Case Note: Maison St-Patrice inc. v. Cusson, 2016 QCTAT 482: Exclusion of Facebook Snooping Evidence in Québec — a minority view

March 31, 2016

This case deals with the admissibility of Facebook content as evidence. It arises in the context of a hearing before the Occupational Health and Safety Division of the new Québec Administrative Labour Tribunal. This tribunal results from the merger, as of January 1, 2016, of the Labour Relations Board and of the Occupational Injuries Board.

The employer wanted to introduce evidence obtained surreptitiously from the worker's Facebook page, to advance its case.

The issue came up at a first hearing where the worker was not represented. The administrative judge raised the issue of the admissibility of that evidence on his own initiative, not waiting for the worker to object, and relying on article 2858(1) of the *Civil Code of Québec*:

2858. The court shall, even of its own motion, reject any evidence obtained under such circumstances that fundamental rights and freedoms are violated and whose use would tend to bring the administration of justice into disrepute.

The Tribunal demanded that, in a separate hearing, evidence be adduced proving that the Facebook evidence had not been obtained illegally.

The worker testified that her Facebook profile was private; that two former colleagues had been her "friends", but no longer were. The employer had on an earlier occasion asked the worker to provide Facebook information on a co-worker, which she had refused to do. The employer's executive director testified that she had been given the Facebook posts by her predecessor, who had refused to disclose her source. The worker did confirm at the hearing, however, that the copies of her Facebook page in the possession of the employer were authentic.

In coming to his decision, the administrative judge first referred to an earlier decision of the Tribunal where it had been decided that the information contained on Facebook is public and that even the use of private settings will not necessarily render Facebook

evidence inadmissible, if not obtained illegally. However, it may be inadmissible if private settings are used and the number of "friends" is limited. That said, illegal access is another story.

The administrative judge then went on to refer to a leading privacy case from the Québec Court of Appeal for the proposition that surveillance is inherently a breach of privacy that may be justified if it is necessary, that is if it is carried out for rational reasons and by reasonable means.

Rational reasons may not be mere doubts, intuition or vague suspicions or rumours.

To be reasonable, the means of surveillance must be the least intrusive and as limited as possible.

Once a tribunal has ruled on the reasonableness of having gathered surveillance evidence, it must decide whether its use would tend to bring the administration of justice into disrepute. This requires a balancing of the breach of the worker's privacy rights with the tribunal's mission to seek the truth. For this purpose, a tribunal must consider the gravity of the privacy violation and what societal values are at stake in the particular case.

The majority view is that illegally obtained evidence may still be admitted if not admitting it would bring the administration of justice into disrepute by not allowing the truth to prevail.

The administrative judge in our case is of a different view, an approach adopted by a minority of the members of the Occupational Health and Safety Division of the Québec Administrative Labour Tribunal.

They believe that surveillance evidence obtained without a rational reason necessarily brings the administration of justice into disrepute and must be excluded in all cases. For them, to rule otherwise would be to allow the end to justify the means.

On this basis, and given that the employer had not argued that it had a rational reason to proceed to obtain the worker's Facebook profile, its admission into evidence was denied.

One has to be mindful that Courts allow different views to co-exist within an administrative tribunal. Members of a tribunal have no duty to rally with the majority. Courts will not intervene in judicial review to decide which is the better view. In such cases, unfortunately, one can truly say that "it depends on the judge".

All the more reason to be careful when assessing a possible surveillance situation. There may be little point gathering such evidence if the judge ultimately may not look at it.

By

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