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CURRENT NEWS AND PRACTICAL ADVICE FOR EMPLOYERS ISSUE NO. 484 • APRIL 25, 2007

# Facebook controversy arises in workplaces

## Recent ban of website in Ontario government offices highlights employer concerns

BY RONALD MINKEN

TECHNOLOGY

On May 2, 2007, the government of Ontario barred its employees from access to Facebook, the popular social networking site originally launched for Harvard University in February 2004, sparking international attention from employees and employers regarding the scope of employer control over Internet access in the workplace. The barring of access to Facebook has raised important issues regarding the extent to which an employer can reasonably restrict their employees' use of the internet while at work. Are employers within legal rights to ban access to Facebook, and similar sites, from the workplace?

The backlash against Facebook is largely due to a concern over derogatory comments and a decrease in workplace productivity, which are both valid concerns for employers. There are currently 21 million Facebook users worldwide, and Canadians spend on average of 29.6 minutes per day on the social networking site, according to its marketing staff. Its increasing popularity among employees and employers alike is a cause for concern and is likely one of the primary reasons for the Ontario government's ban of Facebook over another less popular social networking site called MySpace. Companies are entitled to establish ground rules to regulate employee behaviour, including use of company electronic media equipment to ensure such equipment is not used to damage the employer's reputation, and guard against time theft or excessive personal use.

The City of Toronto has also followed the province's lead in blocking employees' access to Facebook, except those in the offices of the mayor and the city's 44 councillors. According to city agencies, the reasoning behind this ban is because Facebook has little relevance to municipal work. For Ontario government employees, including MPPs and cabinet ministers, and Toronto municipal employees, Facebook joins the likes of other forbidden sites dealing with pornography, gambling and dating as well as YouTube, a free video viewing website.

Courts view an employee's use of the Internet in the workplace as use of corporate assets, which should be used for business purposes. Personal use of the Internet while at work need not only include accessing or distributing inappropriate material in order to warrant a ban of a particular website and disciplinary measures. It can also include excessive use, which can lead to "cyber-slacking" – employees who spend

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**Ask an Expert**

with **Colin Gibson**

**Harris and Company, Vancouver**

Have a question for our experts?
E-mail **carswell.celt@thomson.com.**

## ACCOMMODATION: Accommodating Family Needs

**Question:** Does an employer have any legal obligation to accommodate an employee's personal or family needs by providing flex time or adjusting work hours?

**Answer:** Generally speaking, an employer does not have an obligation to grant an employee's request for flex time or other changes to work hours, absent a contractual or collective agreement requirement. However, a duty to accommodate an employee's child care or other family needs may arise under human rights legislation.

Most human rights statutes prohibit an employer from discriminating against an employee on the basis of "family status." In *Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society*, the British Columbia Court of Appeal ruled a *prima facie* case of discrimination will be established when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial family duty. The employee in this case was a child and youth support worker. She had four children, including a child with severe medical and behavioural problems who required specific parental and professional attention.

The employer notified the employee that, for operational reasons, the start time of her shift was being moved forward three hours. She worked the new shift for a few weeks and than claimed she could not continue because the shift interfered with her child-care obligations. The employer refused to adjust the shift and she went on sick leave. She was subsequently diagnosed with post-traumatic stress disorder and she never returned to work.

At arbitration, the union claimed the employer had violated the *Human Rights Code* by discriminating against the employee on the basis of her family status. The union argued "family status" included the fiduciary obligation of parents to care for their children. The arbitrator rejected the union's argument and dismissed the grievance. He interpreted the phrase "family status" to mean the status of being a parent *per se*, not the individual circumstances of a family's needs, such as child-care arrangements.

On appeal, the B.C. Court of Appeal concluded the arbitrator's interpretation of "family status" was too narrow and did not address the potential for discriminatory impact some employer decisions may have on the family obligations of employees. The court acknowledged "family status" cannot be an open-ended concept, as that "would have the potential to cause disruption and great mischief in the workplace," and ruled whether the particular conduct of an employer gives rise to a *prima facie* case of discrimination on the basis of family status, will depend on the circumstances of each case. The court stated:

"In the usual case where there is no bad faith on the part of the employer and no governing provision in the applicable collective agreement or employment contract, it seems to me that a *prima facie* case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee. I think that in the vast majority of situations in which there is conflict between a work requirement and a family obligation, it would be difficult to make out a prima facie case."

