MANAGEMENT
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Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

The management of workplace technology can be a touchy subject. Mention the word "monitoring" and cries of invasion of privacy ring from the rafters. But it doesn't have to be this way.

"Privacy is dead, deal with it"[1]

The use of electronic resources in the workplace has become so pervasive that many employees insist that they could not survive even a day without their laptop, cell phone or personal data assistant. And while employees will use these resources to complete regular employment tasks, more often than not they will also be used for personal or non-business purposes.

The management of workplace technology can be a touchy subject. Mention the word "monitoring" and cries of invasion of privacy ring from the rafters. But it doesn't have to be this way. Most employees understand that information technology is both expensive and necessary, and that an IT use policy is a reality of employment.

A well-crafted policy outlining an employer's right and ability to monitor an employee's computer, cell phone, or other electronic resource ("IT Use Policy") can create an effective balance between business objectives and workplace harmony. The content of an IT Use Policy will vary depending upon a number of factors such as whether the workplace is unionized, the nature of the work, the workplace culture and, of course, prevailing legalities such as privacy laws and reasonable expectations.

Legal Considerations

In most **non-unionized workplaces**, an employer will be permitted to unilaterally implement an IT Use Policy. Courts can be expected to uphold a policy which is reasonable in nature provided that employees are given appropriate notice of the implementation of the policy and the change is either not considered fundamental to the terms and conditions of employment, or employees receive some form of consideration to compensate them for the change.

Unionized workplaces may operate differently. For example, a collective agreement may require consultation or agreement with the union prior to the implementation of the policy. As well, arbitrators have routinely found that employees have a reasonable expectation of privacy in certain activities that include the use of electronic resources.

That being said, if the collective agreement does not restrict management rights as they relate to the use of information technology, management may unilaterally implement an IT Use Policy. The only parameters are that the policy must be reasonable, unequivocal, consistently enforced, and its implementation and consequences of a breach, must be brought to the employees' attention.

Government operations will need to also consider the impact of the *Charter of Rights and Freedoms*. Section 8 of the *Charter* protects individuals from being the subject of an unreasonable

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[1] *Sun Microsystems Chairman Scott McNealy in 2000*

October 2008 Vol. VII No. 6

"Privacy is dead…" continued from page 1

search or seizure. Courts and Tribunals have interpreted this restriction as prohibiting an employer from engaging in certain surveillance or monitoring activities if there is a reasonable expectation of privacy.

For example, in *Amalgamated Transit Union Local No. 569 v. Edmonton*, a decision of the Alberta Queen's Bench from 2004, a unionized employee filed a grievance alleging that the employer's off-duty surveillance of his activities while on a leave of absence violated his rights under Section 8 of the *Charter*. The Court affirmed that the *Charter* did apply to the City of Edmonton and that its employees were provided, under Section 8, with the general right to be free from an unreasonable invasion of their privacy. The Court concluded, however, that this right had *not* been infringed by the employer as the surveillance occurred in a public place and monitored activities which occurred in the public eye. As such, the grievor had no reasonable expectation of privacy when the surveillance took place.

A recent Court of Appeal ruling in the United States, on the other hand, found that an employee had a reasonable expectation of privacy in a text message sent from a government-issued cell phone and that the employer could not read the contents of the message without a warrant or consent from the employee. The case in question, *Quon v. Arch Wireless Operating Co. Inc.*, involved an employee who was disciplined after a review of text messages sent from his pager revealed a number of inappropriate or non-work related messages. The employee complained that his privacy had been unlawfully violated when the contents of these messages were disclosed to his employer by the service provider that transmitted and stored them. The Court agreed with the employee and ruled that obtaining the text messages resulted in the employee being the subject of an unlawful search. The Court also found that although the employer had an electronic resources policy which applied to pagers and which could have authorized the employer to review the text messages, it was not routinely or consistently enforced and, contrary to the scope of it, employees had *also* been told that text messages would only be audited in certain specific situations. In these circumstances, the employee had a reasonable expectation of privacy in the text messages, and the policy could not be relied upon. While this case is not binding on Canadian courts and employers, a similar result in Canada is not beyond the realm of possibility.

