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• HAPPY NEW YEAR! SUPREME COURT LIMITS EMPLOYERS' DUTY TO INSPECT WORK PLACES •

Paul Boshyk, Partner, McMillan LLP.

The Supreme Court's final decision of 2019 had federally-regulated employers under the *Canada Labour Code* ("Code") celebrating.[1] In *Canada Post Corp. v. Canadian Union of Postal Workers*,[2] a majority of the Supreme Court confirmed that an employer's obligation to conduct safety inspections only applies to work places over which the employer has control.

• In This Issue •

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BACKGROUND

A representative of the Canadian Union of Postal Workers ("CUPW") filed a complaint with Human Resources and Skills Development Canada ("HRSDC") alleging that Canada Post failed to comply with subsection 125(1)(z.12) of the Code. This subsection provides that employers must ensure that every part of the work place is inspected by the work place health and safety committee or a health and safety representative at least annually.

CUPW's complaint specifically alleged that Canada Post failed to comply with the Code by limiting safety inspections to its Burlington Depot. The complaint stated that the safety inspections should also include letter carrier routes and locations where mail is delivered (referred to as "points of call"). In support of this position, CUPW noted that "work place" is broadly defined in the Code as "any place where an employee is engaged in work for the employee's employer".

In response to the complaint, a Health and Safety Officer from HRSDC conducted an investigation and found that Canada Post had failed to comply with the Code's safety inspection requirements. However, Canada Post appealed the Health and Safety Officer's finding on the basis that subsection 125(1)(z.12) only

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applies to parts of the work place over which the employer has control. The matter eventually made its way up to the Supreme Court.

Supreme Court's Decision

In siding with Canada Post, a majority of the Supreme Court noted that the purpose of Part II of the Code (Occupational Health and Safety) is to prevent accidents and injury in the course of employment. Regarding safety inspections in particular, the purpose of subsection 125(1)(z.12) is to permit the identification and removal of hazards in the work place. In order to fulfil this purpose, control over the work place is necessary.

In this case, Canada Post had no control over the carrier routes or individual points of call (e.g., many points of call are on private property). Even if a hazard existed on a carrier route or at a point of call, Canada Post would be unable to alter or fix the hazard in most cases. In the Supreme Court's words: "[a]n interpretation which imposed on the employer a duty it could not fulfil would do nothing to further the aim of preventing accidents and injury."

A majority of the Supreme Court also acknowledged that there would be practical limitations to requiring safety inspections along letter carrier routes and at points of call, given that Canada Post letter carriers travel approximately 72-million linear kilometres whilst delivering mail to 8.7-million points of call across the country.

Therefore, the Supreme Court confirmed that Canada Post's obligation to inspect the work place did not extend to carrier routes or points of call.

Lessons for Employers

Because *Canada Post Corp. v. Canadian Union of Postal Workers* dealt with the interpretation of a specific subsection of the Code, the Supreme Court's decision is only binding on federally-regulated employers.[3] Nevertheless, the Supreme Court's reasons will be highly persuasive in terms of interpreting the Code's provincial counterparts.

In Ontario, for example, the *Occupational Health and Safety Act* ("Ontario OHSA") requires employers to inspect the condition of the work place at least once a month (or, if it is not practical to inspect the work place once a month, at least once a year). Much like in the Code, "workplace" is broadly defined in Ontario OHSA as "any land, premises, location or thing at, upon, in or near which a worker works". Applying the Supreme Court's reasoning, it is likely that the safety inspection requirements under Ontario OHSA apply only to those work places that the employer controls.

Please note that safety inspection requirements vary from province-to-province. For more information, please contact a member of our Employment & Labour Relations Group.

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1 RSC 1985, c L-2.

2 [2019] S.C.J. No. 67, 2019 SCC 67.

3 In Canada, the power to make laws is divided between the federal and provincial governments. In the area of employment law, the federal government has jurisdiction over employment laws for specific works and undertakings within exclusive federal constitutional jurisdiction, such as air transportation, banks, marine shipping, ferry and port services, railways and interprovincial transportation (about 6% of workers in Canada).

