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ARTICLE

Does an Employee Have a Reasonable Expectation of Privacy When Using Their Work Computer to Run a Charity?

Toronto (City) v. CUPE, Local 79 (Wright Grievance) [2016] O.L.A.A. No. 445

On November 21, 2016, an Ontario Labour Arbitrator, Gail Misra, was required to consider whether an employee's right to privacy in information that goes to their biographical core established by the Supreme Court of Canada in *R. v. Cole* extends to documents related to that employee's charity. In particular, the arbitrator had to determine whether the City could rely on these documents to terminate the grievor for cause.

The grievor, Sebrina Wright, was employed by the City of Toronto for two years between 2010 and 2012. She was terminated following a six week investigation into whether she used City resources and work time to manage and run her charity. Ms. Wright had also not disclosed that she was involved in the operation of a charity when she was hired by the City. In the course of the investigation, Ms. Wright initially denied using City resources for her charity other than during breaks, but subsequently admitted to greater use.

The arbitrator's decision covered a number of issues including whether the termination was appropriate and whether the City had breached the grievor's human rights. The following, however, will focus on the privacy issue raised.

The Privacy Issue

The City sought to rely on seven emails with attachments sent by the grievor from her City email account to her personal email account to establish that she had been operating and managing her charity during working hours. These emails were sent in a one hour span shortly before she was terminated and after the grievor knew she was under investigation. The documents attached to the seven emails included a number of documents related to the grievor's charity, her and her husband's resumes, and some job searches.

The documents appear to have originated from Ms. Wright's H Drive: a network drive used by employees to store work-related documents which are being actively worked on. Ms. Wright appears to have cleansed her network drive after these emails were sent.

The Union on behalf of the grievor argued the City could not rely on these emails and attachments to establish cause for termination because of the privacy right established in the Supreme Court's decision in *R. v. Cole*. In that decision, the Supreme Court found that the personal use by a teacher of a workplace provided laptop created information which was "meaningful, intimate, and organically connected to his biographical core" and that this information was protected from unreasonable search and seizure by section 8 of the Charter.

In particular, the Union argued that the expectation of privacy was established by the fact that the documents had been sent to the grievor by her husband. It relied on Arbitrator Ponak's decision in *SGEU v. Unifor Local 481*[1] which found that the employer (SGEU) could not rely on emails between the employee and his spouse which seemed to establish he was in a biker gang, to terminate him from his employment. The Union also argued that the activity itself, running a Christian charity, was deserving of protection.

On the other hand, the City of Toronto argued that employees should have no expectation of privacy in these emails due to its clear IT policies; these policies specifically outlined that an employee's use of the City's IT resources including email and internet would be monitored. Further, while limited and occasional personal use was permitted, the policies specified that this should be done only during breaks and not be used for an activity that can lead to personal gain. All employees are trained on the policies and are required to acknowledge in writing that they have read the City's Policy handbook.

The City also argued that documents which relate to running a charity are not part of the grievor's biographical core and as such are not protected by the privacy right established in *R v. Cole*.

Did the Employee Have a Reasonable Expectation of Privacy?

In order to determine whether the employee had a reasonable expectation of privacy in the documents she had emailed to herself, the arbitrator considered the City's workplace policies and the subject matter of the documents.

The arbitrator found that the City's policies significantly limited any expectation of privacy that the grievor would have had in documents saved on the H Drive. Additionally, any expectation of privacy was further diminished by the fact that the grievor sent the emails containing the attachments to herself when she was aware that she was under investigation.

The arbitrator also considered the documents themselves. She found that the documents which related to the operations of the grievor's charity should not be considered to be part of her biographical core. Further, the fact that her husband may have emailed her the documents did not change the character of the documents.

The arbitrator also found that the City conducted its investigation in a reasonable manner and did not seek to rely on information related to the grievor's biographical core:

"I have found that the City acted in a measured manner in seeking to rely on only seven emails from the Grievor's City email account, those emails were sent after the investigation had commenced, and the Grievor knew that she was under City surveillance, and those emails directly related to the matters in issue in this case."

The arbitrator also found that the fact that the grievor's documents related to the operations of a Christian charity did not make them deserving of privacy protection.

As such, the City could rely on the documents related to the operations of the charity to establish that the grievor had misused City resources.

The arbitrator did find that other documents, such as the grievor's curriculum vitae and her job searches, were part of her biographical core and should be excluded.

Ultimately, the arbitrator upheld the termination and also dismissed the grievor's human rights complaint.

Conclusion

This is another decision in which right to privacy established in *R v. Cole* needed to be balanced with an employer's right to manage its workplace and conduct an investigation. This balancing will likely be part of any cases in which the employer seeks to rely on documents and emails obtained from a search of an employee's work computer.

In this case, the decision was focused on whether the documents themselves were related to the employee's biographical core rather than the investigation itself. This is because the City was found to have strong IT policies and training and only relied on a limited number of documents obtained after other investigative steps had been completed.

The decision in this case highlights the importance of considering privacy issues when conducting investigations which involve an employee's workplace computer and ensuring employees are trained on IT policies. Overly broad or intrusive investigations in the absence of strong policies could lead to important evidence being deemed inadmissible.

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[1] *Saskatchewan Government and General Employees Union v Unifor Local 481*, 2015 CanLII 28482

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