

2016 CarswellOnt 10550
Ontario Arbitration

Toronto Transit Commission and ATU, Local 113 (Use of **Social** Media), Re

2016 CarswellOnt 10550

**In the Matter of an Arbitration between Amalgamated Transit Union, Local 113,
(the “Union”) and Toronto Transit Commission, (the “Employer”)**

In the Matter of the Grievance re Use of **Social** Media (Twitter)

Robert D. Howe Member

Heard: February 10, 2014; September 11, 2014; September 12, 2014; September 16, 2014; October 16, 2014;
January 30, 2015; February 5, 2015; July 21, 2015; July 22, 2015; October 2, 2015; December 10, 2015; April 1,
2016

Judgment: July 5, 2016

Docket: None given.

Counsel: Ian J. Fellows, Kassia Bonisteel, for Union

Dolores Barbini, Ed O’Dwyer, for Employer

Subject: Labour; Public

Headnote

Labour and employment law

Robert D. Howe Member:

1 Through a grievance filed on April 2, 2013, the Union (also referred to in this award as “Local 113”) grieves the Employer’s use of **social** media, including Twitter, “to publish personal information about Local 113 members, to receive and make complaints about Local 113 members, and to solicit public comment with respect to Local 113 members”. (For ease of exposition, the Employer will also be referred to in this award as the “Commission”, and as the “TTC”.)

2 During the twelve days devoted to the hearing of this matter, six persons were called as witnesses. In addition to their testimony, 38 exhibits were entered as evidence during the course of the proceedings. In making the findings and reaching the conclusions set forth in this decision, I have duly considered all of that oral and documentary evidence, the submissions of counsel, and the usual factors germane to assessing evidentiary credibility and reliability, including the firmness and clarity of the witnesses’ respective memories, their ability to resist the influence of self-interest when giving their version of events, the internal and external consistency of their evidence, and their demeanour while testifying. I have also assessed what is most probable in the circumstances of the case, and considered the inferences which may reasonably be drawn from the totality of the evidence.

3 Since this award could not be issued within the time prescribed in subsection 48(7) of the *Labour Relations Act* due to other professional commitments, the complexity of the issues, and the many days of evidence and argument which had to be carefully reviewed due to the protracted nature of the proceedings, that time has been extended pursuant to subsection 48(9) of the Act.

Facts

4 Twitter is a commercial online **social** media service featuring “tweets”, which are messages consisting of a maximum of 140 characters. Longer messages can be sent by sending two or more tweets. (Tweets often contain abbreviations, short forms, typographical errors, and misspellings. With the exception of tweets to which words have been added or modified in square brackets for the purposes of exposition, the tweets quoted in this award have all been quoted verbatim, without repetitively inserting “[sic]” as further confirmation that they have been accurately quoted.) Photographs and videos can also be posted on Twitter. Anyone with internet access and a web browser can read tweets (and view posted photographs and videos) by going to the Twitter website, but only someone who has become a registered user by creating a Twitter account can send tweets (and post photographs and videos). Anyone with an email address can create a Twitter account by providing Twitter with that email address (which will not be publicly visible to others on Twitter), and selecting or creating a username (also known as a “handle”), which need not be and often is not the person’s actual name. There is no charge for creating the account, or for sending or receiving tweets. Each registered user has a “profile”, which initially includes only the user’s handle, but which can be revised to include a photo and other information, including a brief biography, the user’s location, and the user’s website.

5 Under Twitter’s Terms of Service, by using Twitter’s services users consent to Twitter collecting and using any information that users provide to it. Those Terms of Service also include the following caution: “You understand that by using the Services, you may be exposed to Content that might be offensive, harmful, inaccurate or otherwise inappropriate, or in some cases, postings that have been mislabeled or are otherwise deceptive.” The section titled “Your Rights” begins with the following paragraph:

You retain your rights to any Content you submit, post or display on or through our services. By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed).

The Terms of Service stipulate that they “will be governed by the laws of the State of California”, and include a limitation of liability.

6 There are also Twitter Rules, which are part of Twitter’s Terms of Service. They stipulate that users “may not publish or post direct, specific threats of violence against others”, and that they “may not engage in targeted abuse or harassment”.

7 If a registered user of Twitter opts to “follow” another registered user, the former will receive in his or her stream of tweets (also known as his or her “timeline”) all of the tweets posted by the latter, except tweets that are sent as direct messages to one or more specific users. Once a tweet has been posted, it can only be deleted by the person who posted it or by Twitter; it cannot be deleted by a follower who has received it in his or her timeline. Tweeters can use the hashtag symbol (“#”) to mark keywords or topics in their tweets. Clicking on a hashtagged word in a tweet shows all the other tweets in which that word has been hashtagged. Twitter generates revenue by selling advertisements which appear in users’ timelines, and through “Promoted Tweets”, which can be targeted to specific users by gender, geography, interests, key words, and other means of selection. Increases in Twitter traffic may enable it to generate more revenue.

8 The TTC’s **social** media presence includes a corporate Facebook page, a YouTube channel, and two Twitter accounts: @TTCnotices, which commenced operation in January of 2009 and is used by the TTC’s Transit Control to provide service updates, reminders, and information about service issues; and @TTChelps, which commenced operation in February of 2012 and is used to receive and respond to customer service questions and concerns. Members of the public cannot post anything on the TTC’s YouTube channel. Although the Facebook page has a small area to which members of the public can post, it generally does not present problems of the type identified by the Union with respect to Twitter, because the TTC can delete

from that page anything it finds to be objectionable.

9 The Union's concerns about the Employer's use of **social** media pertain primarily to @TTChelps. Anyone with a Twitter account can send a tweet to @TTChelps by including "@TTChelps" in a tweeted message. Those tweets are monitored and responded to by six senior service representatives employed in the TTC's Customer Service Centre (the "CSC"), using a computer program called TweetSuite. They perform that work on a rotational basis, with one on the morning shift and one on the afternoon shift. They are trained to perform that work through peer-to-peer training, job shadowing, and reviewing past tweets. (Although they were not included in the bargaining unit when evidence was being adduced in these proceedings, during the course of argument counsel indicated that the senior service representatives had recently become members of the bargaining unit represented by the Union.)

10 Since early January of 2014, the CSC has been managed by Sue Motahedin, who has over twenty years' experience in customer service managerial positions, having previously worked for Telus, Yahoo, and Chapters. As of late January of 2015 when Ms. Motahedin was called by the Employer as a witness in these proceedings, @TTCnotices had over 100,000 followers, while @TTChelps had about 16,000 followers and had posted about 82,000 tweets.

11 The only tweets which automatically appear in the timeline of a person following @TTChelps are the general tweets broadcasted by @TTChelps (or posts by other tweeters which @TTChelps chooses to retweet for the information of its followers). On some days the only tweets broadcasted by @TTChelps to all of its followers are a general tweet by which TTC Customer Service signs on for the day (by tweeting, for example, "Good morning Toronto @TTChelps is signed on the for the day. Have a wonderful day. [followed by the initials of the senior service representative who posted it]"), and a general tweet by which it signs out (by tweeting, for example, "Goodnight Toronto @TTChelps is now signed out"). On other days, they may include tweets broadcasted by @TTChelps regarding service delays, restorations, or changes. Ms. Motahedin testified that the number of tweets broadcasted by @TTChelps averages about four a day. She testified that @TTCnotices has more followers than @TTChelps because it broadcasts more tweets. She further testified that the number of followers that @TTChelps has is insignificant because users can interact with @TTChelps without following it.

12 @TTChelps replies to numerous tweets from users each day. Each of those replies is tagged to the individual user to whose tweet @TTChelps is responding. They do not automatically appear in the timelines of other Twitter users following @TTChelps (unless they are also following the user to whose tweet @TTChelps is responding). However, any user may view those replies (other than replies sent as direct messages) by accessing @TTChelps' profile (by clicking on "TTC Customer Service") and then clicking on "Tweets & replies". To view the tweet(s) that gave rise to a particular reply, the user clicks on the reply, and the thread of tweets and replies will appear on the screen. (@TTChelps uses direct messages to respond to users who prefer to contact @TTChelps privately. Those direct messages cannot be viewed by other users.)

13 When she was asked (in examination-in-chief) why the TTC has @TTChelps in addition to @TTCnotices, Ms. Motahedin gave the following response:

We have it because our customers expect us to have it. **Social** media is incredibly important and continues to grow. Customers expect to be served through a channel of their choice. Different generations expect different experiences so we're being responsive to what our customers want. Having @TTChelps on Twitter allows customers to contact us from their smart phones wherever they are and at any time, so by us having that presence we're easily accessible. It allows us to interact with customers one-on-one. It can be immediate so it allows us to **assist** someone who is experiencing an issue right then and there. We can clarify, provide additional information, and de-escalate situations. We reduce frustration for our customers and reduce frustration employees are experiencing.... As well, @TTChelps builds trust with our customers. They see that we're visible and present. Our responses are transparent. We have nothing to hide.

14 During the course of her testimony, Ms. Motahedin also expressed the view that the tweets about which the Union is concerned would be tweeted whether or not @TTChelps existed, because tweeters can and do create hashtags such as #TTCsucks and #TTCproblems. She also expressed the following view:

Twitter is a new and continuing to grow form of **social** media. It is public and people will say what they want about the

TTC and any other person or product regardless of whether that person or organization has a Twitter account.

15 Ms. Motahedin testified that the TTC's protocol for responding to tweets is generally to be informative and friendly. She further testified that it is "evolving based on some trial and error", and that how her staff responds to tweets continues to change based on how customers react and based on feedback received from her staff. She also stated, "It's a new area so we're being adaptable and flexible".

16 Although customer complaints about employees were accepted through @TTChelps prior to 2014, Ms. Motahedin testified that this no longer occurs. It was her evidence that since January of 2014 when she was hired as the head of the CSC, customers who have a complaint are asked to contact the TTC by telephone or via the TTC website, which has a fillable complaint form for complaints relating to TTC employees, as well as a fillable complaint form for complaints about TTC service.

17 Some of the tweets received by @TTChelps are complimentary. However, others are critical of the service being provided by the TTC or the manner in which TTC employees perform their duties. As indicated below, replies sent by @TTChelps to tweets that are critical of TTC employees or service often include phrases such as "sorry to hear that", "that's not good", and "that was not nice at all". When it was put to Ms. Motahedin in cross-examination that such responses suggest or acknowledge that the employee has done something wrong, she disagreed and expressed the view that they are merely expressions of empathy and acknowledgements of how the customer is feeling. However, she also acknowledged that "one of the many possible inferences" which may reasonably be drawn from a response of that type is that the customer has been mistreated. During re-examination, she testified as follows regarding those kinds of responses:

They're using empathy, putting themselves in the customer's shoes - listening and trying to gather information to provide a response. We're not making a judgment on the customer's perceptions of a situation, whether it's service or any employee, but we are trying to let them know we're listening and that we care.

I think they help de-escalate certain situations. Sometimes customers are disappointed with service and when the TTC is able to clarify or empathise it helps the customer at the moment and can potentially deflect any attention from the operator.

18 Responses sent by @TTChelps to tweets expressing dissatisfaction with service provided by TTC employees also sometimes provide information or an explanation about what is occurring. Examples contained in the Union's book of exhibits (entered as Exhibit 15) include "Reported delays due to restricted speed zone - drivers have to slow down"; "Rush hour traffic attributing to buses getting bunched up"; "Employee would be concerned for your & other commuters' safety. Roller blading is not allowed on TTC property"; "Thanks for advising, but operators are allowed to make stops to use the facilities"; and "I can understand your point, but having to use the facilities is beyond our control as human beings". However, in providing such information, customer service representative sometimes also appear to be expressing an opinion about the situation, as exemplified by the use of the word "unfortunately" in the following exchange:

@TTChelps Ex of lack of front line Cust svc. Driver of car 4085, 504 line watching young mother struggle w/stroller onto streetcar #ttc

TTC Customer Service's response: Unfortunately, operators are not required to assist.

@TTChelps Maybe not required, but TTC ops have a bad rep for a reason, and he's one of the. Didn't even fake concern. Despicable.

19 Rocco Signorile was the first witness called by the Union in these proceedings. Mr. Signorile was hired by the TTC in 1986. He operated street cars and buses for many years before being elected to various full-time positions in the Union. At all times material to these proceedings he was Executive Board Member - At Large Transportation. He had also previously served as a Union shop steward, a Joint Health and Safety Committee member, Executive Board Member -Transportation -

Roncesvalles / Russell / Wheel-Trans / York Region, and as the Secretary-Treasurer of the Local. In 2008 he became aware that blogs set up on the internet by members of the public and media outlets were being used by members of the public to attack bargaining unit members by posting photos and abusive rants containing derogatory and vulgar comments about them. However, he did not take any action regarding them because they were not operated by the Employer.

20 Tweets in the Employer's first book of documents (Exhibit 16) indicate that a number of derogatory, abusive, offensive, and inappropriate tweets about TTC drivers were tweeted from various Twitter accounts before @TTChelps was created, including one tweeted in July of 2011 which reads: "A TTC driver was pepper sprayed on a bus <- GOOD. #TTC sucks asssss"; two tweeted in January of 2011 which read: "Worst streetcar driver ever. He almost e everyone fall bout 3 times now he just took off a car's mirror. Way to go bud #ttcfail" and "Invariable delays, rude employees, stations in perpetual disrepair, and the TTC braintrust has the balls to suggest a fare hike?! #TTCsucks"; one tweeted in August of 2010 which reads: "Now I understand why at least 1 #ttcdriver is assaulted a day ... They feel so nice that they get the same profit as a macdonalds manger .pshh"; one tweeted in March of 2011 which reads: "Lmaoo this #ttcdriver is a bitch he told the packed bus it would b a 5min wait half the ppl got off then he closed the door nd drove off"; one tweeted in November of 2011 which reads: "Once again thanks 2 #TTC and the asshole #TTCdriver am 40mins late to wrk"; one tweeted in April of 2011 which reads: "TTC's Warden route sucks. The sched and reality don't match. Bus 7495 came, driver closed doors on customers & let colleagues on"; one tweeted in December of 2011 which reads: "TTC still fuck'n sucks ass... whe it comes to customer servaiice!!! to the streetcar driver..your a dickhead"; and a set of two tweeted on April 20, 2009 which read: "stands and watches 3 TTC driver sit and shat and stuff their face for 10 minutesd while passengers freeze #ttcfail", and "sits and watches TTC drivr mk riders frz in rain at bath statn while he tlks to pals (car 4183) #ttcfail".