• DEFERENCE TO LABOUR ARBITRATORS: A TALE OF NEAR CAUSE •

Jill W. Wilkie, Partner, and Hodson Harding, Articling Student, Miller Thomson LLP.

The Court of Appeal for Alberta recently considered a labour arbitration decision where it was found that the termination was without just cause, even though the employment relationship was found to no longer be viable due to the employee's pattern of untruthfulness.[1]

BACKGROUND

The employee, Mr. Ross, was a corrections officer employed at Alberta's Edmonton Remand Centre (the "**Employer**"). He had thirty years' experience and was active in his union, the Alberta Union of Provincial Employees ("**AUPE**"). He had held various positions in AUPE including shop steward, and chair of his local chapter for 20 years. He also ran for president.

On June 28, 2013, the Employer dismissed Mr. Ross for cause due to his role in a 2013 wildcat strike and for related conduct. Despite being described as "insolent, insubordinate, and untruthful", an Arbitrator issued an award on April 14, 2015, ordering the Employer to reinstate Mr. Ross and to substitute a six-month suspension for the discharge. The Arbitrator found Mr. Ross deserving of discipline, but held that the Employer's decision to terminate Mr. Ross's employment was "excessive".

On April 21, 2015, CTV broadcast images captured by an Edmonton Remand Centre's surveillance camera of an inmate assaulting a correctional officer. On July 16, 2015, Mr. Ross was suspended for three days due to comments he made to a television reporter during the aforementioned broadcast. The President of AUPE also took part in this televised interview, but

Mr. Ross explicitly told the reporter that his Employer had previously fired him for voicing occupational health and safety concerns. In the Employer's view, these statements were knowingly false based on his previous discipline and were defamatory as they alleged an offence under the *Occupational Health and Safety Act*.

The Employer subsequently determined that two correctional officers wrongly recorded the video and provided it to CTV. The Employer questioned Mr. Ross five times in a seven-month period about the leaked video and his television interview. Following the conclusion of each investigative session, Mr. Ross was directed by the Employer not to discuss the interview with anyone other than his legal counsel. Despite this warning and Mr. Ross's agreement, he continued to discuss with one of the correctional officers under investigation her involvement in the recording and release of the video.

On November 20, 2015, the Employer again terminated Mr. Ross's employment for cause.

DECISION OF THE ARBITRATOR

AUPE grieved Mr. Ross's three-day suspension. The Arbitrator found that the suspension was not warranted, highlighting the significance of the steward/employee relationship and the union representative's right to speak out on behalf of the union members. It was found that the comment asserting that Mr. Ross was previously disciplined for voicing occupational health and safety concerns was simply a "one-off background comment" made by the reporter. Based on Mr. Ross's role as a union representative and the increased latitude this provides, it was found that the incident did not warrant a disciplinary response.

AUPE also grieved the termination. The Arbitrator found that there was insufficient evidence to conclude that Mr. Ross had inappropriately influenced his co-worker. This was due to the text messages between the two of them being unreliable, as they were coloured by their personal relationship, and Mr. Ross's role as union representative and shop steward. The Arbitrator determined that without more evidence, Mr. Ross could not be said to have deliberately tampered with the investigation regarding the recording and release of the video.

However, the Arbitrator made several findings with respect to Mr. Ross's conduct. The Arbitrator found that Mr. Ross was dishonest during the investigation, misled investigators, fabricated a story to cover his tracks, told investigators he would not discuss the matter with his co-worker (and he did), etc. However, despite this serious misconduct, the Arbitrator found the Employer had only made out a case for discipline, not termination. Yet, reinstatement was not awarded, as the "continued pattern of untruthfulness … created an insurmountable barrier to a viable and continuing employment relationship." This, ordinarily, would be expected to ground a finding of just cause for termination. But, in this case, the Arbitrator found that while there was not enough cause for termination, reinstatement was not appropriate. Instead, Mr. Ross was awarded one year of salary in lieu of reinstatement.

DECISION OF THE ALBERTA COURT OF QUEEN'S BENCH

On April 6, 2017, AUPE applied for judicial review of the decision of the Arbitrator to not reinstate Mr. Ross. On April 7, 2017, the employer filed a cross-application regarding the decision that the suspension was not warranted with respect to the monetary award for damages in lieu of reinstatement.

