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Claim for Intrusion No Delusion

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The Facts

Sandra Jones and Winnie Tsige had similar jobs and a similar taste in men. Both worked for the same bank. After Jones' marriage ended, Tsige started seeing Jones' ex-husband. Tsige and "the ex" did not have a perfect relationship either - they fought about money. As a result of a financial dispute, Tsige wanted to verify whether the ex was actually paying child support. That prompted Tsige to use her employee access to review Jones' bank account information.

Tsige examined Jones' banking information more than once. In fact, over a three year period, Tsige reviewed Jones' bank account at least 174 times. Eventually, the bank detected Tsige was reviewing Jones' personal information. When confronted, Tsige admitted wrongdoing and apologized for her actions. Her employer suspended her for five days, and she did not receive her bonus.

The information accessed by Ms. Tsige included information about personal transactions such as account balances, account postings, deposits, stop payments, transfers, and bill payments. She also reviewed Jones' date of birth, marital status, language spoken and residential status.

The Claim for Invasion of Privacy

Tsige did not publish, distribute, or record the information in any way. Nevertheless, Jones maintained this was a serious intrusion upon her privacy and brought a civil action against Tsige alleging invasion of privacy.

Initially Jones' claim was struck out without a trial based on a lower court's finding there was no such cause of action. Jones then took her case to the Ontario Court of Appeal which acknowledged an existing debate regarding the existence of this tort and which was prepared to make a clear determination. According to the Court of Appeal, although various legislative measures had been passed to protect privacy rights, there was no legislation available which provided Jones with a monetary remedy. The Court of Appeal therefore acknowledged a breach of privacy rights called "intrusion upon seclusion", which requires the following conditions to be met:

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1. The intruder must act intentionally or recklessly.
2. The intruder must invade, without lawful justification, another's private affairs or concerns.
3. A reasonable person would regard the invasion as highly offensive, causing distress, humiliation and anguish.

The Court of Appeal awarded Jones \$10,000 in damages, noting in cases where a plaintiff has not suffered pecuniary loss, damages for intrusion upon seclusion should not exceed \$20,000.

What's In Store for Employers

Although Jones elected not to name her employer as a defendant, this case does have implications for employer liability. Following *Jones v. Tsigie*, an employee may be able to succeed in a civil claim against her employer for reviewing personal information without justification if, under the circumstances, the invasion was highly offensive. As well an employer may be found to be vicariously liable for an employee's breach committed against a third party in the course of employment.

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The good news for employers is the Court of Appeal's decision should not fundamentally alter an employer's right to require employees to produce medical information to support an absence and/or need for accommodation. Employers continue to be entitled to confidential information necessary to serve a legitimate, work-related purpose. Depending upon the circumstances, an employee's refusal to provide personal information may justify disciplinary action.

This has been confirmed by at least one labour arbitrator whose view of *Jones v. Tsigie* is summed up as follows:

...whatever *Jones v. Tsigie* actually stands for in terms of the non-legislated or non-contractual right to privacy, it does not stand for the proposition that asking for or even demanding that an employee disclose confidential medical information for a legitimate purpose constitutes an improper or actionable intrusion on the employee's right to privacy...It remains the case that an employer is entitled to request and receive an employee's confidential medical or other information to the extent necessary to answer

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legitimate employment related concerns, or to fulfill its obligations under the collective agreement or legislation, including the human rights or health and safety legislation (for example)...

Proactive Steps for Employers

The full impact of *Jones v. Tsigie* will not be known until there are further adjudications of claims for intrusion upon seclusion. That said, given the Court of Appeal has confirmed this tort's existence, employers can expect to see this cause of action more regularly.

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To prepare for the impact of *Jones v. Tsigie*, employers should consider the following proactive measures:

- Review what access employees have to personal information of other individuals, including employees, customers, third parties, etc., within the control of the employer. Unless necessary to perform her job an employee should not be allowed access to the personal information of others.
- Ensure the employer has a well-crafted, clear and transparent information technology policy, affirming the employer's right to monitor the employee's computer, cell phone, or other electronic resource.
- Consider the employer's practices relating to employee surveillance. Some forms of employee surveillance are justified, but *Jones v. Tsigie* raises the possibility an employer could be ordered to pay damages for conducting unjustified surveillance.
- Provide full disclosure as to the manner in which personal information may be collected, used, or disclosed and obtain appropriate written consent.

To learn more about how to protect your organization from an allegation of breach of privacy, please contact a member of the Sherrard Kuzz LLP team.

DID YOU KNOW?

Ontario Ministry of Labour Inspectors are currently engaged in a safety blitz of construction projects employing workers in high and low rise formwork, masonry, siding and built-up roofing work in Ontario. Inspectors are paying special attention to ensure work areas are safe from hazards that can cause dangerous slips, trips and falls, and workers are using proper fall protection systems.

