



## MESSAGE FROM THE PRESIDENT:

**Y**ou will find some very topical and useful articles in this issue of *The Steward*. Everyone is using social media platforms such as Facebook or Twitter these days, and BCGEU and our members are no exception. Do you follow us on Twitter? Have you checked us out on Facebook?

Social media is about instantaneous communication, information sharing and building online relationships. As workplace stewards, you may be asked for guidance on using social media platforms at work. Social media brings immense benefits but also new challenges, especially at the workplace. Our first article outlines key concerns on this topic.

We strongly believe all union members should err on the side of caution when using Facebook and other social media platforms at work. Many workers may have an expectation of privacy that simply does not exist when you are using employer time and equipment, including your office computer. .

Please feel free to share your thoughts on any article in *The Steward*, or let us know if there is a topic you would like covered in your newsletter. Just send an e-mail to: [steward@bcgeu.ca](mailto:steward@bcgeu.ca).

Wishing you all the best for the year 2011,

Darryl Walker, BCGEU President

## STEWARD UPDATES:

# The perils of posting to Facebook

BY CATHERINE SULLIVAN, STAFF REPRESENTATIVE

**R**ecent arbitration and case law awards confirm that employees will be disciplined if they use employer equipment and work time to view, create and distribute personal electronic material. Many workers have an expectation of privacy that does not exist.

In B.C., there have been some recent media headlines about government-wide investigations conducted after objectionable emails were inadvertently sent to government representatives. The resulting investigations resulted in discipline for many of our members, including a number of terminations.

How did this situation happen? How can it be avoided? What can be done differently?

There is a clear need for education about what is and what is not appropriate content for emails or Facebook or Blog postings. Stewards, elected officials and activists need to give guidance to

members to help them understand the boundary between acceptable and unacceptable content.

### **No unacceptable material in the workplace**

One simple rule is: pornographic, racist or sexist material should not be circulating in the workplace. If a member receives material that offends them, they should delete it. If they continue to receive material that offends them, they can report the situation. All of our Collective Agreements and the relevant human rights statutes provide protection for workers to be free from harassment in their workplaces. Harassment has been defined to include



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forms of print and visual text media. If a member receives or wants to circulate material that they are unsure if it would offend others, best advice would be not to circulate it at the workplace. We all have different standards for humour and pleasure. If you want to circulate material that you think is “funny” but are unsure how others will receive it, the email or text can be sent to a home address and then a personal decision can be made outside of work time and work resources about any further distribution.

## **Assume no privacy at work**

The easiest and simplest rule that will keep members out of trouble is: assume there is no right to privacy on the employer’s electronic equipment and conduct your business accordingly.

Imagine your supervisor or your co-worker’s reaction if they saw the “joke” or motivational email you are thinking of circulating. If you think the response would not be positive, best not to send it or send it home and you can make a decision about circulation after you take more time for reflection. Think carefully before you push the “send” button.

If an employer has a clear policy prohibiting personal use of their equipment, and members breach that policy, it is not a defence to argue that there is a right to privacy and the employer had no right to view that information. Breaches of the policy are usually discovered either because the offensive material falls into the hands of someone who is offended or is discovered during the employer’s routine data system maintenance. In the event that a member is disciplined, union advocates may be able to argue that the employer’s search was unreasonable or the employer didn’t have to right to conduct the search as extensively as they did. However the easier defence is a good offense.

## **Stewards role**

If you as a steward become aware of electronic “jokes” circulating in the workplace, the best policy

would be to delete the information and to send a reply email to the source reminding the member that there is no privacy on the employer’s email system and offensive material should be deleted and not circulated.

Facebook records, blogs and email records can last forever and are increasingly being used by the courts and arbitrators to defeat personal injury claims and as evidence of irreparable employment relationships. Recently, the government employer relied on Facebook records to discipline a member whom they believe had falsified a sick leave claim. Employees have little control over their digital footprints. Public electronic venting about co-workers and supervisors can and will be used as evidence against members despite claims that it was intended only for a private audience.