21 Exhibit 16 also includes a number of offensive tweets that postdate the inception of @TTChelps but which were not addressed to it, including one tweeted in May of 2013 which reads: "Fucking #ttc driver you heartless creature ugh pretending to not see people on the bus stop"; one tweeted in June of 2013 which reads: "why am I not surprised by this fool ass #ttcdriver that got let go for chasing a pickney — working for #ttc does not mean they're all smart"; one tweeted in November of 2013 which reads: "THIS TTC DRIVER SUCKS.. UGH STOP JERKING THE BUS!"; one tweeted in February of 2013 which reads: "Ttc service sucks like these bus driver are chit chatting when they need to shut the fuck up and drive the bus #useless"; one tweeted in September of 2014 which reads: "Ran for the Ttc n was there but the streetcar driver drove off!!!! Way to support your peple giving U JOBS!!!! So disrespectful!!!!"; and one sent in May of 2013 which reads: "Didn't know that being a jerk was part of the job #ttcdriver #501 giving all the good ones a bad name. R u hungover or just a #prick".

22 Mr. Signorile opened a Twitter account in April of 2009 but did not use it very actively until 2012. In February or March of 2013, he began to earnestly monitor @TTChelps after bargaining unit members contacted him to raise concerns about the TTC allowing customers to use it to make comments which made them feel intimidated, bullied, harrassed, and threatened. When he began to monitor @TTChelps in earnest, he was overwhelmed by the amount of abuse being visited upon bargaining unit members by the public, including racist remarks, homophobic remarks, vulgarity, and death threats. When he raised the matter with Andy Byford, the TTC's Chief Operating Officer, Mr. Byford referred him to Brad Ross, the TTC's Executive Director of Corporate Communications. When Mr. Signorile expressed concern to Mr. Ross that @TTChelps was allowing that abuse of bargaining unit members to proliferate and doing nothing to stop it, Mr. Ross expressed the view that "you can't stop the public from what they say on Twitter". Mr. Signorile also raised his concerns with Megan MacRae, the TTC's Director of Employee Relations, who seemed concerned and asked if they could meet again later. However, after weeks turned into months with no further response, the policy grievance which gave rise to these proceedings was filed by the Union.

23 The TTC's lack of response to the objections which he had raised also prompted Mr. Signorile to join the conversation by tweeting to @TTChelps through his Twitter account. When he was asked (during cross-examination) why he did so, his response was: "When I saw that @TTChelps wasn't doing anything about my objections or trying to stem some of the stuff that was going on, from my perspective I was protecting my members. I figured if @TTChelps wasn't going to do it, I was going to do what I could to the best of my ability to make people aware that you can't post that kind of stuff with regard to my membership". Mr. Signorile's Twitter profile includes his name, his handle which is "@imthedarknight" and an image of "The Joker", who is a fictional villain in the Batman series. It also briefly included "Executive Board Member ATU Local 113. STOP TWEETING ON MY MEMBERS! GET A LIFE! @TTCDOESNTHELP", until Mr. Signorile decided to remove that addition. Although he suggested that his tweets were intended to calm down situations and discourage frivolous

complaints, he acknowledged that some of them included “unprofessional” language, such as calling tweeting customers “whiners”, “a whining snitch”, and advising them to “get a life”. However, he also suggested that this language was not offensive, and that it helped bargaining unit members because “the best way to deal with a bully is to face a bully”. Other messages that he tweeted included: “get a life what ru a professional snitch? Drivers aren’t required to enforce fairs! U dont want 2 pay? Don’t pay”; “lol [laughing out loud] u think ttc drivers care about people like you do yourself a favour buy a car you waste of space”; “if your dumb enough to go out in a major ice storm and expect no delays you deserve to be left out in the cold OMG [Oh my God]”; and “ur a joke most passengers stink drivers have the RIGHT 2 smoke btw [by the way] I’m not a drvr or smkr”. In commenting on the effect of a customer’s tweet to @TTChelps alleging that a driver was “texting and driving”, Mr. Signorile tweeted “yes thank you the driver was just fired over your twitter report congratulations”. However, he acknowledged in cross-examination that his response was untrue.

24 Mr. Signorile sometimes monitored all of the tweets sent and received by @TTChelps during a day or a week by scrolling back through those tweets. However, he was unable to view all of the tweets which had been sent and received since the inception of the site because there were too many of them. He gathered a number of tweets with which he had issues or problems so that they could be entered into evidence in these proceedings, but described them as being “a drop in the bucket of what’s potentially out there”. Screen shots of those tweets were presented through the Union’s aforementioned book of exhibits, which sorted them into the following categories:

1. Derogatory Language
2. Violence/Threats
3. Pictures
4. Badge Numbers
5. Breaks
6. Encouraging Negative Views/False Information
7. Public Discipline
8. Requests for More Information
9. Customer Complaints

25 As acknowledged by Mr. Signorile in cross-examination, the screen shots contained in Exhibit 15 are snapshots taken at a moment in time. Some of those tweets contained in those screen shots may have been subsequently deleted by the tweeters who sent them. However, that does not change the fact that they were tweeted and were consequently viewable by members of the public and by TTC employees. While those screen shots did not always capture the entire “conversation” of tweets and replies sent by a tweeter and responded to by @TTChelps, most of them captured enough of the conversation to make them useful to consider in addressing the issues raised in these proceedings. All of those screenshots were taken after Mr. Signorile started following @TTChelps and approached management to express his concerns about it. However, the precise date on which some of them were taken is uncertain.

Derogatory Language

26 The first tweet included in the “Derogatory Language” section of that exhibit book reads:

2 bus rides two completely different experiences. Driver 1 #dick Driver 2 #goodhuman #ttc @TTChelps #toronto

It generated the following response from @TTChelps:

You can call us at 416-393-3030 or go to ow.ly/AKsGz to report your experiences

In commenting on that response, Mr. Signorile expressed the view that by not doing anything about the tweeter calling a TTC driver a “dick”, the Employer was condoning and encouraging it.

27 A tweet from “Whosaane” contained the following obscenities and allegation: “Bitch ass TTC driver just blew past me at Bayview and Eglinton with no just cause. Length of my beard may be a factor @TTChelps #TTCproblems”. The initial part of @TTChelps’ response was “We understand your concerns however please refrain from personal attacks against employees”, but it then went on to provide information on how to file a complaint. Mr. Signorile’s reaction to that response was that it should have ended with the first sentence and should not have gone on to advise how to file a complaint because that indicates that the Employer is condoning the obscenities directed at the employee. He expressed the view that when @TTChelps receives an offensive tweet, it should respond that the TTC does not condone profane and abusive language and should then immediately block the tweeter because “hopefully when the members of the public see this response it would slow down or stop this type of thing because people would know that it’s not getting them anywhere”. He also suggested that tweets to @TTChelps are different from telephone calls or emails to the Employer because they are online for everyone to see. He further testified, “From my point of view, everything that’s in reference to one of my members falls under the public relations provision of the collective agreement and is supposed to be private”.

28 A tweet reading “slow ass service fix ur self bitch” generated the following response from @TTChelps: “We are here to help, however discriminatory or abusive comments are not condoned”. After the grievance was filed, responses of that type appeared more frequently on @TTChelps, but did not stop the use of abusive language.

29 Other tweets contained in Tab 1 refer to TTC employees as “bitchy bus drivers”, “racist asshole bus drivers”, “shitty drivers”, “cunts”, “douchebags”, “fucking dicks”, “doublefucks”, “pricks”, “morons”, “fucking idiots”, “losers”, “union jerks”, “goons”, “rude surly subway drivers”, “rudest people on the planet”, “psycho”, “insane”, “bipolar”, “idiot”, “wank”, “grumpy bastard”, “stupid bus driver”, “moron driver”, “absolute jerk driver”, “dickhead driver”, “retarded driver”, “rude selfish beastly male TTC subway operator”, “mother fucker”, “total pompous jerk”, “fucking fatass”, “not fit to drive a bus let alone provide customer service”, “needs to learn how to drive”, “rude and pissy”, “dumbnrude”, “scum”, “another fucking faggot in a not in service bus”, “brown son of a gun of a driver”, “bald white piece of shit fuck”, “racist fuck that needs to get laid”; “overweighted ginger with a grouchy attitude”, “Racist driver much? Total jerk to white customers, perfect gentleman to black customers”; and “bald dude w/ 2 earrings taking tickets at temporary Union entrance is an absolute prick”.

30 In describing the impact of that derogatory language, Mr. Signorile testified that bargaining unit members feel that they are just punching bags for the public and that the TTC does not care about them. He also testified that they are angry the TTC is allowing this to occur, that they are under enormous pressure, and that the negative stigma that they feel is overwhelming.

31 As indicated above, when @TTChelps receives a profane or otherwise inappropriate tweet directed at a TTC employee, it generally sends a response indicating that it does not condone abusive, profane, derogatory or offensive comments, and asking the tweeter to please refrain. Other responses in the tweets introduced into evidence in these proceedings include: “I can see that you are frustrated but please refrain from derogatory comments towards our employees”; “I can see that you are frustrated but please refrain from abusive language and personal attacks on our employees”; “We understand you may be upset, however please refrain from personal insults”; “The TTC does not condone abusive or offensive comments”; “If you would like our help pls refrain from using that language”; “We understand your frustration but pls refrain from profanity”; “Can you please refrain from using vulgarity and elaborate on what happened?”; “Pls let me know what is upsetting u and I’ll try to help but, pls refrain from the foul language - it is not acceptable”; “Please refrain from the offensive language. Please call 416-393-3030 or go here: ow.ly/AlhFc to submit complaint”; “Please refrain from making these types of comments when making a report. Please provide details location & vehicle#”; “Please explain what happened”; “I’m sorry it happened, but employee complaints have to be taken off line”; “Sorry to hear, call us at 416-393-3030 if you want to discuss further”; and “Sorry to hear, I hear your frustration, however in order for me to **assist** may I please ask that you refrain from using profanity”.

32 While those type of responses may dissuade some tweeters from sending offensive tweets to @TTChelps, they are certainly not universally successful in that regard, as they sometimes result in further tweets such as “I’m past refraining, when I give myself an extra 45min to get somewhere & I’m still late because of your service I use profanities”; “it’s a free country and I’ll call a spade a spade”, “Why should I? Are you guys going to give me a new job when I get fired for being

late for my current job? Ridiculous public service”; “@TTChelps pretend you didn’t see it if I hurt your feelings. Can you send a bus to pick me up if I don’t swear? Didn’t fuckin think so”; “@TTChelps you are a cunt, motherfucking piece of shit, god awful, bitch ass of a company. Condone my foot up your ass”.

33 If a tweeter does not refrain from using profane or otherwise inappropriate language after being requested to do so by @TTChelps, the tweeter may be blocked, muted or ignored by @TTChelps. Blocking and muting are both features of Twitter. If a tweeter is blocked, the tweeter is no longer able to follow @TTChelps and their tweets no longer appear in @TTChelps’ timeline. Blocked tweeters are not notified by Twitter that their accounts have been blocked, so they will not know that this has occurred unless they are so advised by @TTChelps or unless they try to visit @TTChelps. If a tweeter has been muted by @TTChelps, the tweeter can still follow @TTChelps but his or her tweets will no longer appear in @TTChelps’ time line. Muted tweeters will not know that their accounts have been muted by @TTChelps unless they are so advised by @TTChelps. If a tweeter is ignored, his or her tweets continue to appear in @TTChelps’ timeline, but receive no response from @TTChelps. Ignoring a tweeter is not a feature of Twitter. It is merely a practice which may be adopted in dealing with unwanted tweets.

34 Concerns about a user can also be reported to Twitter. Ms. Motahedin testified that she had reported approximately ten users to Twitter because they were using TTC branding or imagery, which raised a concern about potential damage to the TTC brand. In two of those cases, Twitter shut down the users’ accounts. In the remainder, Ms. Motahedin received a response from Twitter advising that no violation of Twitter’s terms of service had been found. If an account is shut down by Twitter, the tweeter may open another Twitter account in a different name.

Violence/Threats

35 It was Mr. Signorile’s uncontradicted evidence that assaults on TTC operators are a daily occurrence. Those assaults range anywhere from being spat upon to being shot. Threats and verbal abuse also frequently occur.

36 Tweets in the “Violence/Threats” section of Exhibit 19 that were sent to @TTChelps include ones reading as follows: “There is always one bus driver you want to hit. Guess most of the drivers don’t know polite customer service, just their money”; “Since the @TTChelps has screwed us over so much, i like this guy [referring to the “man who robbed a TTC fare collector at gunpoint” mentioned in a Cable Pulse 24 tweet]”; “car 54318 bloor west operator - if he had a stroke heart attack was attacked I would turn my back. Like he does to us”; “You shitty ttc drivers better watch out I’m like a bounty hunter now”; and “YOU NEED TO TEACH YOUR EMPLOYEES SOME MANNERS AND RESPECT! I SWEAR I’LL RAISE THE ASSAULT RATE MYSELF”. (Some of the other tweets in that section of Exhibit 19 are not of assistance in deciding this case, as they were not sent to @TTChelps, nor to any other part of the TTC’s social media presence.)

37 @TTChelps’ response to the last tweet quoted above was: “I understand your frustrated however TTC does not tolerate threats against our employees Please call if you have a complaint”.

38 In extreme circumstances where a tweet is considered to be a real threat, the CSC will contact the Toronto Police Service, the TTC’s Transit Enforcement Unit, or Transit Control. An example given by Ms. Motahedin during her testimony pertained to a tweeter using the handle “El Chapo”, who in the second week of October of 2014 began posting photos of a TTC collector in conjunction with tweets targeting that employee and using a very threatening tone, including one reading “if that ttc employee is working next week at greenwood an he flip out again his family won’t be going to a reunion [sic]”, and another reading “so the next time I come across an irate employee would it be alright I can beat him down cuz I see you guys are no help”. When @TTChelps became aware of the situation, the Toronto Police Service and the TTC’s Transit Enforcement Unit were immediately contacted. The presence of two police officers at the TTC’s Greenwood Station prompted El Chapo to tweet: “Lmfao [an acronym for “laughing my fucking ass off”] 2 cops at greenwood waiting I’mma across the street lol [an acronym for “laughing out loud”]”.

