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Employment and Labour Law Update

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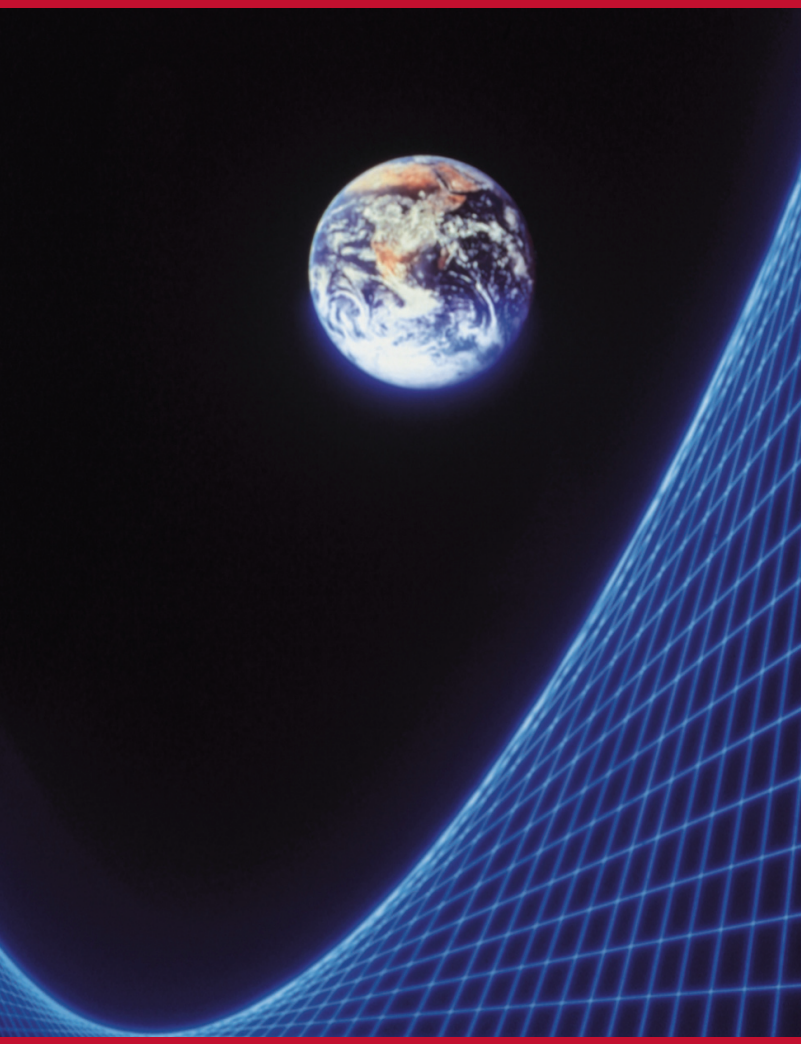
Employment & Labour Lawyers



Global Positioning Systems Big Brother or Good Business?

Global Positioning Systems ("GPS") technology has an exciting and legitimate place in many Canadian workplaces. The technology is becoming increasingly common in the way businesses serve their clients. GPS can allow a business to more efficiently dispatch company vehicles, track the location of vehicles and notify customers if a vehicle is going to be late. The technology is also a useful training tool. In many ways, the possibilities are limitless. However, therein lies the potential problem.

According to the Office of the Privacy Commissioner of Canada ("OPC") *"employers need to carefully consider the privacy rights of their workers before installing [GPS] into their vehicle fleets….This is an important issue for employers and employees across Canada. We're seeing more and more organizations installing GPS in their cars and trucks and it's unclear whether they are adequately addressing privacy issues".*

In a recent case investigated by the OPC, several workers complained that their employer, a telecommunications company, was using GPS to collect information about the employees' whereabouts – specifically their daily movements while on the job. As a federally regulated employer, the telecommunications company was subject to the provisions of the *Personal Information Protection and Electronic Documents Act* (otherwise known as PIPEDA).

The employer was using GPS in its installation, repair and construction vehicles to locate, dispatch and route employees to job sites. However, some workers worried that GPS was also being used to monitor work performance, and that information gathered from this technology would be used to justify disciplinary action.

The OPC investigated the employees' complaint, and ultimately accepted many of the employer's reasons for using GPS, including better service for customers and more efficient location of missing vehicles. However the OPC expressed concern about the use of GPS as an employee surveillance tool. Specifically, that it would impinge on the individual privacy of a worker if an employer routinely evaluated worker performance based on assumptions drawn from GPS information.

Assessing whether the purpose of the GPS was reasonable the OPC reiterated that *"managing workplace privacy is a balancing act. On the one hand, employers have the right to know what workers are up to on company time. On the other, employees have a right to privacy."* That said, the OPC considered the following factors:

- Is the measure demonstrably necessary to meet a specific need?
- Is it likely to be effective in meeting that need?
- Is the loss of privacy proportional to the benefit gained?
- Is there a less privacy-invasive way of achieving the same end?

The OPC concluded that while the GPS did collect personal information, the purpose and intent was to improve the dispatch,

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safety and asset management process.

