SHIBLEY RIGHTON LLP
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Excessive and inappropriate Internet use — disciplining 'Cyberslacking'

Access to the Internet is now commonplace in almost every workplace in Canada. Although this access can increase efficiency, it can also be a source of angst for employers whose employees engage in cyberslacking; that is, leisurely surfing the Internet during work hours. Cyberslacking may take many forms – from occasional innocent Facebook and eBay visits to endless hours spent watching "March Madness" to more serious issues including viewing pornography or conducting personal business while at work. Although many workplaces may allow Internet access for personal reasons including online banking, personal e-mails, and even limited social networking, the burning question remains at what point personal Internet use becomes so excessive that discipline is appropriate and whether the intentional use of the Internet, contrary to company policies, constitutes time theft. Recent jurisprudence has seemingly resolved that although cyberslacking will rarely constitute time theft, excessive use of internet resources can attract significant discipline and, in some cases, may justify summary dismissal.

One of the major decisions regarding the cyberslacking / time theft story is a 2011 decision of the Public Service Labour Review Board (the "PSLRB") titled *Andrews v. Deputy Head (Department of Citizenship and Immigration)*. Franklin Andrews, the grievor, was a senior policy advisor with 27 years of seniority and no prior discipline. During a routine audit of Internet use, the employer found that Andrews' Internet usage was very high and that he had been viewing pornographic materials. A subsequent investigation demonstrated that over the course of approximately seven months, Andrews had spent approximately 50 to 75 percent of his working hours surfing the Internet. Andrews was questioned during the course of the investigation; he admitted to the Internet use, apologized and indicated that his actions resulted from not having enough work. The employer subsequently terminated Andrews' employment; Andrews grieved the termination arguing that it was disproportionate to the offence given his length of service, his clean disciplinary record and positive performance reviews.

At the hearing before the PSLRB, the employer took the position that the grievor's conduct was clearly "time theft" and therefore justified termination for cause. In this respect, the employer argued that evidence clearly demonstrated that Andrews knowingly "sat at a desk surfing the Internet for half the day, day after day and month after month, claiming pay for time not worked…" and that these actions were akin to falsifying a time sheet.

In reviewing the employer's allegations regarding time theft, Adjudicator Rogers recognized that the majority of time theft cases generally require a fraudulent intent to steal time such as where one employee punches another employee's time card. Adjudicator Roberts had difficulty comparing this type of overt fraudulent conduct to a workplace environment in which personal use of the employer's Internet services is permissible and where employees are not required to record their time. Ultimately, Adjudicator Roberts allowed the grievance and reinstated Andrews finding that the initial letter of termination did not mention "time theft," and that there was not sufficient evidence of fraudulent intention to establish time theft in the circumstances. Moreover, the adjudicator also noted that both the employer and

Andrews had to take responsibility for Andrews not having enough work; that is, that although Andrews, as a senior policy advisor, had an obligation to work independently and seek out work, the employer was also responsible for failing to manage Andrews properly.

Adjudicator Roberts did find that Andrews' conduct was very serious insofar has he had violated a number of employee policies and had clearly misused the employer's property and equipment and engaged in ongoing behaviour that was unacceptable in the workplace. However, this behaviour was mitigated by Andrews' 27 years of service, his remorsefulness and the fact that the company's policies did not define *excessive* use. Accordingly, the adjudicator held that termination was unwarranted, but reinstated Andrews without backpay, effectively resulting in a lengthy 21-month suspension without pay.

In short, the *Andrews* decision was significant in that it held that although cyberslacking, without more, will not constitute time theft, excessive Internet use can constitute serious misconduct worthy of significant discipline.

Subsequent arbitral awards have followed this decision, confirming that excessive Internet use, although not time theft *per se*, could yet provide just cause for significant discipline. Indeed, in a recent 2012 Ontario labour arbitration decision titled *Unite Here Local 75 v. Fairmont Royal York Hotel*, 2012 CanLII 3872 (ON LA), Arbitrator Trachuk held that excessive Internet use, regardless of whether the use included viewing of pornography or other similar objectionable material, could provide cause for summary dismissal.

In *Unite Here*, the employer discharged an 18-year employee for time theft resulting from excessive use of the Internet over a 30-day period. Although there was no evidence as to the exact extent of the Internet use by the grievor, the parties had agreed that the Internet use was "excessive." In her decision, Arbitrator Trachuk specifically found that the grievor's actions did not constitute time theft. However, she did make the following salient comments:

> "Whether or not the grievor's misconduct is characterized as time theft, when an employee wastes time by accessing the Internet when he is supposed to be working, the company is harmed as it is paying for work performance that it is not receiving. Furthermore, the grievor's actions were a breach of trust. The company has to trust its employees to be working when they are supposed to be working."

Indeed, Arbitrator Trachuk held that "excessive use of the computer to access the internet is serious misconduct and a breach of the company's policies," and that, "[s]pending excessive time on the computer every day for 30 days certainly could be grounds for discharge." In fact, Arbitrator Trachuk specifically stated that if the grievor were a "shorter term employee his discharge would probably be upheld." Notably, Arbitrator Trachuk made these findings despite the fact that there were no allegations that the grievor was accessing any illegal or distasteful websites; that excessive use, regardless of content, may constitute a breach of trust and attract significant disciplinary sanctions.

In our view, the fact that excessive Internet use is not likely to be categorized as time theft is less important than the findings that excessive Internet use, in and of itself, will attract weighty discipline up to and including summary dismissal, regardless of the online content. This should be welcome news to employers who experience a loss in productivity due to online coverage of sporting events, social networking sites and other, more illicit Internet sites. That said, the above-mentioned decisions make it clear that although employees have an obligation to exercise self-control regarding Internet use, employers must engage in active supervision of their employees, which includes the implementation and employee education regarding acceptable Internet use policies. We strongly urge any employer to seek legal advice prior to disciplining or terminating any employee and would be pleased to answer any questions you may have regarding discipline and/or acceptable Internet use policies.