Pictures

39 The “Pictures” section of Exhibit 19 includes a number of photos of TTC employees taken by customers and tweeted to @TTChelps, along with criticisms of their conduct. The first tweet in that section, for example, includes a photograph of a

TTC collector, with the caption “WARNING: Disgruntled employee verbally assaults”. The second includes a photo of a TTC employee performing crash gate duty, and the following message: “@TTC helps tell my why this worker has his shoe off and is resting his foot on the fare collection box?”, to which @TTChelps responded, “Not sure. Hope the employee is keeping well. To have this reported pls provide details by calling us @ 416 393 3030 or ...”. In commenting on that Tweet, Mr. Signorile indicated that crash gate duties are often given to employees with an injury or who are awaiting placement due to an injury. He also testified that the TTC does not discourage passengers from taking photos and, in fact, encouraged it in the context of a photo of a sleeping TTC collector which was tweeted to a newsite and which subsequently generated the following request from @TTChelps: “Hi, a couple months ago you had tweeted a picture of a sleeping collector. Could you please reply when it was taken?” However, he also acknowledged in cross-examination that the public can and do post photographs and videos on other forms of **social** media such as YouTube, Instagram, and Facebook, and that they would be able to do so even if @TTChelps did not exist.

40 A photograph of the driver of “**Bus 1610**” was attached to a tweet alleging that he was insulting riders, refusing entry to paying customers, and racially discriminating. It was Mr. Signorile’s evidence that although none of those allegations was true, the driver was immediately pulled over and asked what had happened, without the benefit of a Union representative or of any of the protections contained in the negotiated complaints procedure contained in the collective agreement. However, there is no evidence that the driver was disciplined.

Badge Numbers

41 Each TTC transportation employee has a numbered badge that is usually visible on their tunic, from which they can be identified by the Employer, the Union, and other bargaining unit employees. Some tweets received by @TTChelps contain badge numbers. An example contained in section 4 of Exhibit 15 reads: “@TTChelps listen I take the ttc everywhere I go! Why is it every time I have to deal with miserable [employees] who seem to hate their jobs. Your employee 23847 is one of them”. If a tweet does not contain a badge number, @TTChelps sometimes asks that it be provided. For example, in response to a tweet complaining that when a customer asked a TTC employee if the bus he was letting people on was 509, the employee told him to check the sign at the back himself, @TTChelps tweeted “I apologize for that. Were you able to get a badge number?”, to which the customer responded, “I didn’t get a badge number, I was just too surprised. Next time I will though.” Mr. Signorile expressed the view that it was inappropriate for badge numbers to be solicited or displayed on Twitter because of privacy concerns and because a badge number can be associated with an employee’s name.

Breaks

42 Some TTC drivers work split shifts and do not have scheduled breaks. Although the TTC usually provides bathroom facilities at the end of the line, if a vehicle is “short turned” before the end of the line, the operator will not have access to those facilities. Consequently, operators are permitted to take discretionary breaks along the line to purchase items such as a coffee or a bottle of water, and to use washroom facilities. This gives rise to tweets being sent to @TTChelps complaining about drivers taking those breaks, to which @TTChelps provides responses such as “Some operators work split shifts which cover only the peak periods. Operators don’t have scheduled breaks”; “operators are allowed to use facilities if need [be] anywhere along the route”; “Sorry -Operators are permitted to take breaks when able”; “Operators are allowed to use facilities on occasion. Sorry for the disruption in srvc”; “Sorry for the delay, the driver had to use the facilities”; “Yes they are allowed as they don’t have scheduled breaks. Again we expect them to exercise discretion at all times”; “Sorry to hear. Operator likely had a scheduled layover/break or could have been using the facilities”; and “Operators are permitted to use the facilities when nature calls”.

43 The Union’s objection to those tweets, as voiced by Mr. Signorile in his testimony, is that an employee’s need to use the washroom is a private matter, and that it is embarrassing for employees to have it become a matter of public discussion on Twitter. He also suggested that some of @TTChelps’ responses are “almost saying ‘yeah it’s a bad policy’”, and gave the following evidence regarding the effect this has upon bargaining unit members:

When my members see this, they say ‘Rocco, are we not allowed to use the bathroom?’ A lot of my members feel that if they get off the bus to use a washroom, people are photographing them, tweeting about them.... The pressure my

members feel is incredible. They have a thousand eyes looking at them every day just to use the bathroom. According to @TTChelps, people have a point. I know drivers who will not get off their vehicle to use the washroom. They'll wait 'til the end of the line just because of the public pressure, which also raises health issues....

Encouraging Negative Views/False Information

44 In response to a tweet suggesting that something should be done about people playing music or loud games on TTC vehicles without headphones, @TTChelps tweeted, "There is a bylaw in place [and] drivers are to enforce it". It was Mr. Signorile's uncontradicted evidence that although there is a by-law which addresses playing music without headphones, drivers are not required to enforce it. He also testified that if drivers sought to enforce the bylaw, their vehicles would never move and drivers would go crazy, because so many violations of the bylaw occur every day that enforcement would result in TTC schedules being "thrown out the window". He further testified that if drivers attempted to enforce the bylaw they could be assaulted. He expressed concern that as a result of the misinformation provided by @TTChelps in that response, the public would now expect TTC drivers to enforce the bylaw and would report them if they did not do so.

45 A tweet complaining that a driver "just looked at me as he pulled away from the stop I ran to" and asking "why do you employ such people?" generated the following response from l@TTChelps: "We do encourage our operators [to] accommodate whenever possible, however they do have a schedule to maintain". Another tweet about a driver refusing to reopen the door in response to an elderly patron knocking on the door with his cane prompted @TTChelps to respond: "Operators are not required to re-service stops, but they could use discretion and exercise good customer service & do so". Mr. Signorile's evidence regarding those responses was:

The driver serviced the stop, closed the door and moved on as trained. The driver didn't re-stop. The Employer trains us not to re-stop for safety reasons and traffic flow. When a motorist behind sees the bus start to move, they move too. If it re-stops, there could be a collision ... and passengers on the bus lurch forward....

On the one hand they're saying operators are not required to do so, and [on other hand] they could use their discretion.... Public safety is paramount. Re-servicing a stop goes against public safety. Their responses give people the false view that when they don't exercise discretion they're not providing good customer service.

46 The Union also objected to tweets from @TTChelps suggesting that an operator "could have used discretion" to provide a customer with a transfer midroute, after correctly noting that the "transfer should be obtained when entering". In response to a tweet suggesting that a TTC employee providing information about shuttle buses "probably shouldn't be calling customers 'stupid'", @TTChelps wrote "Definitely not. Where was this employee standing?", to which the tweeter replied, "westbound platform, west end of it - said not to ask stupid questions when she just asked a simple question -really uncalled for". @TTChelps' response to that second tweet was: "As you said that comment was uncalled for. Thanks for letting us know." In testifying about those responses, Mr. Signorile stated, "How do they know the comment was actually made - no due process. They're validating the complaint as being valid without due process." He also expressed the view that @TTChelps should not be responding in that manner because it is inconsistent with the complaints process contained in the collective agreement.

47 Mr. Signorile gave similar evidence regarding a number of other @TTChelps' tweets included in section 6 of Exhibit 15, because without any investigation, they expressed agreement with concerns raised by customers regarding employee conduct and/or apologised for what the customer had experienced. He also expressed the view that it was not appropriate for such matters to be addressed in a public forum such as Twitter, noting that the TTC had not bargained any collective agreement provision permitting complaints against employees to be received through **social** media.

Public Discipline

48 Mr. Signorile expressed similar concerns about the tweets contained in section 7 of Exhibit 15, in which @TTChelps

responded to various customer complaints by tweeting “I will have the operator addressed”; “I will advise supervisory staff about this incident”, “We will have your concerns addressed”, “complaints received in any form are investigated”; “Thanks for your feedback. We will be addressing these matters with the operator”; and “Employee has been interviewed and appropriate action taken. Thank you for allowing us to respond. We apologize for any inconvenience.” Mr. Signorile interpreted those responses as being indicative of disciplinary action. However, he acknowledged that he had never checked to determine if any of the employees referred to in the tweets contained in section 7 of Exhibit 15 were actually disciplined.

Requests for More Information

49 The first tweet contained in section 8 of Exhibit 15 asserted that the TTC “needs to stop letting bums ride for free on late night bus routes”, to which @TTChelps responded: “Could you advise the bus # of the operator who allowed this? What route was this on and where did it happen?” In commenting on that response, Mr. Signorile noted that TTC operators are not required to enforce fares, and suggested that engaging with the type of people picked up by buses on late night routes would be fraught with danger. He suggested that using the word “allowed” in that response implies that the operator should not have allowed this to occur. He also suggested that soliciting information such as the bus number in a public forum such as Twitter is wrong and inconsistent with the complaints process in the collective agreement. He testified that @TTChelps constantly solicits from tweeters information that would identify bargaining unit members. Other information solicited by @TTChelps in tweets contained in that section includes: “please provide us with as much info as you can”; “Do you have any idea how fast the operator was going”; “Can you let me know what time, route number, direction and location”; “Can you advise where this happened and at what time”; “Could you elaborate on his behaviour and on what route this was on”; “If we have a vehicle number we can identify the operator of the car”; “Can you please provide the 4 digit bus #, with other information such as the time, location, direction of travel”; and “So just to clarify, the collector briefly had her eyes closed or was she actually asleep”.

Complaints

50 Prior to 2014, @TTChelps sometimes indicated to tweeters that they would pass along a complaint to a supervisor. Examples contained in section 9 of Exhibit 15 include a tweet asserting: “That driver needs a reevaluation. She is not fit to drive a bus let alone provide customer service”, to which @TTChelps responded: “I’m sorry for the experience I will be reporting this to the supervisor”; a tweet asserting that “the shittest ttc ... dude trying to hurt ppl [on a specified bus], to which @TTChelps responded “I’m sorry to hear that” and undertook to file a complaint on the tweeter’s behalf; a tweet asserting that a driver “started swearing and decided to put the car out of service”, to which @TTChelps responded “Thank you for letting me know. A report will be filed on your behalf”. That section of Exhibit 15 also includes numerous other instances in which @TTChelps responded to tweeted complaints by advising “I will send a report on your behalf to have the operator addressed”; “We’ll have his behaviour reported”; “I will have this reported”; “I will report to the supervisor”; and “I will send a report on your behalf to have the employee addressed regarding this behaviour”.

51 Section 9 of Exhibit 15 also includes an example of a situation in which after @TTChelps advised a tweeter that employee complaints were to be made offline and provided information regarding the options for doing so, another tweeter asked: “What purpose do you have if you can’t forward the complaint or file on his behalf? It just further infuriates riders”. @TTChelps responded “I appreciate your view but this is not the proper forum to collect/document complaints - we have reps ready to handle offline”. This generated a further tweet stating “I think you need to rename. You are neither customer service, nor helpful”. At that point another tweeter joined the conversation by tweeting: “They used to take complaints online. Now they just say ‘we have informed management of your concerns’ or ‘file online’”. This was followed by the following tweet from yet another tweeter: “We should just go back to making complaints directly to @bradTTC and/or @TTCsue since @TTChelps just redirects”. That tab also includes several other examples of tweeters expressing frustration with having to call in or write a complaint rather than merely tweeting it. It also includes a tweet asserting: “Wife and 3 year old son sworn at by streetcar driver today. This is not the first time they have been treated like scum”. @TTChelps responded, “Sorry to hear. I believe I spoke to you recently and we will process your report and submit to appropriate staff to address”, to which the tweeter replied, “Yes and complaint is filed. Posting here means the world can see how she was treated!”

52 When Mr. Signorile was asked (during examination in chief) if he had any issue about complaints coming in through

Twitter, he gave the following response:

Absolutely. It's public. All complaints should be between the employer and the employee, not public for all to see. That's why the process [set forth in Section 41 of Article 1 of the collective agreement] was negotiated. Not for public display, consumption or knowledge. It affects the morale of my members, and the mindset of my members. You might as well write it on a billboard.

53 Mr. Signorile also expressed the view that @TTChelps is a public forum which was created by the Employer and which is constantly available for the public to spew vile, racist, homophobic tweets that foster an environment of hate, and adversely affect members of the bargaining unit. He noted that @TTChelps has a TTC logo on it, and expressed the view that this makes it part of the TTC's workplace and the equivalent of graffiti on the wall in the workplace. When it was put to him in cross-examination that the TTC does not have the power to make a tweeter delete offensive tweets, Mr. Signorile stated, "They have the ultimate power - take down the site". He acknowledged that this would not prevent a tweeter from making such comments on **social** media, but suggested that his members would not see those comments and that they would no longer be on a **social** media site that is part of the workplace.

54 In addition to Mr. Signorile, the Union called three other TTC employees as witnesses (who will be referred to in this award as "D.B.", "B.V.", and "C.C.", to protect their privacy).

55 D.B. is a bus operator who has been employed by the TTC since 2004. She first heard about @TTChelps from other operators, who were upset and very negative about it. When she subsequently received a TTC Communication Information System ("CIS") call asking if she had bypassed a passenger at the last stop on her route, she assumed that the complaint had come through @TTChelps because she received the call less than twenty minutes after the incident. However, she acknowledged in cross-examination that she had no actual knowledge of how the incident came to CIS's attention. Although she never heard anything more about the complaint, she testified that she felt "violated" by it, because the manner in which she received it did not afford her the opportunity to have Union representation regarding it.