A Few Tips

A prudent employer might consider the following tips related to the creation and implementation of an IT Use Policy:

Obtain Legal Advice: Even an employer's best intentions can accidentally run afoul of the law. Before implementing an IT Use Policy consult with experienced counsel who will assist you to understand your rights and obligations as an employer. If an IT Use Policy is worth having, it's worth having done right.

Purpose and Application: Explaining to employees the rationale for the policy and how the policy will apply to their work environment will go a long way towards ensuring its acceptance. In plain, straight-forward language, tell employees: the purpose of the policy; what types of technology will be covered (i.e. computers, phones, voicemail, text messages, email, servers, internet access, software, printers and output devices, scanners and input devices and other related equipment, *etc.*); how the policy will apply; when the policy will take effect; how the information collected will be used; and the consequences for a breach or breaches, up to and including dismissal for cause.

"Notice" to Employees: In order for the IT Use Policy to have teeth, "notice" to employees should mean more than merely posting the policy in the lunchroom or slipping it into an office manual. To be enforceable "notice" should include each employee receiving a copy of the written policy and being required to sign-off on a statement that confirms the employee has read and understood the policy and agrees to be bound by it. Without proper notice or agreement, an employer may have difficulty relying on the policy in the future.

Ownership and Expectation of Privacy: The IT Use Policy should include in clear language that the employer owns all workplace information technology and that employees should have *no* expectation of privacy as it relates to its use.

Business and Personal Use: If some limited personal use of workplace technology will be allowed, set that out in the IT Use Policy. Employees appreciate the opportunity to avail themselves of workplace technology for personal use, but also welcome guidance as to what type of usage will be considered off limits.

Degradation of Systems: Many individuals do not appreciate that the downloading of seemingly harmless programs, games, music, *etc.* can cause serious damage to information technology operating systems, punch a hole through security, or drain away precious memory capacity. A "no downloading" policy is therefore to be considered.

Enforcement and Compliance: Once in place, the policy should be enforced consistently. In the *Quon* decision, the employer had implemented a policy that should have eliminated any expectation of privacy relating to the contents of text messages. However, the employer failed to consistently enforce the policy and subsequently set out a different and contradictory "informal" policy. This led the Court to conclude that a reasonable person would believe that employees would be granted additional leeway in their actions. While a court may not expect an employer to discipline or discharge every employee who violates a policy, it will expect the employer to be diligent and clear in its efforts to ensure compliance.

To learn more, please contact a member of the Sherrard Kuzz LLP team.

DID YOU KNOW?

As part of Ontario's ongoing efforts to help reduce workplace injuries, inspectors are currently "blitzing" industrial workplaces to help eliminate specific hazards that could lead to falls.

To learn more, please contact a member of our team.

"Impossibility" not standard of reasonable accommodation, says Supreme Court of Canada

In the latest in a series of "employer-friendly" labour and employment law decisions by our highest court, the Supreme Court of Canada unanimously rejected the argument that an employer must demonstrate that it is "impossible" to accommodate an employee's disability in order to satisfy the duty to accommodate.

Duty To Accommodate – The Test

In Canada, an employer can justify actions that would otherwise constitute prohibited discrimination so long as the test set out by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U., [1999] 3 S.C.R. 3 ("Meiorin")* has been met:

> An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
>
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is **impossible** to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer *[emphasis added]*.

Not surprisingly, the third branch of the *Meiorin* test is the most controversial. Employer and employee counsel often clash over the significance and meaning of the word "impossible."

In the recent case of *Hydro-Québec v. Syndicat des employées de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, the Supreme Court of Canada conclusively clarified that, "what is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship".

An employer is not required to "completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration".