The court concluded the new work shift resulted in serious interference with the employee's ability to fulfil her family obligations. Additionally, the worker's situation was further complicated by her subsequent illness. Thus, the union had made out a *prima facie* case of discrimination.

Similarly, in *Canada Post Corp. v. Canadian Union of Postal Workers*, an arbitrator reinstated a casual employee who was dismissed after refusing a call-in because of her child-care obligations. The collective agreement required casual employees to be reasonably available to work both extended and on-call assignments. but the employee had repeatedly refused to work on-call assignments. The employer dismissed her when she refused, at 6 a.m., to accept a shift which began at 7 a.m. She said she could not organize child care on such short notice. The employee explained her son had developed behavioural problems and was difficult to manage by anyone other than her. One child-care facility had refused to take her son because of his anger and violence towards other children. The arbitrator ruled the employer discriminated against the employee on the basis of her family status when it failed to consider her reasons for refusing the assignment and made no attempt to accommodate her.

These decisions have established employees may be entitled, in certain circumstances, to have important family obligations accommodated by their employers to the point of undue hardship. Faced with a request to accommodate an employee's family obligations, an employer must first assess whether a denial of the request could constitute discrimination. If so, the employer must consider whether the accommodation can be granted without undue hardship.

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# Manager fired for hiding failed relationship with subordinate

## Bitterness from breakup caused problems in the office; repeated denials breached company's trust, court rules

By Jeffrey R. Smith

The British Columbia Court of Appeal has upheld the dismissal of a manager who lied about his relationship with a subordinate after their breakup negatively affected the office environment.

Mike Carroll was a branch manager for Emco Corp., a plumbing and heating supplies company in Abbotsford, B.C. He had a three-year sexual relationship with a female employee who reported directly to him. During that time, Carroll was responsible for the employee's pay raises, discipline, promotions and performance reviews.

In the late stages of their relationship, the employee was sometimes absent from work, which was uncommon for her. Carroll knew the absences were related to their relationship but denied it when a human resources manager inquired about them. Another employee also asked Carroll if he had a relationship with her but he still denied it. Rumours began circulating and Carroll's supervisor asked him about it, which he again denied.

The affair ended bitterly and, as a result, the working relationship between the two deteriorated to the point where it was noticeable to other employees. When Carroll began a relationship with another female employee, it created a "tense atmosphere" in the office which disrupted the business.

The increasing antagonism between the two made the office a difficult place for other employees to work and some described the atmosphere as like "a soap opera" or "elementary school."

Despite the fact the affair had become common knowledge, Carroll continued to deny his original relationship to his superiors. He only admitted it once his superiors knew about it and the employee confirmed the relationship.

Emco decided to terminate Carroll from his position as branch manager after learning the office had become a difficult environment for people to work and he wasn't working with the subordinate with whom he had broken up. He received a letter from the vice-president and general manager stating he had "breached my trust and that of other senior managers and put yourself in a significant conflict of interest."

### BREACH OF TRUST

**His denials as to the nature of the relationship were a breach of the company's trust and faith he could perform his duties as branch manager**

The company also reassigned Carroll and the two women to separate branches. Carroll's position would have the same salary and benefits but no supervisory responsibilities. He refused the reassignment and sued for wrongful dismissal.

The court agreed with the B.C. Supreme Court's assertion that Carroll "deliberately and deceitfully failed to reveal his three-year relationship with his subordinate." It noted the employer had a right to know about it so it could try to avoid the conflict of interest resulting from Carroll's direct supervision and responsibility of the employee with whom he was involved. Carroll's repeated denials of the company's queries as to the nature of the relationship were a breach of the company's trust and faith that he could effectively perform his duties as branch manager.

Carroll's appeal pointed out certain errors in the trial judge's reasons, but the court found these to be trivial and not consequential to the decision.