56 After viewing a series of Twitter screen shots taken by Mr. Signorile, D.B. opened a Twitter account and followed @TTChelps. She also accessed replies sent by @TTChelps to various users, and the tweets which gave rise to those replies. She was very concerned about the profanity, threats, and photographs of TTC employees contained in some of those tweets. The photographs were of particular concern to her because her ex-fiance had made an attempt on her life. Consequently, she did not want her photograph posted anywhere for him to find her and come after her again. She gave the following testimony about how the possibility of her photograph being posted on @TTChelps has affected the way in which she performs her job:

Q. Has @TTChelps had any impact on you in terms of your driving?

A. I'm constantly looking over my shoulder, particularly when anyone is standing near me with their smartphone in their hand. I'm very anxious. I adjust my mirrors so my reflection is not seen by them. I use my driver's shield. I do not engage with the public. Generally people would know me as I regularly do the same route. They would call me "smiley". They don't do that anymore. When I'm on the bus I follow procedure. Even though we have certain establishments where we are able to use the facilities mid-route and get a coffee, I don't do that because I don't want people posting a picture of me doing that, like they have done in the past. On layover at the station, I'm watching my back. I don't engage with people on the platform. I have my keys out and my smartphone in case I need to make an emergency response call.

Q. Why not "smiley" anymore?

A. I don't smile. I don't engage them in any way.

Q. Why?

A. For fear of having it escalate into an incident where they get upset and may take my picture.

Q. Why are you looking over your shoulder?

A. To see how the person is holding their smartphone and where the lens of the camera is pointing. I find it very threatening. The TTC talks about distractions on the bus. That's my distraction and it's a safety issue for me because my mind is on that phone rather than driving.

57 D.B. also gave evidence about screenshots of several tweets to @TTChelps which were not about her, but which she found to be offensive because she viewed them as examples of sexual harassment. In the first one, the tweeter wrote "TTC bus driver on Bellamy 9 from warden is so hot!", to which @TTChelps replied: "You should tell them that. Sure they would appreciate the compliment." The second one reads: "Uhhhm my streetcar driver was a dreamboat. Is it okay to hit on streetcar drivers?". There is no evidence that @TTChelps replied to that tweet.

58 The third tweet about which D.B. testified reads, "Bus driver of #1069 - 199 Finch, y u [sic] so sexy? Too much sexy to handle in the morning", to which @TTChelps replied: "May I ask you to clarify? Are you complimenting the operator?" The tweeter's response was: "nana, yes, yes I am [smiley face emoji] please pass this compliment on to him! Thanks!", to which @TTChelps replied: "Thanks for the feedback, glad to hear! LOL". D.B. found that reply to be offensive because "rather than treating this as a serious matter, they're accepting it". Consequently, using her anonymised handle, she tweeted the following message to the person who sent the third tweet: "this is unprofessional", to which she received the following response: "I'm sorry, but when did complimenting someone [become] unprofessional". This prompted D.B. to tweet: "it is based on sexuality. There are more professional way to commend someone. If this was an employee there would be disciplinary action taken. Double standard". The original tweeter responded, "lol, you taking this way too seriously. Find something more productive to do than seek out TTC relate comments on Twitter." After D.B. tweeted, "have a nice day", the original tweeter ended the conversation by tweeting: "how is he goonna get a note in his file? Nothing wrong with looking good on the job... I appreciate a well-put together person".

59 D.B. also testified that she was afraid for the collector who was the subject of the aforementioned tweets by El Chapo. She was not monitoring @TTChelps at the time those tweets were sent, but she saw them later that day. She testified that El Chapo had a plan of action, as indicated by previous tweets (not produced as evidence) in which he indicated that he would be back at Greenwood Station at three o'clock that day. She was also very concerned that El Chapo had repeatedly posted the collector's photograph in his tweets. When she saw the death threat that had been tweeted by El Chapo, she sent it to Mr. Signorile, but did not send it to anyone in management because she was off duty and because it was directed to @TTChelps. She was unable to recall whether she had retweeted it to the police, but testified that she had done so with respect to other tweets on some occasions. She further testified that on several occasions she had retweeted tweets not only to Mr. Signorile but also to Ms. Motahedin and to Mr. Ross (the TTC's aforementioned Executive Director of Corporate Communications).

60 B.V. has been a TTC street car operator since 1989 and has also driven buses. While she was operating an eastbound streetcar on College Street on September 3, 2014, it appeared that no one wanted to exit or board the streetcar at its Crawford Street stop so she proceeded across Crawford Street on a green light for which the pedestrian crosswalk signal had begun to count down. After clearing the intersection, she stopped to permit the exit of a female passenger who had belatedly called out that she wanted that stop. B.V. then proceeded eastwards, but while the streetcar was stopped in traffic approximately halfway to the next stop at Grace Street, a man ("J.C.") who had run across the red light from north to south on the east side of Crawford Street caught up with it and indicated that he wanted to board. However, B.V. did not open the door because it is unsafe to load between stops. The man then ran to the Grace Street stop and boarded the steetcar there when it arrived at that stop. After boarding J.C. said, "Nice of you to pick me up back there". He also expressed the view that since B.V. had permitted the passenger to exit, she should have permitted him to board. Before exiting the streetcar at Spadina Street, J.C. used his cellphone to take a photograph of B.V. He then stood in front of the streetcar and took at least one more photo of her.

61 After she finished work on September 3, 2014, B.V. was informed by a colleague that her picture had been posted on Twitter in conjunction with a tweet in which B.V. was called an asshole and a bitch. B.V. did not have a Twitter account but on the following morning a colleague who had one showed her the offensive tweet and the photograph that had been posted by J.C. After completing her morning work, B.V. submitted an occurrence report, as recommended by the Union official whom she contacted regarding the situation. As indicated in that occurrence report and in her testimony in these proceedings,

B.V. was very upset about J.C.'s tweet and his posting of her photograph. She characterised what he had done as harassment, intimidation, and bullying. She was angered and embarrassed by it, and found it "insulting to be called a 'bitch' and an 'asshole', for all the world to read". She testified that the photo put her in danger, because anyone who does not like the TTC could find her and "do whatever".

62 @TTChelps' initial response to J.C.'s tweet was "We understand you may be upset however we don't condone personal attacks against employees." In the exchange of tweets which followed, J.C. expressed the view that it was not a personal attack, and that the problem would be solved if the TTC hired people who like their job. @TTChelps also sent the following tweet: "If you would like to file a complaint you can call us at 416-393-3030 or go to ow.ly/B27pF". However, there is no evidence that J.C. filed a complaint.

63 When B.V. opened a Twitter account a few days later to try to see the tweets, she found that they were still there but that her photograph had been removed. Ms. Motahedin attempted to contact J.C. through Twitter to request him to delete the offensive tweet, but he did not respond to her requests.

64 B.V.'s manager is Paul Lefler, who is the Assistant Manager of Rail Transportation in the TTC's Russell Streetcar Division. Since he was away from work at the time, her occurrence report was initially dealt with by Lincoln Calvo, who is another Assistant Manager. It was also reviewed by Human Resources. After meeting with her and a shop steward on October 20, 2014, Mr. Lefler sent B.V. the following written response to that report:

On Monday, October 20, 2014 we met to discuss your report submitted on September 3, 2014. A.T.U. Local 113 Shop [Steward] Douglas Pickering was also in attendance on your behalf.

I advised you that further to your discussions with Mr. Calvo, I have reviewed this report and I note that it is regarding a disparaging **social** media posting. The TTC takes these complaints seriously and strives to provide a work environment that is free from discrimination and harassment. Unfortunately, incidents of unpleasant interactions with customers do occur from time to time. In the situation you describe in your occurrence report, the employer took reasonable steps to request the individual in question not to engage in the behaviour you reported. I also understand that this individual has already removed the picture in question. You indicated that it has been removed from Twitter.

The TTC does not condone the disparaging remarks made by this customer or the posting of your picture on Twitter; however, there are very real limits to the employer's ability to control such incidents, particularly when the behaviour takes place outside the physical boundaries of the workplace. As I'm sure you are aware, the employer has no power to ban an individual from using Twitter or to prevent them from tweeting in any regard. In an effort to resolve this matter, the TTC has attempted to contact this individual to ask them to remove the disparaging comments, however, at this point, the individual has not responded.

Finally, you should be advised that the TTC only operates two Twitter accounts, @TTChelps and @TTCnotices, neither of which is associated with "TTC Helps Sucks", which, as I understand, is a Facebook forum operated by the ATU Local 113.

65 B.V. was not satisfied with the Employer's response, to her concerns. She felt that J.C. should have been blocked, and that he should not have been encouraged by @TTChelps to file a complaint. She also expressed the view that if there can be no governance of what is tweeted to @TTChelps, the site should be taken down.

66 The final witness called by the Union was C.C. He was hired by the TTC in 2004 and worked as a subway and bus operator until Monday September 29, 2014, when he commenced work as a collector. While he was seated in the Runnymede subway station at the crash gate to which he had been assigned that day, a customer ("S.K.") took a photograph of him and posted it on Facebook and on Twitter because she was dissatisfied with the manner in which he responded to concerns she raised with him about a male customer's conduct. Those concerns included allegations of harassment and assault. The Facebook posting included a detailed description of S.K.'s version of what occurred. Her tweets to @TTChelps also included allegations about the customer's conduct and C.C.'s response to it, and an expression of "hope [that] he faces discipline".

67 Tweets sent to @TTChelps by other people regarding S.K.'s Facebook posting about this incident included: "Think someone needs to look into this"; "might want to look at this complaint"; "please explain why the #TTC allowed this assault to take place"; "have you seen this yet? Your staff are supposed to help people"; "Thought I would let you know about this" (to which @TTChelps responded, "Thank you - we're aware and are investigating the situation"); "saw this on FB. Hope that @ttchelps and/or @bradtTC take a look into this"; "Are you listening to this Toronto? Horrible harassment at TTC"; "Saw this on FB. DISGUSTING that the employee victim-blamed you!!"; "YOU SHOULD BE ASHAMED! You ask passengers to respect TTC workers but this is a two way street!"; and "What disciplinary action will you be taking against this TTC employee?"

68 @TTChelps also received the following tweeted message (sent as three sequential tweets) regarding that incident: "I am very concerned. As a muslim woman, hearing about the harassment of a muslim woman going on in front of a TTC official, with this official doing nothing is very alarming. Where is the integrity? When complained, his reply was 'ignore'. This is very disturbing. And unsafe". @TTChelps' response was "I assure you that the TTC is treating this incident seriously and we are looking into this matter", to which the tweeter replied: "I'd like updates on this. And I am glad TTC is taking this seriously."

69 @TTChelps also received the following tweet about the incident (from a tweeter whose initials are "G.S."): "Dear @TTChelps, this douchebag employee needs some disciplining. #Runnymede station #Lazy #Facebook #Scum of TTC". The aforementioned photograph of C.C. was attached to that tweet. C.C.'s testimony about his reaction to that tweet was:

I did not like that comment at all. A person like this would never have said something like this to my face. My wife says 'What's the company doing about it?' I said I don't know. I felt let down. I felt that the company let me down. I felt betrayed by the whole system. It's harassment. It's no different from someone coming to your workplace and screaming these things at you.

70 As indicated by the following tweets, S.K. took down the photograph of C.C. that she originally tweeted to @TTChelps:

I still believe the incident was unacceptable and totally avoidable if the #TTC employees contacted security when I asked repeatedly.

But I have no desire to ignite hatred or vilify a guy who embodies what's actually a larger problem. So I'll retweet the message sans photo.

I took down the photo of the #TTC guy who victim blamed me at Runnymede. He was a jerk but I don't want to contribute to online bullying.

However, the offensive tweet from G.S., and the photograph taken by "S.K." that was attached to it, remained posted on Twitter a year after the incident and, as acknowledged by Ms. Motahedin (during cross-examination), they could remain posted indefinitely. Ms. Motahedin also testified that she was not sure if the TTC took any action regarding that tweet, such as blocking the tweeter.

71 C.C. testified that the photograph and allegations posted by S.K. "went viral", and were seen by friends, his wife, and other family members including his sister in New York. He also testified that when he was assigned to work at a busier subway station on the following day, he felt anxious and uncomfortable, and did not trust the wave of customers coming towards him.

72 Following this incident, C.C. was disciplined for not immediately reporting it to Transit Control. That discipline has been grieved and will be dealt with in other proceedings. Consequently, it would be inappropriate to make any findings about it in this award.

73 The second and final witness called by the Employer was Dr. Amanda Clarke, who has a DPhil (Information, Communication and the **Social** Sciences) from the University of Oxford (Oxford Internet Institute), as well as a Master of

Arts (International Affairs) and a Bachelor of Humanities from Carleton University, where she has been an Assistant Professor in the School of Public Policy and Administration since 2014, following a year as a Sessional Instructor there. Her thesis topic for her doctoral degree was “Government-Citizen Relations on the **Social** Web: Canada and the United Kingdom, 2006-2013”. Her thesis supervisor was the Director of the Oxford Internet Institute, Dr. Helen Margetts, who is a world leader in digital government studies.

74 Dr. Clarke was retained by counsel for the TTC to provide an objective expert opinion on the following three matters:

1. The role of **social** media, specifically Twitter, in Canadian Society as between citizens and public service providers, like the TTC;
2. Should a public service provider use Twitter and if so, why? What are the benefits and/or risks, if any?; and
3. Should a public service provider engage directly with the public through **social** media, specifically Twitter, rather than merely providing information?

75 For the purposes of this case, the Union does not dispute that Dr. Clarke is a public sector media use expert, and that those three matters are totally within her area of expertise. Her expert opinion on those matters is summarised below. In providing it, she drew upon survey data, academic literature, and “grey literature” (which is a library term used to describe reports and documentation that prior to the development of the Internet were traditionally difficult to find). However, she also indicated that Canada is “relatively data poor when it comes to understanding internet trends”.

76 In describing the role of **social** media in Canadian Society as between citizens and public service providers, Dr. Clarke noted that by 2012, 85% of all Canadian households in census metropolitan areas had access to the Internet at home, and that Canadian Internet users are active on a range of **social** media platforms, including Twitter. Although only 10% of Canadian Internet users had Twitter accounts in 2011, that figure had almost doubled by 2013. Twitter users tend to be relatively well educated, affluent, urban, and under the age of fifty, although some growth has also been occurring in the demographic of those aged sixty-five and older.

77 A range of public sector organizations in Canada have been integrating **social** media into their communications and stakeholder engagement functions. It is primarily used by those organizations to deliver information through relatively static one-way communication, rather than being used in a consultative or interactive manner. Twitter is the **social** media tool most commonly used by governments in Canada, although they also make use of other **social** media tools such as Facebook, YouTube, and Flickr. **Social** media usage has grown rapidly in Canada at the municipal government level, and has become an accepted mainstream practice. By April of 2010 approximately 25 Ontario municipalities had developed **social** media presences, but by April of 2012 that number had increased by over 672% to just under 200 Ontario municipalities, of which 69% had Twitter accounts.