The Facts

The employer, Hydro-Québec, terminated an employee's employment on account of her inability to work on a regular and reasonable basis. The employee suffered from an array of physical and psychiatric conditions which led to a high rate of absenteeism as well as difficulties in her relationships with supervisors and co-workers. Various adjustments to her working conditions were made over the years. At the time of her dismissal, the psychiatric assessment obtained by the employer indicated that the employee would not be able to attain regular and continuous attendance in the future.

The union grieved the employee's termination on the basis that it was *not impossible* to accommodate the employee. The union suggested that the employee could work in a satisfactory manner if the "stressors" which affected her and made her unable to work were eliminated, and proposed that the employer completely change the employee's work environment. This included proving the employee with a new work environment, supervisors, and co-workers, on a periodic basis, in order to accommodate her inability to maintain acceptable working relationships.

The arbitrator held that this degree of accommodation constituted undue hardship and upheld the employer's decision to terminate. A series of judicial review and appeals ensued, culminating in the Supreme Court of Canada's decision.

The duty to accommodate has real and tangible limits.

The Supreme Court Clarifies

The Supreme Court's decision has two key components. First, the Court reminded both employers and employee advocates that the goal of accommodation is to ensure that an employee can work if they are able to do so. In the words of the Supreme Court, *"the purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship"* to the employer *[emphasis added]*.

The Court then confirmed that the duty to accommodate does have limits, and that an employer is not required to *"completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration"*. If an employer, said the Supreme Court, has taken all reasonable measures to accommodate the employee and enable them to do their work but the employee still remains unable to do so in the reasonably foreseeable future, the employer will have established undue hardship.

Lessons Learned

There is little doubt that the Supreme Court's decision in *Hydro-Québec* is helpful to employers. It confirms and clarifies a number of important points regarding the employer's duty to accommodate. These include:

1. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded. In other words, exclusion is permitted in appropriate circumstances.
2. "Impossibility" is not standard of reasonable accommodation; "undue hardship" is.
3. Every case must be considered on its own merits. Just as employee advocates argue that each employee is unique and must be considered within the context of the particular employment circumstances at issue, so too must the employer's own set of operational realities

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"Impossibility..." continued from inside...

be examined when considering the accommodation efforts of that employer. In other words, the duty to accommodate has real and tangible limits.

All of this having been said, employers must remember that, despite this recent case, the standard to which an employer is held in the accommodation of a disabled employee remains very high: an employer is required to take all measures short of undue hardship. This case does **not** stand for the proposition that an employer will have discharged its duty to accommodate an employee if *some* efforts have been made.

An employer that is called upon to accommodate an employee must take proactive steps to fulfill that duty in the best interests of the operation. This will include: seeking complete information about the disabled employee's restrictions, considering every possible measure which will enable the employee to perform his or her work, and maintaining constant communication with the employee during the accommodation process.

To learn more about this important topic, please contact a member of the Sherrard Kuzz LLP team.

HReview Seminar Series

Please join us at our next *HReview* Breakfast Seminar:

How to Conduct a Workplace Investigation – Without Becoming the Subject of an Investigation Yourself!

1. Reasons to Conduct an Investigation
2. Legal Obligations to Investigate
3. Union Involvement in the Investigation
4. Suspending Employment During Investigation
5. Use of An Outside Investigator
6. Forensic Techniques to Aid Investigation
7. Use of Surveillance Evidence
8. Interviewing Witnesses
9. Presenting Findings to an Employee
10. Termination for Cause
11. Returning An Investigated Employee to Work

DATE: **Wednesday, November 19, 2008, 7:30 – 9:30 a.m. (program at 8:00 am; breakfast provided)**

VENUE: **Country Club** (formally the Toronto Board of Trade) 20 Lloyd Street, Woodbridge, 905.856.4317

COST: Please be our guest

RSVP: By Friday, November 7, 2008 to info@sherrardkuzz.com or 416.603.0700

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