"The relevant circumstances were the sexual affair and its effects on the performance of (Carroll) and (the female employee) of their respective obligations to (Emco), on the working conditions in the branch generally and on the business of the branch," the court said. "(Emco) and its other employees in the branch were needlessly subjected to several months of what the trial judge described as a 'horrific office situation.'"

The court ruled Carroll's actions were a legitimate reason to remove him from his position as branch manager because Emco had reason to believe it couldn't trust him to do the job. The company notified him immediately of its concerns and offered him another position, so it did not terminate the employment relationship. Carroll's refusal of the new position and his launch of the wrongful dismissal suit was the termination.

**For more information see:**

- *Carroll v. Emco Corp.*, 2007 CarswellBC 717 (B.C. C.A.).

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CASE IN POINT: SEXUAL HARASSMENT

# Young waitress sexually harassed and intimidated by boss

## Restaurant owner fired 20-year-old for rejecting his advances, then harassed her at her new place of work

### Restaurant owner 'preyed' on vulnerability of young waitress

**THE BRITISH COLUMBIA** Human Rights Tribunal found Michel Blais' treatment of a former waitress at his restaurant both during and after her employment to be harassment.

Blais, 57, made sexually suggestive comments towards Mary Clarke, 20, right from her first interview and through her one-month stint as a waitress at his Vancouver restaurant, Frenchies Montreal Smoked Meats, in July 2005. Though his comments made Clarke uncomfortable, she usually didn't say anything because she was extremely shy.

One day, Blais asked her to sit on his lap and Clarke finally confronted him. Blais reacted angrily and soon after he fired Clarke for what he claimed was her failure to maintain a level of cleanliness in the restaurant.

After Clarke filed a sexual harassment complaint, Blais started coming into her new place of work, often glaring, pointing and laughing at her. She felt humiliated, frightened and nervous, going so far as to change her appearance.

The tribunal found Blais' conduct during Clarke's employment was an abuse of his power.

"Mr. Blais preyed on Ms. Clarke's vulnerability," the tribunal said. "He sought to exercise control over her and heighten her vulnerability."

It also ruled her firing was because of her reaction to his harassment, not a failure to do her job.

The tribunal also found Blais' behaviour after she filed the complaint was designed to scare her and was also harassment.

"Mr. Blais' conduct constituted a deliberate attempt to continue to intimidate Ms. Clarke, and was of a piece with his earlier retaliatory behaviour," the tribunal said.

Clarke was awared nearly $12,000 for injury to her dignity for both the harassment she experienced while working at Frenchies and Blais' continued harassment afterwards.

BY JEFFREY R. SMITH

A former waitress at a Vancouver restaurant has been awarded nearly $12,000 after her boss sexually harassed her and then further harassed her after she quit and filed a complaint with the British Columbia Human Rights Tribunal.

Mary Clarke, 20, worked at Frenchies Montreal Smoked Meats Ltd. in the summer of 2005. She was a shy person and her mother described her as having "an undiagnosed social anxiety condition." She applied for a job at a new Frenchies location in late June 2005. During the initial interview, the restaurant's owner, Michel Blais, 57, commented on what a pretty girl she was and asked her if she had a boyfriend. He also told Clarke she was "making him horny." Though Clarke claimed this embarrassed her, her didn't respond to Blais' behaviour because of her shyness.

Clarke returned to the restaurant for a second interview. She characterized the interview as more of a 30 to 45 minute "personal conversation," in which Blais discussed her boyfriend and told her she should break up with him because she was a "goodie good virgin." She noted Blais referred to his waitresses as "his girls." She testified she said very little, except that her boyfriend was a "really nice guy." After the interview, Clarke didn't tell her mother what had been said but she seemed not as open as she usually was to her.

Clarke was hired and worked eight shifts at Frenchies between June 30 and July 21, 2005. During this time, Blais had several conversations with her. Often, he suggested she should quit her two other jobs and told her he would guarantee her full-time hours. Most of the time, Clarke didn't say much, except for once that she recalled where she refused to quit one of her jobs because she received good hours there.