There is developing litigation in this area. In the meantime, we must do a better job educating our members about the perils of assuming a right to privacy when none exists. If you are at work, or away from work performing work duties on employer computer equipment, assume that you don’t have a right to privacy for the content of your electronic records.

## **Government employees**

Recently the Ontario government banned access to Facebook for all of its government employees. This change was done for two reasons: the amount of time members spend on Facebook while at work and the content of the material that was posted on Facebook.

The B.C. government recently announced that union members can access personal email while at work in recognition of the work/life balance. Again, it is best if this contact occurs during breaks and not for long periods of time and be careful of the content of the material. Assume the Employer can access the information on your computer and revise your electronic viewing decisions accordingly. ●



## Addictions and workplace misconduct

BY THOM YACHININ, STAFF REPRESENTATIVE

**R**ecent developments in the courts have raised significant questions regarding to what extent arbitrators will consider addictions when dealing with grievors terminated for serious misconduct. When one of our brothers or sisters is struggling with an addiction that has affected their conduct in the workplace, to what extent do we raise that addiction as a factor during the grievance process and at arbitration?

In the past, when an employee suffering from an addiction to drugs or alcohol was terminated for conduct connected to his/her disability, arbitrators had generally found that the addiction must be accommodated by the employer to the point of undue hardship.

While this approach has never guaranteed reinstatement for an employee who engages in serious misconduct, and nor should it, it properly focussed the attention of arbitrators on the human rights aspects of addiction in discipline.

### So what has changed?

In September of 2008, the British Columbia Court of Appeal issued its decision in *Gooding*. This decision appeared to change the law in British Columbia regarding the discipline of employees suffering from addiction to drugs and alcohol.

The *Gooding* case concerned the termination of a store manager in a liquor store. The grievor had, over a period of approximately one year, stolen liquor from his store. When this conduct was discovered, the grievor revealed that he was suffering from an addiction to alcohol and took steps to treat this illness.

Despite his long service and clear discipline record, the employer decided to terminate the grievor. The Union proceeded to arbitration, and the Arbitrator reinstated the grievor, partly because the employer had failed to properly accommodate the grievor's disability of addiction.

The Arbitrator applied the law from a recent Labour Board decision finding that it was a "hybrid" case with both culpable/blameworthy and non-culpable misconduct. This hybrid approach requires an arbitrator to consider the effect of disabilities, such as addiction, on misconduct to determine to what extent that misconduct is culpable. This is often done in conjunction with a human rights analysis of the situation. The arbitrator reinstated the grievor.

The arbitration award was appealed to the Court of Appeal, where the Court overturned his decision to reinstate the grievor and remitted the matter back for reconsideration.

The majority decision suggests that arbitrators should not consider the human rights aspects of addiction where the misconduct is such that a non-addicted employee would have been terminated. The decision states that the grievor's addiction to alcohol is "irrelevant" if that addiction did not play a part in the employer's decision to dismiss and the grievor did not suffer a greater impact for his addiction than another employee disciplined for the same misconduct.

Despite this seemingly radical change, the Court did not overturn its two previous decisions which affirmed that arbitrators are to consider the human rights aspects of addiction when dealing with grievors terminated for misconduct related to that addiction.

In B.C. we now have two lines of authority from the Court of Appeal. Obviously, if the *Gooding* approach



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is accepted at arbitration it would cause significant problems for any member who commits serious misconduct connected to an addiction.

## Has *Gooding* changed the test?

Over two years have now passed since the Court of Appeal's decision in *Gooding*. Fortunately, thus far there seems to be little interest among decision makers to adopt the kind of radical departure from human rights and labour law that is suggested in *Gooding*.

One of the important developments since the Court of Appeal's decision is the arbitrator's reconsideration of his original award after the case was sent back by the Court.

In 2009, the Arbitrator upheld the termination of the grievor in his reconsideration decision. He applied the hybrid analysis but without an explicit human rights analysis.