78 In responding to the questions of whether a public service provider should use Twitter, and if so, why, Dr. Clarke indicated that the academic and practitioner literature generally concludes that use of **social** media, including Twitter, is a necessary and beneficial component of contemporary public sector communications and citizen engagement strategies. She also indicated that the three rationales typically cited as justification for that conclusion are: (1) public service providers should use **social** media because citizens want them to; (2) **social** media can support official communications functions by providing a useful platform for disseminating policy messages and official announcements, and can ensure that public service providers are communicating to citizens in the online spaces where they aggregate (as opposed to assuming the citizens will find such information via traditional channels); and (3) **social** media provide a new and more effective platform for citizen engagement, which can render government decision-making processes more democratically responsive, and support more effective or efficient public policies and services.

79 Although discussion of the risks involved in governmental usage of **social** media occupies a comparatively smaller portion of the literature on public sector **social** media use, the risks that have been identified are: (1) privacy and security risks of confidential data being leaked as a result of hacking or a result of public sector employees using **social** media in a way that reveals private information about citizens or service users; (2) the risk that governmental usage of **social** media

usage will usher in, or be perceived to usher in, inappropriate governmental surveillance of citizen behaviour on **social** media platforms; and (3) the risk that governmental IT environments, and the policies and procedures applied to government-to-citizen communications, can be at odds with the demands of **social** media. In instances where governments or public service providers prove incapable of interacting with citizens in the rapid, fluid, and informal manner demanded by **social** media, they run the risk of appearing out of date, inaccessible or impervious to citizen or service user initiated engagement, which in turn could damage their reputation and sour their relationship with the public.

80 The literature concludes that the first risk is largely overblown and that it can be minimised by governmental IT infrastructure being kept sufficiently up-to-date. Dr. Clarke also noted that governments face the risk of hacking from any number of entry points, so there is nothing unique about **social** media in that regard. The way in which public service providers minimise the second risk is by developing policies about what types of information can be drawn from citizens or users, and about how it can be used.

81 When Dr. Clarke was asked (during examination in chief) how in her opinion those risks compare to the benefits, she gave the following response:

The consensus now is that if you're a public service provider you need to have a presence on **social** media. That's not up for debate for anybody you speak to in government. These risks come along with that so you just need to develop appropriate policies to mitigate them. The three benefits I laid out are seen to be compelling, in particular in the past five years. The consensus is that **social** media is a necessary component of the communication and stake-holder engagement functions of government.

82 In addressing the question of whether a public service provider should engage directly with the public through **social** media rather than merely providing information, Dr. Clarke indicated that the literature on public sector **social** media use tends to frame one-way information provision, or what can be termed the "broadcast model" of **social** media use, as being more basic and primitive than uses which support two-way exchanges, with the latter being viewed as a more developed, mature, and beneficial use of **social** media. Although she acknowledged that there may be instances in which the broadcast model is more appropriate than uses of **social** media which explicitly seek to promote interaction, she also indicated that where governments tend to receive criticism for use of broadcast models of **social** media are situations in which citizens do not view the **social** media initiative as one which should be used exclusively for one-way broadcasting of government information. If a citizen tweets directly to a government Twitter account and the government chooses not to reply or to restrict the citizen's ability to initiate such contact, the government may be perceived to be unresponsive to citizens, thereby damaging its reputation or its relationship with citizens.

83 During cross-examination, Dr. Clarke indicated that one of the risks of creating a public **social** media platform is that the government agency opens itself up to highly critical public criticism. She also indicated that government agencies that use Twitter should and generally do have policies regarding the use of **social** media, including how to respond to complaints received through it. She further indicated that government agencies seek to align those policies with their privacy obligations or other obligations to which they may be subject. Although she had not been provided with any TTC **social** media policy, she testified that she assumed that the TTC had one because it would be out of the norm for a public service provider to have a Twitter account without having such a policy.

Statutory Provisions

84 During the course of argument, reference was made to a number of statutes, including the *Occupational Health and Safety Act*, R.S.O. 1990, c. 0.1 (the "*OHSA*"), and the *Human Rights Code*, R.S.O. 1990, c. H.19 (the "*HRC*"). The parts of those statutes potentially relevant to the disposition of the grievance include the following provisions:

OHSA

1(1) "workplace harassment" means engaging in a course of vexatious comment or conduct against a worker in a

workplace that is known or ought reasonably to be known to be unwelcome;

”workplace violence” means,

...

(c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in the workplace, that could cause physical injury to the worker.

...

[Section 25(1) imposes a strict duty on employers to ensure that prescribed equipment, materials and protective devices are provided, maintained in good condition and used as prescribed; that prescribed measures and procedures are carried out in the workplace; and that any part of the workplace is capable of supporting any loads which may be applied to it.]

25(2) Without limiting the strict duty imposed by subsection (1), an employer shall,

...

(h) take every precaution reasonable in the circumstances for the protection of the worker;

...

32.0.1(1) An employer shall,

- (a) prepare a policy with respect to workplace violence;
- (b) prepare a policy with respect to workplace harassment; and
- (c) review the policies as often as necessary, but at least annually.

...

32.0.6(1) An employer shall develop and maintain a program to implement the policy with respect to workplace harassment required under clause 32.0.1 (1) (b).

32.0.6(2) Without limiting the generality of subsection (1), the program shall,

- (a) include measures and procedures for workers to report incidents of workplace harassment to the employer or supervisor;
- (b) set out how the employer will investigate and deal with incidents and complaints of workplace harassment; and
- (c) include any prescribed elements.

HRC

5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

5(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

Collective Agreement Provisions Reference was also made during the course of argument to the following provisions of the collective agreement (the “Agreement”):

85

ARTICLE 1 GENERAL PROVISIONS

...

Section 8. Management and Discipline

...

Administration of Discipline

The parties recognize that discipline, including dismissal, can be a traumatic experience for employees, and accordingly, justice must be done in a manner that is consistent with dignity....

...

Section 24. Non-Discrimination

The Commission and the Union recognize the requirement to provide a work environment and transit services to the public that are free from harassment and discrimination, as stated in the *Ontario Human Rights Code*....

...

Section 41. Public Relations Complaints

1. a) A complaint means a complaint received by the T.T.C. from a member of the public regarding the conduct of a Commission Transportation or Maintenance Employee. A written record of the public relations complaints will exclude all particulars regarding the identity of the complainant.

b) All verbal complaints must be set out in writing by the complainant and such letter/signed statement must be forwarded to the Marketing and Public Affairs Department within 21 normal working days (i.e. excluding weekends and statutory holidays) of the incident in question. If such letter/signed statement is not received within the above time limits by the Marketing and Public Affairs Department, the incident/complaint will not be recorded on the employee's departmental record.

This provision will not be required in cases involving allegations of a criminal nature or violations of Article 1, Section 8, of the Collective Agreement.

If during the interview process the employee agrees with the substance of the complaint, the complainant will not be required to submit a letter/signed statement regarding the incident and the incident will be recorded accordingly.

2. The employee will be provided with a copy of the complaint and report(s) and the final response of the Commission to the complainant if the employee so requests these materials within 14 days of the incident interview....

...

4. No transportation employee shall be interviewed unless the complaint is identified by any of the following: name, run number, badge number, or vehicle number.....

...

7. Local 113 will be provided with a report outlining the public relations complaints received.

TTC Policies and TTC By-law No. 1

86 Reference was also made during argument to the provisions of a number of TTC policies, including:

Workplace Harassment Policy

...

2.0 PURPOSE

To protect all employees from harassment that contravenes the Ontario Human Rights Code, by co-workers, supervisors, or other employees. This includes taking all reasonable and practical measures to protect employees from harassment by members of the community and protect members of the community from harassment by TTC employees, in the provision of service.

3.0 DEFINITION OF HARASSMENT

3.1 Harassment may take many forms, but can generally be defined as behaviour, including comments and/or conduct, which when based on a prohibited ground is insulting, intimidating, humiliating, hurtful, malicious, degrading, or otherwise offensive to an individual or groups of individuals, or which creates an uncomfortable work or service environment. The Ontario Human Rights Code and the Workplace Harassment Policy specifically prohibit harassment on the following grounds: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed (religion), sex, gender identity, sexual orientation, disability, age, marital/family status, same sex partnership status or record of offence. The Workplace Harassment Policy also includes all offensive behaviour arising from use of electronic communications, such as the internet, e-mail, etc., which violate the Ontario Human Rights Code....

...

6.0 COMPLAINT PROCEDURE

6.1 Employees who experience harassment are encouraged to make it known that the behaviour is offensive and contrary to the Ontario Human Rights Code and TTC policy. If confronting the individual(s) directly is not possible, or if after doing so the harassment continues, employees should:

- report the incident(s) to their foreperson or supervisor; or
- to any other member of their departmental management (e.g. superintendent, department head).

...

Respect & Dignity Policy

...

2.0 POLICY STATEMENT

The Toronto Transit Commission (TTC) is committed to providing a work environment and service that respects the dignity, self worth and human rights of every individual, and is free from any form of discrimination or harassment. The TTC condemns harassment, denigration, discriminatory actions, and the promotion of hatred. The TTC will not tolerate, ignore or condone any form of discrimination or harassment perpetrated against or by any employee or member of the public utilizing TTC services. All employees are responsible for respecting the dignity and rights of their co-workers and the public they serve.

...

4.0 APPLICATION

4.1 This policy applies to all TTC employees....

4.2 This policy also applies to all persons who attend a TTC workplace, including, but not limited to, TTC's contractors, volunteers, students and members of the public utilizing TTC services.

...

4.4 Prevention and reporting of incidents of discrimination or harassment is the responsibility of all employees whether they have experienced, witnessed, or have knowledge of, a situation that violates the Ontario *Human Rights Code*, the *Criminal Code*, the *Occupational Health and Safety Act* and/or this policy.

5.0 DEFINITIONS

...

5.2 Harassment: Every person has a right to equal treatment by TTC with respect to its services and facilities, accommodation, contracts and employment, without harassment.

...

Harassment may take many forms and includes, but is not limited to:

...

(b) any offensive and/or discriminatory comments or behaviours arising from the use of electronic and/or **social** media, devices and systems;

...

5.3 Racial Harassment: is harassment (as defined at section 5.2 above) on the Protected Ground of race. Racial harassment/discrimination includes, but is not limited to:

- Racial slurs or joke
- Ridicule, insults or differential treatment because of your racial identity
- Posting/emailing cartoons or pictures that degrade persons of a particular racial group
- Name calling because of a person's race, colour, citizenship, place of origin, ancestry, ethnic background or creed.

5.4 Sexual harassment: is harassment (as defined at section 5.2 above) on the protected ground of sex. It includes, but is not limited to:

...

- Sexually suggestive or obscene remarks...

5.5 Poisoned Work Environment

A poisoned work environment is a form of indirect harassment. It occurs when comments or actions ridicule or demean a person or group creating real or perceived inequalities in the workplace. Pornography, pin ups, offensive cartoons, insulting slurs or jokes, innuendos, name calling, malicious gossip (even when they are not directed towards a specific employee or group of employees), have been found to “poison the work environment” for employees.

5.6 Workplace: includes all locations where business or **social** activities of the TTC are conducted, including all land, facilities, mobile equipment and vehicles owned, leased or otherwise directly controlled by the TTC for the purpose of conducting TTC business. It also includes any location or worksites to which employees have been assigned or which they may access during the performance of their duties.

...

7.0 RESPONSIBILITIES

7.2 Supervisory Responsibilities

All supervisors are responsible for preventing, discouraging and addressing acts of discrimination and harassment by:

- ensuring that their workplace is free from harassment and discrimination, being aware of what is happening in their workplace and taking appropriate action upon becoming aware of discriminatory and/or harassing conduct contrary to this policy, the Ontario *Human Rights Code* and/or the *Occupational Health and Safety Act*;

...

not allowing or condoning behaviour that is contrary to this policy, the Ontario *Human Rights Code* and the *Occupational Health and Safety Act*;

...

[Section 8 of the policy details a multi-layered complaint process, and provides for the manner in which complaints are to be investigated and resolved.]

Workplace Violence Policy

...

2.0 PURPOSE

2.1 The TTC is committed to creating and maintaining supportive work environments free from any form of violence. The TTC will take all reasonable and practical measures to protect employees from acts of violence in the workplace by other employees and/or former employees which may contravene the Criminal Code, the Ontario Human Rights Code, the Occupational Health & Safety Act and this policy.

2.2 The TTC will also take all reasonable and practical measures to protect employees, in the provision of services, from

violence by members of the public and to protect members of the public from violence by TTC employees.

...

3.0 DEFINITION OF VIOLENCE

3.1 Violence may take many forms, but can generally be defined as any behaviour which causes an injury to a person or group of persons. This includes intimidation, abuse, threats of direct or indirect physical harm, swearing, screaming, harassment, pushing, kicking, hitting, spitting, assault, and other disruptive behaviours. Such behaviours may be in oral or written form, or as a gesture or expression, or an outright physical act.

...

[Section 4 pertains to reprisals. Section 5 details responsibilities for upholding the Policy. Section 6 details the Policy's incident reporting and complaint procedure.]

...

Code of Conduct Policy

...

2.0 PURPOSE

...

2.3 The Code of Conduct provides a framework of principles for conducting business and dealing with customers, colleagues and other stakeholders which are:

- - to act with integrity and professionalism; ...

...

TTC By-law No. 1

(passed by the Commissioners of the TTC, pursuant to Subsections 143 and 366 of the *City of Toronto Act*)

3. Conduct on Transit System

...

3.17 No person shall operate any camera, video recording device, movie camera or any similar device for commercial purposes upon the transit system without authorization.

...

3.25 No person shall cause a disturbance or act contrary to public peace on TTC property, including but not limited to:

...

- b) using profane, insulting or obscene language or gestures;
- c) behaving in an indecent or offensive manner;

- d) shining any type of light at an operator of a TTC vehicle or any other passenger;
- e) fighting; or
- f) behaving in a manner which would interfere with the ordinary enjoyment of persons using the transit system.