Blais also frequently asked Clarke when she was going to leave her boyfriend and often commented on her physical appearance. Once, he told her he was big "down there" and that he "makes good love." Clarke testified these remarks made her "uncomfortable, scared and embarrassed," but again she would usually not respond.

On July 18, 2005, Blais asked Clarke to sit on his lap. Clarke told him to get his wife to do it and walked away. Blais

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CASE IN POINT: SEXUAL HARASSMENT

# Former boss aimed to 'humiliate and intimidate'

*...continued from page 4*

reacted angrily and after the incident behaved in an unfriendly fashion towards her. A few days later, Blais told Clarke her work had gotten sloppy and it "wasn't working out." He told her to "go home and make love to your boyfriend." After her termination, Clarke claimed she felt ashamed, confused and her self-confidence was shaken. After discussion with her mother and boyfriend, she filed her human rights complaint on Oct. 3, 2005, in the hope "the next girl" would be spared this treatment.

In September 2005, Clarke was transferred from one of her other jobs to a pizzeria a few doors down from Frenchies. After he was served with the sexual harassment complaint in December 2005, Blais came into the pizzeria when she was working and started "waving, pointing and smiling at her, and laughing hysterically," according to Clarke. He returned a couple of days later and glared at her. Two months later, on Feb. 19, 2006, Blais came in again and asked another employee "Where's the girl?"

After Blais' Feb. 19 visit, Clarke and her mother called the police. A week later, the police warned Blais not to go into the pizzeria where Clarke worked. Blais became very angry and told them police and females that he had fired were out to get him.

Blais responded with a complaint to the police on March 30, 2006, claiming Clarke and the owner of the pizza store were harassing and slandering him. He said the store owner pushed Clarke to file the complaint.

Clarke and Blais attended a settlement meeting, arranged by the human rights tribunal, in April 2006. Later the same day, as Clarke walked by Frenchies to go to work, Blais laughed and pointed at her. The police recommended to Clarke she avoid walking by the restaurant, which she usually did.

Blais had differing accounts of his conversations with Clarke, the interviews, and his visits to the pizzaria. He claimed when he fired her, all he said was he was sorry it didn't work out and wished her good luck. He claimed he did not like firing people and it was the first time he had ever fired someone. Blais also testified he fired Clarke because she giggled too much at work, was not cleaning up properly and didn't clean up milk after it was spilled. He claimed he had spoken to Clarke "three or four times" about her job performance. Clarke denied she had been given any warnings before her termination.

The tribrunal preferred Clarke's version of events over that of Blais.

"Ms. Clarke gave her evidence in a clear, straightforward and consistent manner. Mr. Blais, by contrast, was often vague, evasive, contradictory and argumentative in his testimony," the tribunal said. "Any (performance) issues which arose were of a minor nature and of a kind to be expected with new staff in a new operation."

**The tribunal pointed out, by Blais' own testimony, he went through 58 waitresses in one year at Frenchies.**

The tribunal pointed out, by Blais' own testimony, he went through 58 waitresses in one year at Frenchies.

The tribunal noted Blais' behaviour in the restaurant and following the complaint had significant effects on Clarke. She coloured and cut her hair, dressed down and said she didn't want "to look that pretty." She did not sleep well and clearly "felt anxious and scared for her safety."

The tribunal ruled Blais abused his power and his conduct at the restaurant was sexual harassment which affected her employment. He created "a sexualized and oppressive environment" for Clarke at the restaurant. Though she often didn't respond because of her shyness, the tribunal felt Blais should have known his behaviour was inappropriate.

The tribunal found Blais' justification of sloppiness was not a legitimate reason for firing Clarke. Other waitresses had similar incidents without consequences, so it could only be inferred her termination was because of her refusal of Blais' "inappropriate request that she sit on his lap, and in a manner which he was likely to find embarrassing."

The tribunal ruled Blais' conduct was an abuse of his power and he sexually harassed Clarke while she worked at Frenchies. Her termination was a result of her negative reaction to the harassment.