The Court upheld the Arbitrator's decision to allow the suspension grievance finding it to be reasonable. With respect to the termination, the Court substituted its own decision in place of the Arbitrator's decision, stating that there was just cause to terminate. The Court set aside the Arbitrator's award of salary in lieu of reinstatement.

DECISION OF THE ALBERTA COURT OF APPEAL

The Alberta Court of Appeal granted an appeal from the AUPE, restoring the decision of the Arbitrator that there was no cause for the termination. The Court held that the Arbitrator had the discretion to award damages in lieu of reinstatement. It was found that it was reasonable for the Arbitrator to award

damages due to the employment relationship no longer being viable as a result of Mr. Ross's pattern of "untruthfulness".

CONCLUSION

This decision is an example of how labour arbitrators are afforded considerable deference by the Courts. This provides great flexibility to labour arbitrators. Still, it is understandable why both parties continued to appeal in this case. From the perspective of AUPE, there was an issue with the Arbitrator declining to reinstate Mr. Ross upon a finding that there was no cause for his dismissal. From the perspective of the Employer, there was an issue with the Arbitrator's decision finding that the employment relationship was no longer viable, yet there was no just cause. When it comes to resolving labour disputes, sometimes both parties are left feeling that the result was not reasonable.

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[1] *Alberta Union of Provincial Employees v. Alberta*, [2019] A.J. No. 1436, 2019 ABCA 411.

• WORKPLACE PRIVACY RIGHTS FOR THE DIGITAL AGE •

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Changes in technology are increasingly raising questions about workplace privacy. In the span of a single generation large parts of the world have moved to a previously unfathomable level of connectivity. With this same wave of advancing technology, the average employee's life has become far more complex.

Whereas previously an office worker may have worked via handwritten or typed notes, many workers now have access to computers and phones. What's more, these devices are almost permanently connected to the internet. This arrangement allows employees to access a great library of information but it also means that they are consistently generating and storing vast quantities of data.

This new normal leads one to wonder just how much data they are generating and how much of that data remains private. In the context of employment, a similar question arises with respect to the workplace privacy rights that apply to your data. To what extent are you guaranteed privacy as an employee who works and communicates with company equipment? Similarly, if there is no guarantee of privacy, what level of workplace privacy can an employee expect with respect to their data, e-mails, and browsing history?

WORKPLACE PRIVACY LEGISLATION:

Federally, the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") addresses the protection of "personal information" in the context of "commercial activity". In Ontario, the disclosure of personal health information is addressed by *the Personal Health Information Protection Act, 2004* ("PHIPA") which applies to "personal health information". Similarly, the *Municipal Freedom of Information and Protection of Privacy Act* ("MFIPPA"), as well as the *Freedom of Information and Protection of Privacy Act* ("FIPPA") address the disclosure of "personal information" held by public institutions, municipalities, and other bodies such as school boards.

Aside from some protections that may exist regarding the disclosure of information under PIPEDA, the PHIPA, the MFIPPA, and the FIPPA, there are fewer concrete protections for the review of private information such as e-mails or texts that are generated on employer equipment in Ontario. As a result, legitimate

questions arise about the e-mails, communications, or activities that you produce while at work.

In the employment world, employers sometimes operate under the assumption that since work is performed and generated on their dime and equipment, that they should have the unilateral right to access information that might be stored on their systems. Legally speaking however, this right is a little muddied.

WHAT THE COURTS HAVE SAID:

Canadian courts and arbitrators have made several pronouncements on the use of personal information and have in recent years supported a base level of protection for the privacy of employees. For instance, in 2012 the Ontario Court of Appeal in *Jones v. Tsige*, [2012] O.J. No. 148, 2012 ONCA 32, recognized a wrong known as "intrusion upon seclusion" when an individual decided to inappropriately view information related to her co-worker. In that case, both employees were employed with the same financial institution and the defendant breached her ethical obligations by viewing the private banking information of her co-worker.