87 Reference was also made to the TTC's "Privacy Policy", and to parts of the "TTC Web Site Terms & Conditions of Use", including a section which advises potential users about privacy issues, and the following section:

Use of Bulletin Board, Chat Room and Other Communication Forums

If the Web Site contains bulletin boards, chat room, or other message or communication facilities (collectively, "Forums"), you agree to use the Forums only to send and receive messages and material that shall not, in any manner or to any extent, do any of the following:

- commit any criminal or quasi-criminal offence, including without limitation, any pornography, hate, assault, or economic crime whatsoever;
- defame, abuse, harass, stalk, threaten or otherwise violate the legal rights (such as rights of privacy and publicity) of others;
- publish, post, distribute or disseminate any defamatory, infringing, obscene, indecent or unlawful material or information;
- infringe, contravene, breach or otherwise interfere with or harm the rights of any other person, including without limitation any contractual, personality, confidentiality, privacy, moral, statutory, common law or intellectual property;

...

- ... You acknowledge and agree that all Forums are public and not private communications....

Submissions

88 In addition to their submissions summarised below regarding the applicable legal principles, counsel also made extensive submissions regarding the evidence adduced in these proceedings. Those submissions have all been duly considered in deciding this matter and in determining the facts set forth above.

Summary of Union Counsel's Submissions

89 The Employer through its use of **social** media is breaching obligations which it has to bargaining unit members. **Social** media is really a form of public town hall, public square, or bulletin board. The Employer is using it in a manner which is intended or known to have the effect of soliciting confidential private information about bargaining unit members, and is to some extent having a public discussion about what are private matters. The Employer is also providing a forum for haters and abusers to heap abuse on bargaining unit members, and cannot or will not effectively deal with that abuse. The Employer's

conduct is contrary to its obligation to provide a workplace which is safe and free of harassment. It is also a breach of the privacy rights of bargaining unit members, and is inimical to the concept of dignity. The invasion of their privacy comes in two forms: (1) disclosure of private information to which the public would not normally have access, including where employees are working, their employee numbers, details of complaints about their conduct, and photographs of them; and (2) surveillance of employees. The Employer cannot train cameras on operators and video monitor them for the entire time that they are at work, but through the use of **social** media the Employer has enlisted the public to do exactly that in real time. Through @TTC helps the Employer is encouraging people to take photos and videos and to send them to the Employer, thereby doing indirectly what the Employer would not be allowed to do directly. Operating a camera or any similar device for commercial purposes on the transit system without authorization violates section 3.17 of TTC By-law No. 1. This includes using it to take photos or videos for uploading to Twitter, which is a commercial enterprise.

90 A related issue is that **social** media is being used as a surrogate public complaint process which is outside the public complaint process bargained by the parties, and which circumvents that process. Section 41 of Article 1 of the Agreement codifies how public complaints are to be dealt with. The person making the complaint must be willing to set out their complaint in writing and sign it. That requirement acts as a significant filter to ensure that matters the Employer is investigating and employees are responding to are significant, important matters. If the Employer wants to make changes to that process, it must bargain them and cannot just set up a parallel system.

91 It is not appropriate to be taking complaints about employees through **social** media, or to be discussing them publicly. There cannot be any doubt that if the Employer uses **social** media for public communication about the conduct of employees in the workplace, that sphere becomes part of the workplace. It is just as wrong for the Employer to discuss employee conduct on the internet as it would be to make a meeting room and a microphone available on the Employer's property for people to say those sorts of things. Although the Employer cannot control everything that everyone does, that does not mean that it does not have an obligation to control what it can. Just because the Employer cannot achieve perfection does not mean that it should not attempt to have a workplace free of harassment.

92 Harassment is defined in *OHSA*, the TTC's Respect & Dignity Policy, and *Toronto Transit Commission v. Amalgamated Transit Union (Stina Grievance)*, [2004] O.L.A.A. No. 565; 132 L.A.C. (4th) 225 (Shime). The Employer is required by statute and by that arbitration award to have a workplace that is free of harassment. By the Agreement and by its own By-law and policies, the Employer has committed itself to doing so. Despite that, through the use of **social** media which the Employer has participated in via @TTC helps, patrons feel free without consequence to subject bargaining unit employees to all sorts of abuse, including derogatory language, sexual harassment, sexist and racist comments, and threats of violence. The Employer's obligation to take every reasonable precaution includes not just a prohibition on the Employer saying the abusive things; it also requires the Employer to take positive and reasonable steps to see that the workplace is free of harassment. The Employer has failed to do that in this case as it has created and facilitated a public forum where it knows or ought reasonably to know that members are being threatened, abused, and harassed. It has taken virtually no steps to protect members. In fact, to the extent that it replies to the abusers, it facilitates the publishing of these abusive tweets to a broader audience. In merely responding to such tweets by stating that it does not condone them, and failing to take any further action, the Employer is condoning them. The Employer has occupied a part of the internet through its use of **social** media, and @TTC helps has become part of the virtual workplace at the TTC. Those abusive tweets come within the definition of what constitutes a poisoned work environment. The Employer's supervisors have failed to fulfil their obligation to create a workplace free of harassment. Offensive posts are akin to graffiti and trigger similar obligations.

93 The Employer is advancing its own agenda at the expense of bargaining unit members. A good part of what the Employer is up to in addition to creating a surveillance system is a public relations exercise. There is no evidence that the Employer ever secured the consent of the employees that their personal information could be used in this manner.

94 Although the TTC's Web Site Terms & Conditions of Use do not apply to the use of **social** media, they certainly give some hints on what should be done, and reflect an understanding that internet postings are public and not private communications. The law is absolutely clear that an employer is not only liable for its own acts of discrimination or harassment, but also for those of its agents and employees, and that it can also be liable for the acts of third parties such as customers.

95 The TTC has a duty under the *HRC* to investigate a complaint of discrimination. The Union made a complaint to it

long ago about the way in which **social** media is being used, but nothing has been done. Employers have duties and obligations regarding their use of **social** media, just as employees do. In this case, the TTC has not fulfilled those duties and responsibilities. Although there may have been things that the TTC could have done at the beginning to set out rules and publicize that it would not allow @TTCHELPS to become a vehicle for the harassment, based on the record of what has occurred the only reasonable, prompt and effective action is now to shut it down.

96 Other cases referred to by Union counsel during the course of his submissions include *Perez-Moreno v. Kulczycki*, [2013] O.H.R.T.D. No. 180; *Re Loughheed Imports Ltd. (c.o.b. West Coast Mazda)*, [2010] B.C.L.R.B.D. No. 190; *Alberta v. Alberta Union of Provincial Employees (R. Grievance)* (2008), 174 L.A.C. (4th) 371 (Ponak); *Ontario Public Service Employees Union v. Ontario (Ministry of Community and Social Services) (Aboutaieb Grievance)* (2011), 213 L.A.C. (4th) 336 (Ont. GSB -Johnston); *Clarendon Foundation v. Ontario Public Service Employees Union, Local 593 (Mitchell Grievance)*, [2000] O.L.A.A. No. 175 (Sarraf); *B.L. v. Marineland of Canada Inc.*, [2005] O.H.R.T.D. No. 30; *Ibrahim v. Hilton Toronto*, [2013] O.H.R.T.D. No. 664; *Canadian Union of Public Employees, Local 133 v. City of Niagara Falls (Iannoni Grievance)*, [2005] O.L.A.A. No. 228 (MacDowell); *TTC v. Amalgamated Transit Union, Local 113 (Belsito Grievance)*, [1999] O.L.A.A. No. 861 (Chapman); *Electronic Instrument Company Inc. (EICO) and International Union of Electrical, Radio and Machine Workers, Local 431* (1965), 44 Lab. Arb. Rep. 563 (Delany); *Royalguard Vinyl Co.*, [1994] OLRB Rep. January 59; *Godfrey v. Ontario Police Commission*, [1991] O.J. No. 1446 (Div. Ct.); *Toronto Transit Commission and Amalgamated Transit Union, Local 113 (Grievance of B. Ireland)*, unreported award dated June 25, 1987 (Shime); *All-way Transportation Corporation (Wheel-Trans Division) and Amalgamated Transit Union, Local 113 (Grievance of John Howard)*, unreported award dated May 12, 1986 (Devlin); and *Bell Technical Solutions v. Communications, Energy and Paperworkers Union of Canada (Facebook Postings Grievance)*, [2012] O.L.A.A. No. 481 (Chauvin).

97 The remedies sought by the Union are:

- (1) a declaration that the Employer's use of **social** media, including but not limited to @TTCHELPS, is contrary to the Agreement, the HRC, and the OHSAA;
- (2) an order that @TTCHELPS be taken down and not used anymore;
- (3) an order that the Employer not use **social** media or encourage the use of **social** media to receive personal information regarding bargaining unit members or complaints of alleged misconduct;
- (4) damages for the Employer's breaches of the Agreement, the HRC, and the OHSAA;
- (5) an order that the Employer provide to its managerial staff training acceptable to the Union on their duty to protect employees from harassment and abuse by third parties, including but not limited to abuse via **social** media;
- (6) an order prohibiting the Employer from using **social** media until such time as it has developed and implemented a **social** media policy which is consistent with this award, the Agreement, the HRC, and the OHSAA, and which addresses the issue of improper conduct by third parties on **social** media and the steps to be taken to address that improper conduct; and
- (7) a declaration that it is contrary to the Agreement to validate or otherwise give credence to allegations of misconduct against bargaining unit members before the matter has been investigated and dealt with in accordance with the Public Relations Complaints provisions in the Agreement.

Summary of Employer Counsel's Submissions

98 As the public transit provider for the City of Toronto, the TTC has a right to establish a **social** media presence through a Twitter account for the purpose of communicating with the public and with its users. There is no basis for challenging its right to have a Twitter account for that purpose unless the Union can establish a violation of the Agreement or the violation of a statutory obligation. It is inappropriate and unfair for the Union to have structured the grievance as it did, by stockpiling

concerns or complaints arising from @TTChelps without bringing those concerns to the attention of management and engaging the policies that the TTC has put in place as safeguards to prevent and/or deal with employee complaints and concerns, including concerns that emanate from @TTChelps. Those policies include its Workplace Harassment Policy, Respect and Dignity Policy, Workplace Violence Policy, and Code of Conduct. Although the TTC does not have a **social** media policy per se, its existing policies are sufficiently broad and robust to address any employee concerns. Therefore, it is not necessary to have a separate **social** media policy.

99 The Union should not be allowed to proceed in this fashion. The proper and normal course of challenge would be to proceed on a case by case basis. The Union can file a grievance regarding a particular incident if there is any alleged violation of the Agreement or a statute, or an employee can file a complaint under those policies, giving the TTC an opportunity to address the situation by applying those policies and following the procedures set out in them. If the Union is not satisfied with the result of the employee's complaint then a grievance can be filed and arbitrated on the basis of specific facts.

100 A Twitter account such as @TTChelps is simply a neutral form of technology which is not in and of itself discriminatory, harassing, violent or a breach of privacy. It is the particular circumstances of any given case that may give rise to a breach, and it is those particular circumstances which can be the subject matter of a grievance if raised in a timely way such that the Employer is afforded the normal opportunity to address the situation.

101 As shown through the undisputed expert evidence, it is necessary and a best public administration practice for the TTC to have a presence on **social** media, and choosing to have a **social** media presence through a Twitter account such as @TTChelps, which is an interactive/dialogue format, is the most effective way to communicate with the public and TTC users. It is an essential communicative tool and the TTC should be allowed to continue to use it. If a breach is established, it should be remedied in terms of its impact on a particular employee. The TTC could also be ordered to supplement its policies, but there is simply no basis to order that @TTChelps be shut down.

102 The Union's position irrevocably leads to the conclusion that no employer or government service provider can use **social** media as a means of communication with either the public or its customers because of the potential for concerns. This highlights the unreasonableness of that position.

103 There would be no benefit to having a TTC policy regarding members of the public taking videos of employees, as this is out of the TTC's control. Even if the TTC did not have a Twitter account, members of the public could take photos or videos of TTC employees and post them on-line. Although Twitter may have a commercial purpose, a tweeter cannot be said to be involved in a commercial purpose by merely taking a photo or video of a TTC employee and attaching it to a tweet. There have been very few instances where users have attached photos or videos to a tweet since the TTC opened @TTChelps in February of 2012.

104 The Union's case seems to be premised on the misplaced perspective that TTC employees have the right to be free from public complaints. The TTC and its employees provide a fundamental public service which is at least partially paid for by tax dollars. They should be accountable to the public and it is anti-democratic to suggest that the public does not have the right to complain about TTC service either generally or in relation to its employees. While it is arguable that discipline imposed on an employee by the TTC as a result of a complaint ought to be kept private, that is not what this case is about. There is no evidence that any particular employee's right to privacy has been violated. An employee's badge number is not private information, nor is the bus number that an employee is driving or the route number on which it is being driven. In the context of an employee who works in public providing a public service, there is no reasonable expectation of privacy regarding that information. Union counsel's assertion that the TTC enlists the public to perform surveillance on its employees is preposterous and unsupported by any evidence whatsoever.

105 There is no evidence that section 41 of the Agreement has been violated. The Union's assertion that according to this provision nothing can originate from **social** media is incorrect. A verbal complaint can be received, but it must be reduced to writing within 21 normal working days of the incident, unless the employee agrees with the substance of the complaint during the interview process. The TTC's Twitter protocol has been evolving and in direct response to the Union's concern it no longer accepts complaints via Twitter. Since January of 2014, if a tweeter appears to be wanting to complain about something, the tweeter is directed to the complaint process. There is no evidence that the Employer has acted on any tweet as a complaint.