The OPC was also satisfied that the employees had given implied consent to the collection of this information. The employees had been given notice that their employer would use GPS for employee management and further that it would implement training to ensure appropriate use of the technology by management. The employees, knowing this, were deemed to have consented to what otherwise might be considered unauthorized collection or use of their personal information.

PRACTICAL CONSIDERATIONS

Using GPS technology in the workplace may be attractive but before it is implemented an employer should consider the following:

- For what is the GPS technology being used?
- How will the GPS technology be used?
- How will the GPS technology affect employee morale?
- Have the employees been informed of its pending implementation?
- Have the employees been given an opportunity to ask questions regarding its pending implementation?
- Who, within the workplace, will have access to the information generated by the GPS?
- What training will be given to those individuals?
- By what protocol will the information generated by the GPS be stored and destroyed?

UNIONIZED EMPLOYERS

An employer operating within a unionized context will have additional considerations. The approach used by the OPC in assessing the legitimacy of GPS surveillance is similar to the analysis which has developed in arbitrations regarding workplace surveillance in general. As such, a unionized employer must ensure that any form of surveillance complies not only with collective agreement obligations but also the most recent case law regarding the implementation of surveillance. In particular, if the GPS technology will manage employees it is good practice to develop a written policy which will outline:

- How the employees may be monitored.
- What types of behaviour will be the subject of investigation (i.e. speeding, complaints from the public, an investigation into concerns raised within the workplace, or to address productivity problems, etc.).
- How the employees will be notified of performance issues.
- The process of warning and progressive monitoring.

To learn more about the use of GPS in your workplace, please contact any member of our team.

DID YOU KNOW?

The Minister of Human Resources and Social Development Canada (HRSDC) recently announced changes to the Foreign Worker Program to make it easier for an employer in Canada to hire a foreign worker where there is no qualified Canadian citizen or permanent resident available to fill the position.

Next in our series of employment and labour law updates:

HReview Seminar Series

TOPIC: ***Whose Email Is It Anyway?*** **IT Related Misconduct.***

1. Monitoring employee use of the internet, email and PDAs - what are the boundaries?
2. Passwords and privacy.
3. Identifying IT related misconduct.
4. Conducting the investigation - accessing data systems used by employees.
5. Discipline arising from IT misconduct.
6. Preserving evidence of misconduct for litigation.
7. Employer obligations and potential liabilities.

DATE: Tuesday May 15, 2007, 7:30 a.m. – 9:00 a.m. Program to start at 8:00 a.m., breakfast provided.

VENUE: The Toronto Board of Trade, Country Club, 20 Lloyd St., Woodbridge, ON 905.856.4317

RSVP: **By Friday, May 4, 2007 to 416.603.0700 (Tel.) 416.603.6035 (Fax) or info@sherrardkuzz.com**

*** HRPAO CHRP designated members should inquire at www.hrpao.org for certification eligibility guidelines regarding this HReview Seminar.**

"Automatic Termination" Clause Not So Automatic

We are often asked: for how long is an employer required by human rights legislation to continue to employ an employee whose illness or disability prevents him or her from performing the regular duties of the job? What, if any, is the effect on an employer's duty to accommodate of an "automatic termination" clause in a collective agreement (which states that an employee will be terminated upon being absent for a specified period of time)?

In the recent decision of *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employes de l'Hôpital general de Montréal*, 2007 SCC 4, the Supreme Court of Canada unanimously upheld the dismissal from employment of an employee whose disability had prevented her from performing the regular duties of her job for more than three years.

Significantly, the Court's decision was unanimous on the result, but split 6-3 on the issue of whether the "automatic termination" clause was *prima facie* discriminatory. Six judges said it was because the clause was "clearly aimed at ill or disabled persons". Three judges said it was not, relying primarily on the fact that the clause was the result of collective bargaining, and as such an example of negotiated accommodation.

FACTS

In March of 2002, Alicia Brady, a medical secretary employed by the McGill University Health Centre (the "Hospital"), commenced a leave of absence on account of a nervous breakdown. After several unsuccessful attempts at returning to full-time work, the Hospital terminated Ms. Brady's employment effective April, 2003, more than three years after the commencement of her leave of absence. According to Ms. Brady's medical reports, the date of her return to work was undetermined.

In support of its decision to terminate Ms. Brady, the Hospital relied on an "automatic termination" clause in its collective agreement with the Union. The clause read as follows:

> 12.11 An employee shall lose his or her seniority rights and his or her employment in the following cases
>
> 5 - absence by reason of illness or of an accident other than an industrial accident or occupational disease... after the thirty-sixth (36th) month of absence.

The Union filed a grievance seeking Ms. Brady's reinstatement and an order requiring the Hospital to negotiate further accommodation for her. The grievance was dismissed by an arbitrator whose decision was upheld by the Quebec Superior Court. On appeal to the Court of Appeal for Quebec, the arbitrator's decision was overturned. The Hospital successfully appealed to the Supreme Court of Canada.