In *R v. Cole*, [2012] S.C.J. No. 53, 2012 SCC 53, the Supreme Court of Canada reviewed a case where a teacher's school laptop had been seized and handed over to police based on the existence of stored pornographic material. Although largely based on the police's actions, the Supreme Court found that the Principal had the right to seize a school computer based on their legislative obligations under the *Education Act*. The Supreme Court also stated that an employee's expectation of privacy will depend on the "totality of the circumstances" including an assessment of the policies, practices, and customs at play in the workplace.

In *R v. Cole*, the Supreme Court stated that workplace privacy was a matter of "reasonable expectations" and that such expectation would depend on a review of the subject matter, the employee's direct interest in the subject matter, the employee's expectation of privacy, and whether the expectation was reasonable.

Since the *R v. Cole* decision, the "totality of the circumstances" analysis has been applied in other cases, including in unionized workplaces where arbitrators have applied the test to a number of different scenarios, for example a review of USB sticks or e-mails sent between employees. In each case the ultimate decision about whether such a review of personal communications was justified and appropriate was dependent on the whole circumstances of the case.

Unfortunately, there is no easy answer to the question of whether employees have a reasonable expectation workplace privacy. It's safe to say that any expectation of privacy will be limited but the extent of that limited right will depend largely on the entirety of the facts, including the existing policies, procedures, and the customs that have been developed for that workplace.

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• IS YOUR EMPLOYEE CHEATING ON YOU? PRINCIPLES OF A 'WORK TRIANGLE' •

Christine Côté, Associate, Fasken Martineau DuMoulin LLP.

When it is discovered that an employee has been working a second job, employers may often feel betrayed. While the feeling may be real, a side job is not sufficient to justify a breakup.

In our current economy, and with the rise of available side gigs, employees have an increasing number of opportunities to invest their free time into a part-time job, some short-term contracts, some

freelance work or developing their own business through various means such as social media. Because who doesn't like a little extra cash after all?

Not surprisingly, an employer who is caught up in a "work triangle" between its employee and its employee's side gig, may not only feel betrayed, but may have legitimate concerns about the potential or actual impact of that side gig on the employer's financial and business interests. Three main concerns are typically raised, although they vary and are highly circumstantial.

1. **Competition:** Depending on the nature of the job involved, an employee may be directly or indirectly competing with the employer in contradiction of their obligations under an employment contract. For example, through a personal YouTube channel or Instagram account, an employee could be promoting a product that is in some way competing with their employer's product or soliciting its clients away.
2. **Usage of company resources and time:** The employer may be worried that the employee is using company resources, including time, for the side job. In situations where the employee is working remotely, and may be unresponsive from time to time, the employer may begin to wonder whether company time and resources are being used for other purposes. Is the employee offering ride sharing or completing meal deliveries during working hours? Is it possible that the employee is running their side business with the company's computer while on duty? The number of possibilities is as endless as the number of available side gigs. However, suspicions are not enough to justify any type of sanction. An employer should instead implement a proper system to monitor the use of its resources and employee time, in particular where employees are working remotely.
3. **Performance and attendance issues:** While the employee may not be contravening any employer rules, performance and attendance could be negatively impacted if the employee is unable to rest outside of regular working hours because of time spent on a side job. Again, mere suspicions that an employee is engaged in a side job may not be enough to justify discipline. It is therefore critical to have a defined performance and review process in place to assess employees' performance based on measurable variables.

Ultimately, as legitimate as the employer's concerns are, they do not automatically justify a breakup of the employment relationship. Employers need to establish the facts and determine if a side gig is having a negative impact on the employer's interests and the employee's job performance.

While it is true that an employee owes a duty of loyalty to their employer, that duty does not, in principle, restrict the type of activity an employee may do during their free time while off-duty. If the employment contract does not specifically preclude an employee from having a second job, and no other terms or policies are being breached, the employer will likely have to allow the employee to carry on with their side gig.

When a side gig is involved, employers should take a step back and evaluate the situation based on the circumstances. Like in any relationship, communication is key to avoid any misunderstanding. Expectations with respect to side gigs should be made clear at the beginning of the employment relationship, if possible, and be discussed whenever a concern arises. Employers dealing with a "work triangle" — and before taking any steps towards a breakup — should consult a lawyer.

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