106 The Union led evidence from only three witnesses regarding alleged breaches in particular circumstances, and has not discharged its onus of proving any breach in any of those circumstances. The Union also led evidence through Mr. Signorile but his evidence should be accorded little or no weight because it is hearsay and hypothetical evidence without any factual substantiation. Employees could have been called to establish the substance of his evidence first hand. An adverse inference should be drawn because they were not called. Empirical or statistical evidence could also have been adduced. Mr. Signorile's evidence about tweets on @TTChehelps was vague and unreliable. It was also exaggerated and overstated in many respects. The snapshots of tweets that were entered into evidence are also unreliable because they are only part of the Twitter conversation and because their dates are not always accurate or reliable. There is no evidence that employees even knew about those tweets and, if they did, what impact the tweets had on them. There is also no evidence regarding whether these tweets remain posted or whether they have been taken down. Proportionality must also be considered. Even if all of the approximately 1500 tweets introduced into evidence by the Union are taken into consideration, they represent only about one percent of a total of approximately 80,000 tweets. Thus, the issues have been minimal and infrequent.

107 Mr. Signorile also testified about assaults, but this has nothing to do with **social** media. Assaults on TTC employees are possible and unfortunately do occur whether or not the TTC has a Twitter account. There is no evidence that the existence of @TTChehelps increases assaults, but there is evidence which suggests that @TTChehelps de-escalates situations and may reduce incidents of assault.

108 When the TTC tweets a response such as "sorry to hear" or "sorry for the experience", it is not indicating that a TTC employee has done anything wrong. It is merely expressing empathy for the customer's feelings and attempting to de-escalate the situation.

109 The tweets introduced into evidence are full of examples where the TTC responded properly to inappropriate language or content. The fact that there are hardly any repeated offenders demonstrates that the TTC's response is effective. Twitter exists and members of the public can tweet anything about the TTC regardless of whether the TTC has a Twitter account or not. Having an account allows the TTC to be engaged by replying, clarifying, helping, and de-escalating.

110 The cases relied upon by the Union are of no relevance at all. Many of them deal with employee to employee harassment or violence, which is a completely distinguishable situation.

111 The Union has not discharged its burden of proof in this case so no remedy is warranted. The Union's case suffers from a lack of specificity and substantiation. A very different case was argued by Union counsel than was actually proven. If a breach is found, any deficiencies found to exist in TTC policies can be corrected, but shutting down @TTChehelps is not warranted. If a breach is found, the Employer requests that the parties be given an opportunity to make further which from the specific breach.

112 The jurisprudence recognizes that it is not possible for an employer to prevent all behaviour that amounts to harassment or disrespectful behaviour towards employees, and that there are very real limits to the power of an employer to anticipate and control such behaviour. Consequently, the standard is one of reasonableness, not correctness or perfection. The same is true of an employer's obligation under *OHSA*. An employer does not have to take steps to guarantee an employee's health and safety against all possible or conceivable risks; it is only required to take reasonable precautions to provide the appropriate level of protection to employees.

113 The cases referred to by Employer counsel during the course of her submissions include *R. v. Cole*, [2012] 3 S.C.R. 34; *Lee et al and The Crown in Right of Ontario (Ministry of Community, Safety and Correctional Services)*, 2013 CanLII (ON PSGB: O'Neil); *Ankamah V. Chauhan Food Services*, 2010 HRTO 2024 (CanLII); *Cormier V. Caradoc Sands Golf Course*, 2010 HRTO 451 (CanLII); *Kim v. Camenietzki*, 2010 HRTO 1590 (CanLII); *Berger v. Toronto (City)*, 2011 HRTO 265; and *The Aim Grou Inc. and General Motors of Canada Limited*, 2013 CanLII 76529 (ON LRB). She also referred to the *Apology Act, 2009*, S.O. 2009, Chapter 3, for the proposition that an apology is not in law an admission of liability.

Summary of Union Counsel's Reply Submissions

114 The Employer must act reasonably when its actions impact statutory rights or collective agreement rights, such as the

complaints process contained in Article 41. The Union did not stockpile complaints or concerns about @TTCHELPS. Mr. Signorile raised concerns with Andy Byford, Brad Ross, and Megan MacRae. When months went by without those concerns being addressed, Mr. Signorile filed the policy grievance. The offensive material piled up during that intervening period. Employer counsel's contention that concerns should be dealt with by filing individual complaints regarding individual tweets does not fairly deal with the Union's position that it is the system chosen by the Employer that is the problem. The Employer chose to go beyond the @TTCNOTICES broadcast model and to establish the @TTCHELPS engagement model using a medium which is public, anonymous, and beyond its control, and which could be expected to generate the type of abusive language, threats, discriminatory comments, and infringement of privacy rights reflected in the numerous tweets introduced into evidence by the Union in these proceedings. If some of those tweets were only part of the conversation or had inaccurate dates, that should not reduce the weight to be given to them because it was open to the Employer to fill in the missing portions and to correct them.

115 The three witnesses who brought forward individual examples of the types of problems being encountered were not the only people who had concerns. Mr. Signorile testified that bargaining unit members generally were raising their concerns with him and that this is what caused him to act. That was entirely proper evidence regarding their state of mind. The Union put in its case in an orderly and business-like manner. Requiring it to call every individual adversely affected by @TTCHELPS would make it impossible to litigate a case of this type. Mr. Signorile also provided numerous concrete examples of inappropriate tweets received and responded to by @TTCHELPS, and described them as being "just a drop in the bucket". Consequently, it is misleading to focus on them as a percentage of all of the tweets dealt with by @TTCHELPS. The party which should be expected to track tweets and to determine how many of them are inappropriate is the Employer, because it is the one which chose to use this medium rather than an email model which would have enabled it to engage back and forth with customers more privately. The way in which the Employer has operated @TTCHELPS has created a brand which has been wrecked and which should be shut down. Merely requesting a tweeter to stop sending inappropriate tweets is not effective, as the evidence shows that there are a number of repeat offenders. Moreover, the problem is not confined to the existence of repeat offenders. If a tweeter calls a TTC employee a "douchebag", the problem is not that they do it a second time. The point is that the Employer has created an abuse generation system that licenses people to do things that they would not do if they were personally accountable. The Employer cannot choose to use a system over which it has virtually no control and then throw up its hands and say that it cannot control what happens on it. The Employer is using Twitter for a purpose that does not fit that medium.

116 When @TTCHELPS receives a tweet alleging employee misconduct and the tweets a response such as "sorry to hear" or "sorry for the experience", it leaves the impression that what the customer has complained about actually happened and it validates that the employee has done something wrong.

117 Although this appears to be the first case concerning employer misuse of **social** media, it would be a complete double standard if the principles applicable to employee misuse of **social** media were found to be inapplicable to an employer. Although a long line of labour jurisprudence makes it very clear that employees have varying expectations of privacy, when videos are taken of them that is fundamentally different from just being seen walking around in public.

118 The *Apology Act* is great for lawyers, but for workers and members of the public when @TTCHELPS receives a tweet alleging employee misconduct and then tweets a response such as "sorry to hear" or "sorry for the experience", it leaves the impression that what the customer has complained about actually happened and it validates that the employee has done something wrong. While it may not do that in law, it does that in perception. If perception were not important, the Employer would not be doing it. The Employer has made a decision to prioritise the perceptions of the public without any regard at all for those of its workforce.

119 In addition to distinguishing the cases relied upon by the Employer, Union counsel referred to the following cases during his reply submissions: *Re City of Kamloops and Canadian Union of Public Employees, Local 900 (Ms. X Grievance)* (2014), 241 L.A.C. (4th) 378 (Nichols), and *Re Ontario (Ministry of Natural Resources) and O.P.S.E.U. (Wickett)* (2005), 143 L.A.C. 14 (Petryshen).

Decision

120 Although the grievance filed by the Union challenges the Employer's use of **social** media, the essence of its case

pertains to the Employer's @TTChelps Twitter account, on which almost all of the evidence adduced in this case was focused and which will accordingly be the focus of this award.

121 The Employer contends that the Union should have proceeded on a case by case basis, grieving each particular incident only after it had been the subject of a complaint addressed under the TTC policies described above. However, that would not have been an efficient or effective manner in which to address the comprehensive concerns raised by the Union in these proceedings, including its contention that it is the **social** media platform chosen by the Employer that is the essence of the problem. When Mr. Signorile raised concerns about @TTChelps with the TTC's Chief Operating Officer, Mr. Byford referred him to the TTC's Executive Director of Corporate Communications, Brad Ross, who expressed the view that "you can't stop the public from what they say on Twitter". Mr. Signorile also raised his concerns with the TTC's Director of Employee Relations, Megan MacRae, who seemed concerned and asked if they could meet again later. However, after weeks turned into months with no further response, the policy grievance which gave rise to these proceedings was filed by the Union. In the circumstances of this case, that was an appropriate manner in which to proceed to have this matter arbitrated.

122 Many of the tweets received by @TTChelps are innocuous requests for information about service or messages about malfunctioning equipment. Some of them are even complimentary. However, as indicated above, others are critical of the service being provided by the TTC or the manner in which TTC employees perform their work, and a small but significant minority of the latter contain language that is vulgar, offensive, abusive, racist, homophobic, sexist, and/or threatening.

123 As indicated above, Mr. Signorile began to earnestly monitor @TTChelps in early 2013 after bargaining unit members contacted him to raise concerns about the TTC allowing customers to use it to make comments which made them feel intimidated, bullied, harrassed, and threatened. Employer counsel submitted that Mr. Signorile's evidence should be accorded little or no weight because it is hearsay. However, Mr. Signorile's evidence regarding how employee's felt about offensive tweets sent to @TTChelps arguably falls within the ambit of the "state of mind" exception to the hearsay rule, which rule is not in any event directly applicable to arbitration proceedings, in which there is an arbitral discretion to receive hearsay evidence and to give it such weight as may be warranted in the circumstances of the case.

124 Employer counsel also submitted that employees could have been called to establish the substance of Mr. Signorile's evidence first hand, and that an adverse inference should be drawn because they were not called. As indicated above, one of the employees who was called by the Union as a witness in these proceedings was B.V. In testifying about her reaction to finding that a customer had posted a photograph of her on @TTChelps in conjunction with a tweet in which she was called an asshole and a bitch, B.V. indicated that she was very upset about that tweet and the posting of her photograph. She characterised this as harassment, intimidation, and bullying. She was angered and embarrassed by it, and found it "insulting to be called a 'bitch' and an 'asshole', for all the world to read". Evidence regarding employees' feelings about offensive tweets was also provided by D.B. and C.C.

125 This is not a case in which it would be appropriate to draw an adverse inference because other employees were not called to provide similar testimony. The following comments made by Arbitrator Nichols in *Re City of Kamloops and Canadian Union of Public Employees, Local 900 (Ms. X Grievance)*, *supra*, are equally apt in the circumstances of the instant case:

63 This is not a situation where no evidence was called by a party in relation to an issue in dispute. Parties are not required to call every witness who may have knowledge about an event. In my view, this is not a circumstance where an adverse inference should be drawn.

Indeed, the inference which may most reasonably be drawn in the circumstances of this case is that few if any employees would not be offended by being described in tweets accessible through the Commission's @TTChelps Twitter account as "bitchy bus drivers", "racist asshole bus drivers", "shitty drivers", "cunts", "douchebags", "fucking dicks", "doublefucks", "pricks", "morons", "fucking idiots", "losers", "union jerks", "goons", "rude surly subway drivers", "rudest people on the planet", "phsycho", "insane", "bipolar", "idiot", "wank", "grumpy bastard", "stupid bus driver", "moron driver", "absolute jerk driver", "dickhead driver", "retarded driver", "rude selfish beastly male TTC subway operator", "mother fucker", "total pompous jerk", "fucking fatass", "not fit to drive a bus let alone provide customer service", "needs to learn how to drive", "rude and pissy", "dumbnrude", "scum", "another fucking faggot in a not in service bus", "brown son of a gun of a driver", "bald white piece of shit fuck", "racist fuck that needs to get laid"; "overweighted ginger with a grouchy attitude", "Racist

driver much? Total jerk to white customers, perfect gentleman to black customers”; and “bald dude w/ 2 earrings taking tickets at temporary Union entrance is an absolute prick”.

126 Subsection 5(1) of the *HRC* gives every person a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability. Subsection 5(2) gives every employee a right to freedom from harassment in the workplace on the basis of similar prohibited grounds.

127 In *B.L. v. Marineland of Canada Inc.*, *supra*, Adjudicator M.D. Garfield wrote, in part, as follows in paragraph 57:

I also find that subsection 5(1) of the Code dealing with freedom from discrimination “with respect to employment” governs the situation where the discriminator/harasser is not a fellow employee, but a guest or visitor of the employer. The right in subsection 5(1) is owed by the employer to its employee. It does not matter if the alleged discriminator/harasser works for the employer or not. This principle - that the employer’s obligation is triggered if its employee is discriminated/harassed by a non-employee third party (e.g., visitor or guest) - has been recognized and applied in other jurisdictions...

128 A similar conclusion was reached by Arbitrator Sarra in *Clarendon Foundation v. Ontario Public Service Employees Union, Local 593 (Mitchell Grievance)*, *supra*, in which she wrote, in part, as follows in paragraph 39 of her award:

Adjudicators and the courts have held that an employer is liable not only for its own acts of discrimination, but also those of its Agents and employees. An employer can also be liable for the acts of third parties, such as consumers, customers, and residents of correctional or health care facilities.... In the case of harassment by consumers or customers, it is the employer that has the greatest control over workplace conditions, and thus it must intervene effectively to stop harassment by third parties (Jalbert, *supra*). While an employer may not be able to control the remarks of a customer or consumer, the employer does have control over how it responds to discriminatory conduct in the workplace, regardless of how the condition occurred (*Mohammed v. Marisposa*, *supra*; *Uzoaba*, *supra*). “Unwelcome conduct” should not be treated any differently because that conduct was perpetuated by a customer (*ibid.*) In situations of racial harassment, an employer has the responsibility to respond with diligence and take reasonable steps to eliminate the problem (*Uzoaba*, *supra*).

129 In section 24 of the Agreement, the Commission expressly recognized “the requirement to provide a work environment and transit services to the public that are free from harassment and discrimination, as stated in the *Ontario Human Rights Code*”. Similarly, in its Workplace Harassment Policy, the TTC recognized its obligation to protect all employees from harassment that contravenes the Ontario Human Rights Code, and its obligation to take all reasonable and practical measures to protect employees from harassment by members of the community. As indicated above, the definition of harassment contained in that policy reads:

3.1 Harassment may take many forms, but can generally be defined as behaviour, including comments and/or conduct, which when based on a prohibited ground is insulting, intimidating, humiliating, hurtful, malicious, degrading, or otherwise offensive to an individual or groups of individuals, or which creates an uncomfortable work or service environment. The Ontario Human Rights Code and the Workplace Harassment Policy specifically prohibit harassment on the following grounds: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed (religion), sex, gender identity, sexual orientation, disability, age, marital/family status, same sex partnership status or record of offence. The Workplace Harassment Policy also includes all offensive behaviour arising from use of electronic communications, such as the internet, e-mail, etc., which violate the Ontario Human Rights Code....