THE ARGUMENTS

The Hospital argued that the "automatic termination" clause constituted an agreement by the parties regarding the scope of the duty to accommodate, and provided for a maximum period of time beyond which any absence would constitute undue hardship. The Union argued that the "automatic termination" clause constituted an "employee benefit" - it provided 36 months of job protection for a ill or disabled employee. As such, the clause could not be relied upon by the Hospital as an upper limit to its duty to accommodate.

THE COURT'S DECISION

The majority of the Supreme Court of Canada decided the issue as follows: First, the "automatic termination" clause was *prima facie* discriminatory because it was "clearly aimed at ill or disabled persons". Second, as a result of the finding that the clause was discriminatory, the onus shifted to the employer to establish that it had fulfilled its duty to accommodate. Finally, the question to be answered was the "role of a collective agreement in the assessment of an employer's duty to accommodate an employee who is absent for an indeterminate period owing to personal health problems". In other words, what, if any, is the effect of an "automatic termination" clause on an employer's duty to accommodate an employee whose illness or disability prevents him or her from attending work regularly?

"The Hospital argued that the "automatic termination" clause constituted an agreement by the parties regarding the scope of the duty to accommodate, and provided for a maximum period of time beyond which any absence would constitute undue hardship."

"AUTOMATIC TERMINATION" CLAUSE SIGNIFICANT BUT NOT DETERMINATIVE

In a 6-3 split the majority of the Supreme Court held that the establishment in a collective agreement of a maximum period of absence is a significant factor to be considered in assessing an employer's duty of reasonable accommodation. However, it is not determinative. It is significant because it is: (i) a form of negotiated accommodation that is similar to a right to return to work on a part-time basis; (ii) agreed upon by the parties most familiar with the particular circumstances of the enterprise; and (iii) negotiated by parties (the employer and the union) that represent differing interests, and as such it can be assumed that the agreement is in the mutual interest of the employer and employees.

That said, the majority rejected the Hospital's position that the clause constituted the upper limit of its duty to accommodate:

> Such clauses do not definitively determine the specific accommodation measure to which an employee is entitled, since each case must be evaluated on the basis of its particular circumstances... [The parties cannot] definitively establish the length of the period in advance, since the specific circumstances of a given case will not

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> be known until they occur, that is, after the collective agreement has been signed.

In addition, the majority of the Court held that in order for an "automatic termination" clause to be effective, the maximum period of absence established must not be less than the period to which an employee is entitled under the employer's duty to accommodate pursuant to the *Human Rights Code*:

> Neither the employer nor the union may impose a period shorter than the one to which a sick person is entitled under human rights legislation in light of the facts of and criteria applicable to his or her particular case. A clause purporting to do so would have no effect against an employee who is entitled to a longer period. Since the right to equality is a fundamental right, the parties to a collective agreement cannot agree to a level of protection that is lower than the one to which employees are entitled under human rights legislation…

THE HOSPITAL HAD FULFILLED IT'S DUTY TO ACCOMMODATE

On the facts of this case, the majority of the Court found in favour of the Hospital, chiefly because the arbitrator had not limited himself to mechanically applying the automatic termination clause in the collective agreement - but rather had considered all of the circumstances and determined that it would be "difficult to imagine an additional duty to accommodate an employee whose attending physician considers her to be totally disabled".

MINORITY JUDGMENT FOUND NO *PRIMA FACIE* DISCRIMINATION

While the three judge minority agreed with the final result (that the Hospital had fulfilled its duty to accommodate), it disagreed that the automatic termination clause was *prima facie* discriminatory. In reaching this decision, the minority was persuaded by three principal arguments:

First, an "automatic termination" clause represents a bargain struck by the parties to balance "an employer's legitimate expectation that employees will perform the work they are paid to do with the legitimate expectation of employees with disabilities that those disabilities will not cause arbitrary disadvantage".

Second, the three-year period prescribed by the collective agreement was significantly longer than that required by Quebec's labour standards legislation. As such, the clause represented extensive protection from job loss caused by disability.

Third, and significantly, from a policy perspective "designating such clauses as presumptively discriminatory removes the incentive to negotiate mutually acceptable absences".

IMPLICATIONS FOR EMPLOYERS

The extent and scope of the employer's duty to accommodate must always be assessed in light of the circumstances of the particular case. Even where the parties have negotiated an "automatic termination" clause, an employer should be weary about relying on the clause as the principal or sole justification for dismissing an employee whose illness or disability prevents him or her from performing the regular duties of the job. The clause will not insulate an employer from its duty to accommodate to undue hardship, and/or from prosecution under applicable human rights legislation. This is particularly true where the time period specified in the "automatic termination" clause is shorter than that which is prescribed in applicable human rights and other employment-related statutes.

Finally, despite the compelling reasoning of the Supreme Court's minority view - that an "automatic termination" clause is not *prima facie* discriminatory - the majority of the Court found otherwise. As such, every employer should operate on the assumption that should it chose to rely upon a automatic termination clause as the basis, in whole or in part, for the dismissal of an employee, the onus will shift to the employer to demonstrate factually that it has taken every reasonable step to accommodate the employee to the point of undue hardship.

To consider how this issue may affect your organization, please contact any member of the Sherrard Kuzz team.

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