The tribunal also found Blais' visits to the pizzeria were to intimidate her. There were several other options for him to get pizza, so it was not the only choice for him as he claimed. His complaint with the police was also found to be frivolous and was retaliation against Clarke. His actions after Clarke filed the initial sexual harassment complaint were aimed to "embarrass, humiliate and intimidate Ms. Clarke," which the tribunal noted had the desired effect.

The tribunal awarded Clark $318 for lost wages and tips for the period after she was fired until she was able to pick up more work. Because she was young, vulnerable and Blais abused his position of power over her, Clarke was awarded $4,000 for injury to her dignity at work. For the campaign of intimidation after she no longer worked at Frenchies and the extreme effect it had on Clarke, the tribunal awarded $7,500 for further injury to dignity for total damages of $11,818.

**For more information see:**

■ *Clarke v. Frenchies Montreal Smoked Meats and Blais (No. 2)*, 2007 BCHRT 153 (B.C. Human Rights Trib.).

# Consistent Internet policy important for employers

*...continued from page 1*

their time doing anything but working and therefore abusing company time and money.

One of the most egregious examples of an employee's excessive use was illustrated in the 2000 case of *Syndicate Canadien des Communications, de l'energie et du papier, section local 522 c. CAE Electronic Itee (grief de Petruzzi)*, where the arbitrator concluded the employee committed time theft and upheld the employer's decision to terminate the employee. The employer found during the four-and-a- half month span in which the employee claimed about 480 hours of overtime, he had also spent about 300 hours on the Internet. According to the arbitrator, the actual content of information the employee accessed was irrelevant. Rather, it was the amount of time wasted along with the employee's claim for overtime that justified disciplinary action and termination. Where employees overuse their Internet privileges while at work and waste company time, resources and productivity, employers are justified in taking disciplinary action. Dismissal, however, should be viewed as a last resort and for extreme cases of employee abuse of company assets.

There are also matters of policy at play. Premier Dalton McGuinty indicated the Government does not view Facebook as adding value to the workplace, but Facebook proponents argue the Ontario government's decision to ban access to the website further isolates it from the public it serves. In banning a site from access by employees, employers must bear in mind the potential usefulness of certain Internet sites with respect to their company's productivity and capital gain. The bottom line for employers, however, is the importance of producing and consistently enforcing a workplace Internet policy, which must clearly address the following:

- the amount of reasonable time employees can spend using company equipment to access non-work related websites;
- whether an employer has the right to ban a website altogether;
- whether employees' Internet access privileges can be revoked or limited at any time; and
- the type of Internet access on company equipment which is strictly forbidden, such as time theft or excessive use, pornography and employee blogs containing defamatory content about the company.

Since employers have control over company assets, and Internet access on workplace computers is deemed to be a use of company assets, then it is only reasonable Internet access to Facebook should fall under the control of employers. Employers should, ideally, have discretion to limit or revoke access to sites such as Facebook At present, the Ontario government can revoke or limit its employees' Internet privileges.

Non-work related internet privileges should have higher scrutiny in government offices than in private enterpises because, in addition to wasting the government's assets, activities such as employees' use of Facebook amounts to time wasted at the expense of the taxpayer.

Employers can strengthen their ability to control assets, such as access to the Internet at the workplace, by clearly and expressly indicating in company policy they have the right to revoke, limit and regulate workplace Internet privileges. In addition, the restrictions noted within the policy should be implemented and enforced on a consistent basis.

As a result of the Facebook ban by the Ontario government and the City of Toronto, employees in private enterprises may soon find an "access denied" message on their computer monitors similar to the one the government and city employees received. It is at the discretion of the employer to determine whether certain employee Internet access privileges are appropriate for their workplace. There is nothing wrong with sharing information via Facebook or other social-networking sites, but not on company time, with the use of company assets and at the expense of the employer. CELT

## Employers differ on Facebook usefulness

**FACEBOOK IS NOW** on par with online gambling sites, pornographic sites and YouTube in Ontario government offices. Employees attempting to access Facebook will get the same message as if accessing those other sites: "The Internet website that you have requested has been deemed unacceptable for use for government business purposes." The ban applies to all government workers from office employees to MPPs to cabinet ministers. However, similar but not quite as popular website MySpace hasn't been banned as of yet.