Another arbitrator considered the *Gooding* decision in 2008. In that case, the arbitrator applied the hybrid approach to the case of an employee with a marijuana addiction who was terminated for smoking marijuana while on duty.

The Arbitrator referenced the *Gooding* decision but found that it did not remove the requirement

to consider the human rights aspects of addiction, which he referred to as "long-standing and [predating] the decision in *Gooding*".

Other arbitrators and the Human Rights Tribunal have also agreed that the *Gooding* decision has not changed the existing law regarding the need for a human rights analysis in addiction/discipline cases.

## So Where Are We Now?

So far, arbitrators and human rights panels in British Columbia have stated that *Gooding* did not fundamentally change the law on employees suffering from addictions.

We cannot say that an arbitrator, given a challenging set of facts, may not be influenced by the reasoning in the *Gooding* decision. This may be most true when an employee has committed serious misconduct, particularly conduct rising to the level of criminal.

We should continue to raise the issue of addictions and accommodation with employers when the facts support a human rights analysis, we should continue to pursue rehabilitation treatment for our members when it is necessary, and we should continue to argue the issue of addiction and accommodation before arbitrators.





## Mitigating lost income - an update

BY MEGAN ASHBURY, STAFF REPRESENTATIVE

**M**itigation is defined as “the lessening or reducing the effects of a bad situation”. In the context of a grievance and arbitration, there is a duty to mitigate which requires a grievor, after filing a grievance, to take steps to reduce the negative impact of the situation being grieved.

The principle of mitigation has long been used by arbitrators as a way to determine what loss a grievor has suffered when they are successful at arbitration: (See “*I have a duty to WHAT?*” in the March 1999 edition of *The Steward*.)

In the context of a lengthy suspension or a termination, the duty to mitigate requires that a member takes steps to look for work and earn income. Waiting for arbitration, without looking for work, could undermine a grievor’s claim for wages lost after being terminated. Arbitrators consider the concept of mitigation when they are determining the specifics of the financial remedy for a member who has been successful at arbitration.

In order to justify a claim for lost wages, grievors must show that they have taken all reasonable steps to mitigate or “lessen” the loss of income. The employer, in order to reduce its obligation to pay lost wages, has the onus to show that the efforts made to obtain alternative employment were not reasonable in the circumstances.

The arbitrator will consider all the circumstances to decide if the grievor acted reasonably.

### What are reasonable efforts?

What does reasonable efforts mean? Reasonable efforts means that in cases of suspension or discharge, grievors should be encouraged to look for a job, even a temporary or part-time one, as soon as possible. The duty to mitigate doesn’t necessarily mean that members have to find another job, it means that they have to provide evidence that they made a reasonable effort to look for other work.

An arbitrator will look very closely at circumstances where the grievor has been offered, and refused, another position or re-employment with the employer.

In a 2008 decision in *Evans*, the Supreme Court of Canada considered the issue of mitigation where an employer had offered an employee a chance to mitigate damages by returning to work for that same employer. The employee was given notice by the employer that their employment would end on a certain date and they were offered the opportunity to remain working until that date. In such cases, the central issue is whether a reasonable person should have accepted the offer.

Mr. Evans had worked as a business agent for the union for 23 years. A new president of the union was elected. Mr. Evans had supported the incumbent during the election. He was told his employment would be terminated and the employer entered into negotiations with him concerning working notice and the amount of notice. The negotiations broke down. The employer union told Mr. Evans he could keep working in his position. He refused to report back to work. The Supreme Court of Canada ruled that Mr. Evans failed to mitigate his loss by failing to report back to work. The Court emphasized that no employee is obliged to continue or return to a working atmosphere of hostility, embarrassment or humiliation but none of those circumstances were present in the case before them.

The Court’s decision tells us that an employer’s offer to re-employ, or move a grievor to another position



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should be carefully considered and not outright rejected. In the absence of a hostile, embarrassing or humiliating atmosphere, an arbitrator may consider a grievor's refusal to accept re-employment - particularly in the current economic climate - as less than reasonable.

