "But I still find it funny". Concentrate a bit more on looking at your communications and really trying to see it from "The Mexican's position or woman's perspective"...

Having said all this, I still don't think you did any of this from a mean spirited or demeaning place. I don't believe it would interfere with the performance of your job, otherwise you would not have received a report at all...

In her testimony, Ms Murray explained that although she and the grievor were finishing their sessions, she wanted him to continue to be mindful of his words. She explained that when the grievor said he "still found it funny", he was referring to the fact that his friend was working as a landscaper, and that he still found that funny. She was worried that he was focussing not on the tweet, but on the situation.

The grievor, however, failed to do justice to those who have sought to help him. The grievor does not absolutely accept the proposition that his comments were offensive. He has said, repeatedly in his evidence, that "he can see how someone might consider them offensive". His

words ring hollow. They do not reflect real appreciation of the degree to which his comments offend. In cross examination, he made an effort to deny that some of his messages were offensive. He tried to parse and minimize the nature of the remarks and pictures.

I am sure that the grievor is sorry that all of these things happened, and that he is sorry that he ever opened a Twitter account. I accept that he is sorry that he dismissed his co-worker's admonishment when he used a racial slur in one of his tweets, and failed to take that opportunity to consider his behaviour. I do accept Ms Murray's view that as a result of these events the grievor has learned a great deal. But I am not convinced that he genuinely accepts responsibility for the offense and for the damage he has caused.

I cannot agree with Ms Murray when she says that she is confident that the grievor's conduct will have no impact upon his work as a firefighter. My view is that by his disregard of the Employer's policies he has demonstrated that he failed to appreciate the entire job of the firefighter. Through his evidence at hearing, he demonstrates that continue to lack insight into the entirety of the responsibility.

The job involves more than attending at a fire, or attending as the first responder when someone calls 911 for a medical emergency. It involves more than performing the life saving interventions that he has learned and practiced. The other part of the job, the part that I am not convinced he can perform to satisfaction, is the part that requires him to conduct himself in a way that brings honour to the uniform. I have to wonder if a deaf person, a woman in labour, a homeless person, a member of a visible minority group, apprised of his comments, would welcome this man into their home in a time of need.

Conclusion

In accordance with the elements proposed in *Millhaven*, I conclude that the conduct of the grievor has harmed the reputation of the Employer. His conduct has impaired his ability to fulfill the complete range of responsibilities of a firefighter. His serious violation of the Employer's Human Rights and Anti-Harassment policy has rendered his conduct injurious to the general reputation of the Toronto Fire Service.

A reasonable and fair minded member of the public, if apprised of the facts, would, in my view, consider that the grievor's continued employment would so damage the reputation of the Employer as to render employment untenable.

The grievance is dismissed.

My thanks to Mr. MacDonald and Ms Crisp for their thoughtful and comprehensive contributions to this process.

DATED at Toronto this 12th day of November, 2014.

A handwritten signature in cursive script, appearing to read 'Elaine Newman', written in black ink.

Elaine Newman,
Arbitrator