There are about 2 million Facebook users in Canada, with 500,000 of them in Toronto. The number of users is growing by 5 per cent a week and the average user spends about a half-hour a day on the site.

Some employers, such as Toronto-Dominion Bank, also ban the site from office computers. However, others feel it can be a useful tool for business networking. In the federal government, some departments, but not all, ban access to the site.

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*Ronald gratefully acknowledges Andrea Lim for her assistance in preparing this article.*

## MORE CASES

*COMPILED BY JEFFREY R. SMITH*

### ACCOMMODATION: Changing work hours failed to accommodate employee's disability: tribunal

**A BRITISH COLUMBIA** company discriminated against an employee with multiple sclerosis (MS) when it changed his work hours, the B.C. Human Rights Tribunal has ruled.

Dennis Chong worked Violetta Industries Ltd. in Burnaby, B.C., as a builder of water sterilization systems. He was hired March 30, 2005, and as part of his employment agreement, he was entitled to five sick days and flexible work hours. Chong had MS, which caused extreme fatigue around 3 p.m. each day. As a result, Chong received approval in June 2005 to work from 6: a.m. to 2 p.m.

The owner of Violetta, Douglas Somerville, soon learned Chong had MS. He changed company policy on paid leave and flexible hours, saying employees required one year of service before they could take time off with pay and the company's work hours were 8 a.m. to 5 p.m. with no exceptions.

Chong explained to Somerville the earlier hours accommodated his MS symptoms but Somerville insisted he work the regular hours and "if Mr. Chong did not like that, he could quit."

As a result of this situation, Chong became stressed and upset, which exacerbated his MS symptoms and he missed a day of work following Somerville's ultimatum.

On Feb. 22, 2006, Somerville sent Chong a letter reiterating his work hours and reduced some of his benefits, including personal days. Chong responded by proposing possible solutions including the status quo, telecommuting from home in the afternoon or working reduced hours. Somerville was not receptive to the suggestions and the two had "heated discussions." After work on Feb. 24, 2006, Chong told his manager he would not be returning to work at Violetta for the sake of his health.

The tribunal found Chong's MS was a disability which required accommodation. Changing his work hours was a failure to accommodate his disability. Chong was willing to co-operate by offering compromises, but Violetta was not.

Chong was awarded lost wages or the time he was unemployed and the difference between his Violetta pay and the lower pay of his subsequent employment. The total wage loss was set at $11,480.

The tribunal also found Somerville's attitude and treatment towards Chong was unacceptable and made his condition worse.

"(Somerville's) conduct resulted in the aggravation of Mr. Chong's disability," the tribunal said.

In addition to the lost wages, the tribunal awarded Chong $7,500 for injury to dignity, feelings and self-respect. See *Chong v. Violetta Industries and Somerville (No. 2)*, 2007 BCHRT 163 (B.C. Human Rights Trib.).

## ASK AN EXPERT

*...continued from page 2*

### ACCOMMODATION: Payment of commissions

**Question:** We have a sales executive who earns a flat annual salary plus a commission based on total sales figures, which is paid out quarterly. The quarterly calculation is based not on the total sales amount but what the client has paid at that point in relation to the total sales figure. For example, on a sale of $50,000, if the client has only paid $10,000 of the total, the commission in that quarter is based on the $10,000. The employment contract only outlines simple remuneration such as total amount and payday. Is this method of commission calculation common or even legal?

**Answer:** Employment standards legislation in each Canadian jurisdiction requires an employer to pay wages, which includes earned commissions, within a prescribed period of time. In British Columbia, for example, the *Employment Standards Act* requires an employer to pay an employee at least semi-monthly and within eight days after the end of the pay period "all wages earned by the employee in a pay period."

The point when commissions become earned and payable depends on the terms of the contract between the employer and the employee. For example, the parties may agree commissions are payable at the time the employee makes the sale, at the time the customer is invoiced, at the time the goods are delivered and when the customer pays.

Where the contract is silent, the employer's past practice regarding payment of commissions to the employee and co-workers may be reviewed to determine the terms of the parties' agreement.