## Practical Guidelines

it is important for a grievor to understand how to fulfill their duty to mitigate after a suspension or termination.

The caselaw decisions have identified the following practical steps that members should take:

- look for other work to replace their lost income;
- keep a record of all job positions applied for;
- keep copies of correspondence related to their job search efforts such as letters and any electronic communications to employers, resumes, job descriptions, reply letters from prospective employers;
- keep a log record of any job interviews.

- keep a daily log of the names of people contacted by telephone, email, and in-person as part of the job search.

If the grievor obtains alternate employment, the arbitrator will also review the amount of income earned since the date the grievor was suspended or dismissed. Grievors should keep track of the following material:

- Copies of any pay stubs, statements of earnings, etc.
- Record all expenditures made that would have been covered by your dental, extended health, MSP premiums paid, etc.
- Records of any expenses incurred in relation to job search.

Applying for and receiving Employment Insurance (EI) benefits can also be used as evidence of duty to mitigate. The EI requirement of ongoing job search efforts provides useful evidence of mitigation efforts. However, after a suspension or termination, EI benefits may have to be repaid by the member if the arbitrator makes an order for full back wages or the parties agree to settlement terms that characterize money received by a member as past income.

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## A criminal investigation at the workplace

BY BRITTANY SKINNER, STAFF REPRESENTATIVE

**S**ometimes allegations of misconduct in the workplace have both criminal and labour relations implications. For example, an allegation of theft can lead to discipline, including termination, and may also lead to criminal charges, prosecution, and even incarceration.

When there is a situation that has both criminal and labour relations implications, the member should be aware that there may be a conflict on the best way to respond.

In the labour relations context, members are told

that honesty is the best policy. They are advised that if they are responsible for misconduct then they should accept that responsibility and apologize as soon as possible. This is because a member who fails to provide an explanation and/or apology at the earliest opportunity may face challenges



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about their sincerity at their arbitration hearing, specifically where the member seeks reinstatement.

In the criminal context, the opposite is usually true. A criminal lawyer will likely advise the member to exercise their right to silence and say nothing until the criminal lawyer has had a chance to assess the facts and evidence. This is because any statement made by a member may be used as evidence against them in a subsequent criminal prosecution. If a member exercises their right to silence and does not provide any statement, in some cases it may be difficult for the Crown prosecutor to convict them.

As the criminal advice and the labour advice can often be contradictory, members who have committed an infraction will have to make a choice about what route to pursue. Remaining silent could adversely affect their future employment, but admitting and apologizing could jeopardize their prospective criminal defence.

The consequences of a criminal conviction are often much more serious than the labour relations consequences. While a suspension or a termination is very serious, a criminal record or incarceration will be much worse.

So what do you do if you are called into an Employer meeting to discuss allegations that are criminal in nature?

- Get criminal legal advice. Demanding your right to counsel does not make you look guilty -- it makes you look smart. Even if you know you are one hundred percent innocent, you need to protect your legal interests;
- Exercise your right to remain silent but be fully informed about the consequence for your employment;
- Don't sign away any of your rights. If the Employer provides you with any document waiving your rights you should not sign it without consulting a lawyer;

- Ask if you have the right to leave the interview and return to your work station. If yes, exercise that right and do not make any statements regarding the alleged misconduct. If no, remain silent and demand access to legal advice; and
- Remember that the Employer has limited power to influence how the criminal investigation will proceed. Do not believe the Employer if they tell you that an admission from you will affect the outcome of the criminal prosecution. The ultimate discretion to decide if criminal charges will be laid or proceed to hearing rests with the Crown Counsel in BC.

