Arbitrator Allows Video Surveillance of Employees Where Viability of Company at Stake

May 25, 2018

On March 9, 2018, Arbitrator André Sylvestre (the "Arbitrator") in the matter of *Unifor, section locale 145 v. Aliments Prémont Inc.*, 2018 CanLII 12945 (QC SAT), dismissed a union grievance challenging Les Aliments Prémont Inc.'s (the "Employer") decision to install five surveillance cameras continuously filming employees performing their duties. Unifor, section locale 145 (the "Union") had alleged that by installing the cameras that continuously filmed employees performing their duties, the Employer had breached the employees' right to privacy in contravention of the provisions of the *Québec Charter of Human Rights and Freedoms* (the "Québec Charter") dealing with privacy rights and fair and reasonable conditions of employment as well as the *Québec Civil Code* (the "Civil Code") provisions dealing with privacy.

The Facts

The Employer operates a meat processing plant. In February of 2017, without consulting the Union and without any prior notice to the Union, the Employer installed five surveillance cameras continuously filming employees performing their duties. These cameras were installed notwithstanding the fact that there had not been any vandalism or rash of thefts (grounds that the case law has traditionally held as justifying an employer's decision to install surveillance cameras in the workplace that continuously monitor employees).

The Union filed a grievance claiming that the installation of the said cameras was an intrusion of the employees' privacy, thereby contravening the applicable provisions of the Québec Charter and of the Civil Code. In addition, the Union alleged that since the employees were constantly supervised by the foreman and by the quality control department, the installation of surveillance cameras was not justified. In other words, the Union was of the view that the already strict supervision of the employees did not, in and of itself, justify the installation of surveillance cameras.

The Employer took the position that the installation of the cameras was done in good faith in order to assure the financial viability of the Company. In particular, the Employer put into evidence before the Arbitrator that in 2016, it had developed a new product

aimed at the Japanese market. This decision required the installation of a highly sophisticated production line at a cost of $150,000. The operations on the said line began in January of 2016. During the month of June, however, the Japanese customer informed the Employer of the presence of an important contaminant in the products received. Several months later, the same customer notified the Employer of four other contaminants in the processing of the products between the months of January and June 2016. Following the first complaint, management put into place a plan in order to prevent the repetition of the same anomalies. However, the plan was not successful because of the second complaint received from the same customer. As a result, the Employer lost the contract with the customer in question and closed the new production line.

On November 9, 2017, at the date of the hearing before the Arbitrator, the production on the new line was still suspended, resulting in the loss of a contract for the Employer worth $2,000,000 annually and in a futile investment of $150,000 worth of new machinery. It was following the two contamination incidents brought to the Employer's attention by its former customer that the Employer decided to install surveillance cameras. The declared purpose of these surveillance cameras was to improve the protection of the alimentary salubrity of its production, to look after the health of the consumers, and to insure the financial survival of the Company following the loss of an important Japanese customer. According to the Employer, the loss of another important customer resulting from the delivery of another contaminated product could result in the Employer's demise.

The Decision of the Arbitrator

At the outset, the Arbitrator held that the Employer could have been more transparent by meeting with the Union before the installation of the cameras and by explaining to the Union the reason behind the Employer's decision. However, the Arbitrator pointed out that the collective agreement did not contain any provision imposing these obligations upon the Employer.

In any event, the Union's principal position in support of its grievance was not based on the provisions of the collective agreement but rather on those imposed upon the Employer by the Québec Charter in sections 4, 5, 46, and 49:

4. Every person has a right to the safeguard of his dignity, honour and reputation.

5. Every person has a right to respect for his private life.

[…]

46. Every person who works has a right, in accordance with the law, to fair and reasonable conditions of employment which have proper regard for his health, safety and physical well-being.

[…]

49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

In addition to these provisions, one also must take into consideration the following two articles of the Civil Code:

3. Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy.

[…]

36. The following acts, in particular, may be considered as invasions of the privacy of a person:

[…]

(3) appropriating or using his image or voice while he is in private premises;

[…]

The Arbitrator reviewed the relevant case law and reminded the parties that the continuous surveillance of employees while at work represents, *prima facie*, infringement upon a right granted by Article 46 of the Québec Charter providing that every person is entitled to *fair and reasonable conditions of employment which have proper regard for his health, safety and physical well-being.*

As a consequence, it is always incumbent upon an Employer to establish that it had reasonable grounds justifying the installation of surveillance cameras that continuously monitor employees and, as a result, allow the Employer to infringe upon an employee's right to privacy. Based on the evidence presented before him, the Arbitrator noted that the loss, in January 2017, of an important Japanese customer as a result of the contaminated products sold to it, resulted in an annual loss of $2,000,000 of revenues for the Employer and in an investment (purchase of new machinery) that had become useless. In addition, the Arbitrator was satisfied that the cameras were not installed to spy on the personnel but rather for the purpose of discovering, during each of the production stages, the sources of contamination and put an end thereto. According to the Arbitrator, the right of employees to elude the inquisitive eye of surveillance cameras is not absolute as there may be particular circumstances other than theft or vandalism, for example, that may justify an exception. The Arbitrator was of the view that in this case, those particular circumstances existed.

Conclusion and Takeaways

The use of surveillance cameras in the workplace is quite common. What is less common is the use of surveillance cameras that continuously film employees performing their duties.

As a general rule, an employer's right to install surveillance cameras that capture employees performing their duties has been upheld where the employer was able to demonstrate that the surveillance cameras were installed to deter theft, vandalism,

assault or sexual harassment. The Arbitrator in the *Aliments Prémont* decision, while acknowledging the traditional case law upholding an Employer's right to install surveillance cameras, has rightfully, in our view, also pointed out that there may exist particular non-traditional circumstances which would justify an Employer's installation of surveillance cameras that continuously monitor employees at work.

The Arbitrator was satisfied that there was nothing in the evidence to suggest that the surveillance cameras had been installed simply to spy on the employees while they were working. Rather, the Arbitrator was sensitive to the Employer's argument that it had already lost a contract worth $2,000,000 in annual revenues as a result of product contamination, was left with a $150,000 investment that had become futile, and that the loss of another major contract for the same reason would threaten the Employer's continued viability.

In the Arbitrator's view, the demonstration by an Employer that surveillance cameras constantly monitoring employees at work were installed to insure the Employer's continued viability would constitute a particular circumstance justifying an employer to infringe upon employee privacy rights.

By

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