In order to avoid unexpected liability, employers should take care to ensure commission terms are clearly spelled out in employment contracts and policies. The contract or policy should state such considerations as: the commission rate, what it's calculated on, when commissions are earned and payable and what happens when the employee goes on vacation.

**For more information see:**

- *Campbell River & North Island Transition Society v. H.S.A.B.C.*, 2004 CarswellBC 1012 (B.C. C.A.).
- *Canada Post Corp. v. Canadian Union of Postal Workers*, [2006] CLAD No. 371 (Can. Lab. Arb. Bd.).

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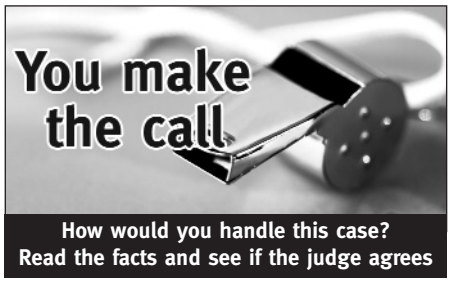
# Fire inspector's future plans alarm employer

This instalment of You Make the Call looks at a worker who was fired after his employer claimed he was trying to start a competing business and recruit co-workers.

Ameerodin Alishah worked as a senior fire inspector for a fire alarm company for eight years. In December 2004, Alishah was hired for a similar position by J.D. Collins Fire Protection Company. Collins assured him at the time of his hiring he had "a viable long-term future with Collins."

On Jan. 14, 2005, upon the start of his employment with Collins, Alishah was asked to sign a confidentiality and non-solicitation agreement which prevented him from recruiting any Collins employees while with the company and for one year after leaving it. He had received no prior notice of the agreement and was told he wouldn't be able to start work with Collins until he signed it.




**How would you handle this case? Read the facts and see if the judge agrees**

Shortly before he started working for Collins, Alishah had casually discussed the possibility of starting his own business with a friend. He claimed these were just musings and "he had no intention of starting such a business in the immediate future." After he joined Collins, he casually discussed his plans with a couple of his co-workers at Collins and suggested he would offer them a "theoretical position." No salaries or other details were discussed.

Word of these discussions reached Collins management and the company's operations manager met with Alishah on April 29, 2005. The manager told Alishah "Collins would not stand in the way of his setting up his own company" but there was no discussion on solicitation of customers. Alishah denied he was starting his own business and asked to explain the situation directly to the owner, though he only spoke briefly with him.

Alishah was then given a notice of termination which claimed he had been speaking of starting his own fire protection company with Collins' service technicians "during working hours and while on our clients premises." Alishah expected he would be able to have a more detailed discussion with the company's owner and explain he "had no intention to compete with Collins in the near future." However, as far as Collins was concerned, his termination was effective that day and the discussion was over. Alishah claimed wrongful dismissal after only three-and-a-half months with Collins.

### You make the call

- ☑ Was the employee wrongfully terminated?
  OR
- ☑ Did the employee violate his non-solicitation agreement and good faith obligation?

**IF YOU SAID** Alishah was wrongfully terminated, you're right. The court found Alishah's long-term plans to leave and his "vague long-term discussions" about going into business with other employees did not constitue a breach of his good faith obligations to Collins. It also found he attempted to clearly explain the situation to his manager and the owner but was not given the opportunity to do so. While Alishah may not have been completely straight with his manager when asked about it, the court ruled his behaviour did not warrant summary dismissal.

"Alishah's plan to leave his employer and start his own business was little more than an idea at the time of his dismissal," the court said.

The court also found the confidentiality and non-solicitation agreement Alishah signed was unenforceable because he wasn't notified of it beforehand and wasn't given an option.

"He had resigned from his previous employment and no longer had any choice but to sign this agreement," the court said.

Because Alishah was induced to leave his previous employer to join Collins, the court ruled his eight years of service with that employer should be included in the consideration of reasonable notice. The court awarded Alishah five months' notice plus business expenses and costs. CELT

**For more information see:**

■ *Alishah v. J.D. Collins Fire Protection Co.*, 2006 CarswellOnt 7285 (Ont. S.C.J.).

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