Where there is a risk of criminal charges, members should protect their rights by consulting a criminal lawyer. Some options in seeking legal criminal advice are:

- *Legal Aid* offers a *Legal Services Society Call Centre* at 604-408-2172 (Lower Mainland) or 1-866-577-2525 (toll free, outside the Lower Mainland);
- The B.C. Branch of the *Canadian Bar Association* operates the *Lawyer Referral Service*. This service can be used during business hours, 8:30am - 4:30pm, Monday to Friday at 604-687-3221 or 1-800-663-1919. The Service enables members of the public to consult with a lawyer for up to 30 minutes for a fee of \$25. After the consultation, the fees to be charged are strictly between the lawyer and the client; and
- The *Law Student Legal Advice Program*, where appointments can be booked by calling the switchboard at (604) 822-5791.



# arbitration award summaries

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## ➤ CERTIFICATION

BCGEU and UFCW and HEU and others  
September 1, 2010  
BCLRB No. 145/2010

The BCGEU and CSSEA filed a section 141 application for reconsideration of the Original Decision which upheld the award of the Umpire which struck down a Memorandum of Agreement between the BCGEU and CSSEA with the support of one other union in the Bargaining Association. The Union argued the Umpire had erred in the interpretation of what constitutes a constituent union for the purposes of the Articles of Association. The Board granted the BCGEU's application and overturned the Umpire's and the Board's Original Decision. The Panel found the Umpire erred in interpreting the representational language of the articles. It was intended to protect the majority rule of the largest union, and not the smaller constituent union

## ➤ CLASSIFICATION

Gateway Casinos (Starlight Seniority Issue)  
September 1, 2010  
Arbitration 1008

The Employer opened a new casino and brought together two groups of workers from different work locations. There was an unresolved issue regarding the determination of seniority between the Riverboat Casino workers and the Royal Towers Casino site (which had been closed for 2 years). The Union provided separate independent legal counsel to the two groups to resolve the seniority issue. The arbitrator provided guidance to the parties which will dovetail the classification seniority dates for all members.

## ➤ CLASSIFICATION

BCGEU and Mainroad East Kootenay  
June 30, 2010  
Arbitration 1006

The member was a road foreman (RF) who worked in an RF1 position. He moved to an RF4 position and shortly after the move, the employer reclassified his position as an RF2. The Union grieved the reclassification and successfully argued the position was properly classified as an RF4 position and the member should receive the increase in pay on a retroactive and ongoing basis. The Union called evidence to establish the member was performing the same duties as other RF4s and the same duties as the previous employee in that position.

## ➤ CLASSIFICATION

BCGEU and Maxaam Analytics  
June 28, 2010  
BCLRB No. 113/2010

The BCGEU has been certified for a unit of employees at Maxaam. The employer acquired another large company, Cantest, and applied under section 35 for a declaration that it was the successor to Cantest and for a merger of the two businesses and a revocation of our certification at Maxaam. The Union argued the application was premature and there should be a vote of the merged employees. The Board granted the employer application for a declaration of a Successorship and ordered a representation vote of the merged employees, which we won.

The Employer successfully appealed the decision. The Board stated that a union must demonstrate that it is a viable candidate in the representation vote. On the facts, the union would have needed to show one-third membership support. The circumstances fell below that threshold and thus did not justify the ordering of a vote. However, a just labour relations result required that the Board should exercise its discretion to acknowledge the strong majority support and not cancel our certification.



# arbitration award summaries

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## ➤ CLASSIFICATION

Okanagan College and Okanagan College Faculty Association and BCGEU

April 26, 2010

BCLRB No. B66/2010

The Faculty Bargaining Association applied for a declaration that certain vocational instructors in the BCGEU bargaining unit should be moved to the Association bargaining unit due to certain changes in the Human Services Work program including the move from a one year certificate to a two year diploma program. The sole issue was whether the instructors work continues to be vocational in nature. The Board dismissed the application, finding that the Faculty Association failed to establish that the instructors, despite the program changes, had ceased to be vocational instructors.

## ➤ CLASSIFICATION

Andrea Rachel and HEU/BCGEU

March 4, 2010

EI Board of Referees

The unions filed a representative appeal of the Commission's decision that the Bill 29 settlement payments from government to members were earnings for EI purposes. The majority found the payments were earnings but recommended the Commission should waive the overpayment. The minority found that the payments did not arise out of employment and allowed the appeal. The unions have filed an appeal to the umpire level of review.