130 As contended by Union counsel and as implicitly recognised in the final sentence of that definition, **social** media sites operated by the TTC, such as @TTChelps, can be considered to constitute part of the workplace for purposes of determining whether the *HRC*, the Agreement, and TTC policies have been contravened as a result of harassment.

131 Also instructive is the following passage from *Re Toronto Transit Commission and A.T.U. (Stina)*, *supra*, in which Arbitrator Shime wrote as follows (at page 45) in describing what harassment includes:

249 Harassment includes words, gestures and actions which tend to annoy, harm, abuse, torment, pester, persecute, bother and embarrass another person, as well as subjecting someone to vexatious attacks, questions, demands or other unpleasantness. A single act, which has a harmful effect, may also constitute harassment.

132 A number of the tweets contained in Exhibit 15 constitute harassment on grounds prohibited by the *HRC*. Tweets calling a TTC employee a “fucking faggot”, “brown son of a gun of a driver”, or “bald white piece of shit fuck”, clearly fall into that category, as do a number of others included in the Tab 1 “Derogatory Language” section of the exhibit. Many of them are also violative of the Commission’s Respect and Dignity Policy, which applies not only to employees but also to members of the public utilizing TTC services.

133 It is clear from the totality of the evidence that the TTC has failed to take all reasonable and practical measures to protect bargaining unit employees from that type of harassment by members of the community, as required by the *HRC*, the Agreement, and the Workplace Harassment Policy. The evidence discloses many inadequate responses by @TTChelps to offensive tweets of that type, such as: (1) ignoring the offensive language and merely advising the tweeter “You can call us at 416-393-3030 or go to ow.ly/AKsGz to report your experiences”; (2) responding by stating “We understand your concerns however please refrain from personal attacks against employees”, but then going on to provide information on how to file a complaint; (3) responding “Can you please refrain from using vulgarity and elaborate on what happened?”; or (4) responding by merely stating that the TTC does not condone abusive, profane, derogatory or offensive comments. To deter people from sending such tweets, @TTChelps should not only indicate that the TTC does not condone abusive, profane, derogatory or offensive comments, but should go on to request the tweeters to immediately delete the offensive tweets and to advise them that if they do not do so they will be blocked. If that response does not result in an offensive tweet being deleted forthwith, @TTChelps should proceed to block the tweeter. It may also be appropriate to seek the assistance of Twitter in having offensive tweets deleted. If Twitter is unwilling to provide such assistance, this may be a relevant factor for consideration in determining whether the TTC should continue to be permitted to use @TTChelps.

134 Counsel for the Union also submitted that through its use of @TTChelps the Employer is breaching the privacy rights of bargaining unit members by enlisting the public to train cameras on operators and video monitor them for the entire time that they are at work, and by disclosing private information to which the public would not normally have access, including where employees are working, their employee numbers, details of complaints about their conduct, and photographs of them.

135 In *TTC v. Amalgamated Transit Union, Local 113 (Belsito Grievance)*, *supra*, Arbitrator Chapman conducted an extensive review of the pertinent judicial and arbitral jurisprudence which led her to conclude that although employees in Ontario have a right to privacy, it is not an absolute right but rather one that must be balanced against other rights and interests. She also concluded that where an employer undertakes surveillance of an employee, an arbitrator must balance the employee’s interest in privacy against the employer’s interest in obtaining the information collected. The potentially intrusive effect of video surveillance on the privacy and dignity of employees is also recognized and discussed in *Electronic Instrument Company Inc. (EICO)* and *International Union of Electrical, Radio and Machine Workers, Local 431*, *supra*; and *Royalguard Vinyl Co.*, *supra*.

136 Counsel for the Union submitted that taking photos or videos and uploading them to Twitter violates section 3.17 of TTC By-law No. 10 because Twitter is a commercial enterprise. However, as submitted by Employer counsel, a tweeter cannot legitimately be said to be involved in a commercial purpose by merely taking a photo or video of a TTC employee and attaching it to a tweet. Union counsel further submitted that through @TTChelps the Employer has enlisted the public to train cameras on TTC employees, to take photos and videos of them, and to send them to the TTC. Although that contention is not supported by the evidence adduced in these proceedings, the evidence does establish that members of the public have occasionally included a photograph of a TTC employee in tweets sent to @TTChelps. As recognized by B.V.’s manager after she filed the aforementioned occurrence report, it is not appropriate for a member of the public to post a photograph of a TTC employee on @TTChelps, particularly in conjunction with an offensive tweet. Although the person who posted that offensive tweet did not respond to Ms. Motahedin’s request that he delete it, he did delete the photo. In order to reduce the risk that

TTC employees will be subjected to this type of indignity and invasion of their privacy, @TTChelps should adopt the approach described above in relation to abusive, profane, derogatory or offensive tweets. @TTChelps should not only indicate that the TTC does not condone the posting of photographs of TTC employees on Twitter but should go on to request the offending tweeters to immediately delete the posted photographs and to advise them that if they do not do so they will be blocked. If that response does not result in the photograph being deleted forthwith, @TTChelps should proceed to block the tweeter.

137 Union counsel also submitted that the privacy of TTC employees is invaded by tweets disclosing where they are working, their employee numbers, and details of complaints about their conduct. However, as submitted by Employer counsel, a TTC employee's badge number is not private information, nor is the bus number that a TTC employee is driving or the route number on which it is being driven, because in the context of an employee who works in public providing a public service, there is no reasonable expectation of privacy regarding that information.

138 In determining the propriety of complaints about employee conduct being tweeted to @TTChelps, it is necessary to consider the effect of the inclusion of Section 41 in the Agreement. That section provides a procedure which must be followed in the investigation of complaints received by the TTC from the public regarding the conduct of a Commission Transportation or Maintenance employee. Although it permits verbal complaints to be made, it requires that they be set out in writing by the complainant in the form of a "letter/signed statement" forwarded to the TTC's Marketing and Public Affairs Department within twenty-one normal working days of the incident in question, unless the complaint involves allegations of a criminal nature or violations of Section 8 of the Agreement, or unless during the interview process the employee agrees with the substance of the complaint.

139 As indicated by the Divisional Court in *Godfrey v. Ontario Police Commission, supra*, at paragraph 41, "[i]n the traditional labour relations context, matters or issues of employee discipline are essentially a private matter between the parties". Thus, it is troubling to have allegations of misconduct by particular TTC employees included in tweets which can be viewed by others. As indicated above, although neither the tweet containing the allegation nor @TTChelps' tagged reply to that tweet will automatically appear in the timelines of other Twitter users following @TTChelps (unless they are also following the user to whose tweet @TTChelps is responding), any user may view those replies (other than replies sent as direct messages) by accessing @TTChelps' profile (by clicking on "TTC Customer Service") and then clicking on "Tweets & replies". If a user wants to view the tweet(s) that gave rise to a particular reply, the user then clicks on the reply. There is no evidence regarding how frequently users take those additional steps. Consequently, it is unclear how often this information is accessed. Nevertheless, it remains troubling that it can potentially be accessed by persons who would not normally be privy to that information. However, eliminating @TTChelps would not preclude information of that type from being posted on social media. As indicated above, a number of derogatory, abusive, offensive, and inappropriate tweets about TTC drivers were tweeted from various Twitter accounts before @TTChelps came into existence. A number of those tweets also include allegations of misconduct by TTC employees. The same is true of the aforementioned offensive tweets contained in Exhibit 16 that postdate the inception of @TTChelps but which were not addressed to it. Thus, as noted by Ms. Motahedin, tweets of the type which concern the Union would be tweeted whether or not @TTChelps exists, because tweeters can and do create hashtags such as #TTCsucks and #TTCproblems.

140 Although there are clearly some downsides to having @TTChelps operated as an official Twitter site of the TTC, there are also some advantages. As indicated by Dr. Clarke, social media usage has grown rapidly in Canada at the municipal government level, and has become an accepted mainstream practice, with Twitter being the social media tool most commonly used by governments in Canada. Her evidence also indicates that use of social media, including Twitter, is a necessary and beneficial component of contemporary public sector communications and citizen engagement strategies for various reasons, including the fact that citizens want public service providers to use it. In addressing the question of whether a public service provider should engage directly with the public through social media rather than merely providing information, Dr. Clarke indicated that the literature on public sector social media use tends to frame one-way information provision as being more basic and primitive than uses which support two-way exchanges, with the latter being viewed as a more developed, mature, and beneficial use of social media. Thus, her evidence supports the validity of the aforementioned following observations which Ms. Motahedin made during the course of her testimony:

We have [@TTChelps] because our customers expect us to have it. Social media is incredibly important and continues to grow. Customers expect to be served through a channel of their choice. Different generations expect different

experiences so we're being responsive to what our customers want. Having @TTChelps on Twitter allows customers to contact us from their smart phones wherever they are and at any time, so by us having that presence we're easily accessible. It allows us to interact with customers one-on-one. It can be immediate so it allows us to **assist** someone who is experiencing an issue right then and there. We can clarify, provide additional information, and de-escalate situations. We reduce frustration for our customers and reduce frustration employees are experiencing... As well, @TTChelps builds trust with our customers. They see that we're visible and present. Our responses are transparent. We have nothing to hide.

141 Although customer complaints about employees were accepted through @TTChelps prior to 2014, Ms. Motahein testified that since January of 2014 when she was hired as the head of the CSC, customers who have a complaint are asked to contact the TTC by telephone or via the TTC website, which has a fillable complaint form for complaints relating to TTC employees, as well as a fillable complaint form for complaints about TTC service. If that were all that was being tweeted back in response to such tweets, this aspect of the use which is being made of @TTChelps might be found to be an acceptable balancing of the disparate interests reflected in Section 41. However, many of the responses sent by @TTChelps include language such as "I apologize for that"; "I'm sorry for the experience", "sorry to hear that", "that's not good", and "that was not nice at all". While as suggested by Ms. Motahedin that language may express empathy and acknowledge how the customer is feeling, it can also readily be interpreted as accepting that what the customer tweeted actually happened and validating that the employee has done something wrong, without any investigation having been conducted to determine what actually occurred.

142 To bring the operation of @TTChelps into closer alignment with the letter and spirit of Section 41, and with the Section 8 recognition of the requirement that justice in relation to disciplinary matters must be done in a manner that is consistent with dignity, when @TTChelps receives a tweet alleging misconduct by a TTC employee its response should simply be that complaints cannot be filed through Twitter and that customers wishing to file a complaint can do so by calling 416-393-3030 or going to ow.ly/B27pF. A possible exception to that approach would be tweets alleging misconduct on the basis of an obvious misperception, which might usefully be corrected through a response of the type described below.

143 One of the advantages of having @TTChelps operated as an official Twitter site of the TTC is that it enables the Commission to (in the words of Ms. Motahedin) "clarify, provide additional information, and de-escalate situations". However, if that advantage is to be fully realized, greater care needs to be taken to ensure that the information provided by @TTChelps is accurate, and that it does not include inappropriate editorialising, such as the inclusion of the word "unfortunately" in the aforementioned following response that @TTChelps sent to a customer who criticised an operator for not **assisting** a mother in getting her stroller onto a streetcar: "Unfortunately, operators are not required to **assist**".

144 As indicated above, responses sent by @TTChelps sometimes contain inaccurate information, such as the aforementioned following response to a tweet suggesting that something should be done about people playing music or loud games on TTC vehicles without headphones: "There is a bylaw in place [and] drivers are to enforce it". As indicated above, it was Mr. Signorile's uncontradicted evidence that although there is a by-law which addresses playing music without headphones, drivers are not required to enforce it. He further testified that if drivers attempted to enforce the bylaw they could be assaulted, and expressed the legitimate concern that as a result of the misinformation provided by @TTChelps in that response, the public would expect TTC drivers to enforce the bylaw and would report them if they did not do so.

145 In some instances, such as those involving customers' tweets about drivers not restopping after servicing a stop, it may well be appropriate for @TTChelps to advise customers that due to safety considerations drivers are not required to re-service stops, but inappropriate for @TTChelps to add editorial comments that are implicitly critical, such as "but they could use discretion and exercise good customer service & do so". Similarly, it may be appropriate for @TTChelps to advise customers that operators are permitted to take breaks to use washroom facilities, but inappropriate for @TTChelps to add implicitly critical editorial comments such as "Again we expect them to exercise discretion at all times".

146 Developing templated responses mutually acceptable to the Employer and the Union might well be of **assistance** to the senior service representatives who respond to tweets received by @TTChelps, and beneficial in ensuring that the responses they provide are not violative of the TTC's collective agreement or statutory obligations. It might also be beneficial for the parties to develop mutually acceptable guidelines regarding when information of that type should be provided, and when tweeters should simply be advised that if they wish to file a complaint they must contact the TTC by telephone or via

the TTC website.

147 As indicated above, the Union seeks an order requiring the TTC to shut down @TTChelps. However, this has not been proven to be necessary or appropriate at this juncture. Operating @TTChelps permits the TTC to provide useful information to customers. Hopefully the relatively small number of offensive tweets received by that **social** media site can be further reduced, if not totally eliminated, by lesser measures such as the ones described above and the development of a TTC **social** media policy. Although parts of the other policies described above may be applied to concerns raised by offensive tweets sent to @TTChelps, it would be preferable to have them brought together and refined in a **social** media policy. In this regard, it is noteworthy that Dr. Clarke indicated that she assumed that the TTC has a **social** media policy because it would be out of the norm for a public service provider to have a Twitter account without having such a policy.

148 In the circumstances of this case, I find it appropriate to afford the parties an opportunity to confer regarding the steps which should be taken in light of the findings made in this award, remaining seised to deal with the matter of remedy, with the benefit of additional submissions (and evidence, if appropriate), in the event that the parties are unable to reach agreement on that matter.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.