## ➤ DISMISSAL

BCGEU and Argo Road Maintenance

August 5, 2010

BCLRB No. B131/2010

The Union filed a section 99 appeal arguing the member had been denied a fair hearing when the arbitrator failed to provide an opportunity of reply

to the Union. The Employer filed a preliminary objection that the grievance had been filed out of time. The Union was not provided a copy of the Employer submission until after the arbitration award was issued. The matter was remitted back to the arbitrator to review the process.

## ➤ DISMISSAL

BCGEU and Starlight

April 8, 2010

Settlement

The BCGEU filed an unfair labour application at the Labour Relations Board against the Employer in relation to the termination of an employee organizer. The parties agreed to mediation and with the assistance of a Vice-Chair achieved a settlement that resulted in the reinstatement of the employee and full back pay.

## ➤ DISMISSAL

BCGEU and Government of B.C.

April 6, 2010

Arbitration 1002

Two long service members were terminated for sending/receiving inappropriate emails at work. The Union acknowledged some discipline was warranted but relying on their clean records and other factors argued progressive discipline principles should apply, the terminations were excessive and suspensions should be substituted. The arbitrator found there was evidence of a long standing pattern of accessing/distributing highly inappropriate material. The grievances were dismissed based on the arbitrator's finding that the members failed to accept full responsibility for their behaviour and they minimized the seriousness of the misconduct.

The members filed a section 99 appeal that was unsuccessful. The members have also filed a section 141 application that is currently outstanding.



# arbitration award summaries

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## ➤ DISMISSAL

BCGEU and Ministry of Children and Family Development

January 6, 2010

Arbitration 1000

The grievor was an 11 year employee who was terminated for failing to perform visual checks of sleeping youths in a provincial custody centre. The Union argued that termination was an excessive response as others received suspensions for similar misconduct. The arbitrator accepted the Union argument and reinstated the worker effective the date of the award (for the serious employment offence). The worker had a clean record and the arbitrator agreed his apology was sincere.

## ➤ LONG TERM DISABILITY

BCGEU and Communities Addiction Resource Society

August 9, 2010

WCAT award

A recreation activity worker in a residential care home was assaulted by a resident and suffered a severe psychological condition. She was initially assessed at 40% of total disability. The WCB reduced her award to 20% deciding that she had a pre-existing condition. On appeal, the Union successfully argued for reinstatement of the 40% and an additional 3% which resulted in an additional monthly payment of \$576.81 for the member.

## ➤ PAYMENT ISSUES

BCGEU and Emcon Services

June 27, 2010

Arbitration 1007

The member was issued a fine for operating a commercial vehicle with a load exceeding the legal weight requirements. The Union grieved the Employer's failure to reimburse the member for

the cost of the fine. The grievance succeeded. The arbitrator found there was nothing in the collective agreement that allowed the Employer to impose a monetary fine on an employee and it was not an appropriate action within the proper scope of the Employer's disciplinary powers. There was evidence the Employer had paid for tickets in the past and the Employer did not provide a scale for workers at the loading site.

## ➤ PAYMENT ISSUES

HEABC and BCGEU

March 10, 2010

BCLRB No. B44/2010

The Board dismissed the Employer's section 99 application for review of the arbitrator's award dated September 22, 2009. The arbitrator had determined that the Employer was responsible for the mileage costs incurred by health care workers who were using their vehicles on behalf of and at the request of the Employer. This award resulted in a significant financial remedy for many of our health care members.

## ➤ SETTLEMENTS

BCGEU and Government of B.C.

December 9, 2009

Arbitration 994A - Settlement

The union negotiated a settlement of a number of grievances relating to denial of sick leave benefits, suspensions, termination and a number of outside human rights complaints. The member is now deemed to have retired from employment and will receive \$20,000.00 in RRSP monies and \$15,000 in exchange for giving up his right to reinstatement.