Bill 168 – “Ammunition” for Employers in Cases of Workplace Threats

Nearly two years have passed since Bill 168, the *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace) 2009*, came into force, effectively extending the reach of the *Act* beyond traditional workplace safety to include protection against violence and harassment in the workplace. Now, every provincially-regulated Ontario employer is required to take proactive steps to prevent and address workplace violence including the development of a workplace violence and harassment policy and implementation program.

On the one hand, Bill 168 has increased the burden placed upon the shoulders of employers. On the other hand, it has also put employers in a stronger position to take action against employees who commit acts of workplace harassment and violence. Nowhere has this been more evident than in grievance arbitrations dealing with *threats* of violence.

Impact of Bill 168 on Grievance Arbitration

One of the first arbitration decisions to consider the impact of Bill 168 is the recent decision in *City of Kingston and C.U.P.E. Local 109 (Hudson Grievance)*. This case dealt with the termination of an employee with 28 years’ seniority, for having uttered a death threat against her co-worker (who also happened to be the local union president).

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In upholding the grievor’s termination, the Arbitrator identified four ways in which Bill 168 has impacted upon the process for determining the appropriate penalty for a threat in the workplace:

1. Bill 168 has made it clear a *threat* of violence in the workplace is not just words or gestures; it is itself *violence*. Regardless whether there is any evidence of an immediate ability to do physical harm, or even intent to do harm, the mere utterance of the threat is violence.
2. Bill 168 requires every employer to react to an allegation of a threat in the workplace. No longer may an employer disregard, minimize or turn a blind eye to a report of workplace violence. The allegation must be investigated and appropriately dealt with.
3. While arbitrators traditionally look at a number of factors in determining whether the discipline imposed was appropriate, in light of Bill 168, arbitrators may now place greater emphasis on the seriousness of the incident above all other factors.
4. Bill 168 requires the formal recognition of one more factor to the list of those typically considered by arbitrators:

workplace safety. While workplace safety traditionally formed part of the analysis whether the employment relationship could be salvaged, it now takes on a separate and distinct role.

In considering the impact of Bill 168, the Arbitrator noted the Bill obligates employers to investigate all claims of workplace violence and does not permit employers to pick and choose. In this case, because the employer only investigated and disciplined the grievor, and disregarded the lead hand’s misconduct, the adequacy of its investigation was called into question.

In a subsequent decision, *National Steel Car (Faiazza Grievance)*, the grievor, a crane operator, got into a heated confrontation with a lead hand, accusing him of being a “rat”. When the lead hand responded by challenging the grievor to “take it outside” and “do this like a man”, the grievor threatened to “get” or “bring” his “ammo”. The lead hand, who knew the grievor owned firearms, complained to his employer and later laid criminal charges against the grievor. When asked for his version of the events, the grievor claimed he was misheard and he had, in fact, said next time, he would “use his intuition”. The grievor was terminated and a grievance was filed by the union.

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Regarding the appropriate penalty for a workplace threat, the Arbitrator cautioned the impact of Bill 168 does not mean every threat should result in termination of the offender. In his view, the traditional analysis for deciding appropriate discipline need not be revisited in response to Bill 168. That said, the Arbitrator noted the grievor in this case was a first offender and the incident was a momentary flare-up that was unlikely to be repeated. In the result, he reinstated the grievor on condition any further incident of workplace violence within the following two years would result in his termination.

Lessons Learned for Employers

Changes to the *Occupational Health and Safety Act* brought about by Bill 168 are now front and centre in many grievance arbitrations, particularly where threats of violence are involved. While arbitrators are not unanimous about the full impact of these amendments, they are clear about one thing – a threat of violence in the workplace cannot be discounted or tolerated. As a result, while the law continues to evolve in the wake of Bill 168, employers can take comfort in knowing, despite its burdens, Bill 168 can and often does work for an employer to help ensure dangerous employees no longer pose a threat to workplace safety.

To learn more about Bill 168 and/or for Bill 168 training in your workplace please contact a member of Sherrard Kuzz LLP.

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Disability Accommodation and Return to Work

1. What is (and is not) a disability?

- What types of physical and mental illnesses do not engage the employer's duty to accommodate?
- Does the employer have a duty to accommodate 'stress and anxiety'?

2. How to proactively manage an employee's return to work

- What to do when you receive a vague doctor's note ("Bob is sick").
- What medical information is an employee obligated to provide? What if she refuses?
- What if the employee refuses to perform the modified duties?
- How can you use WSIB resources to help manage accommodation issues?

- What to do if the accommodated duties conflict with the terms of a collective agreement?
- When can you require an Independent Medical Evaluation?

3. When can you terminate?

- What is undue hardship and when is it reached?
- What is required to establish frustration of contract?
- How do the standards of undue hardship and frustration of contract differ?
- Does it matter if the employee was injured at work or outside of work?

DATE: Wednesday May 30, 2012; 7:30 – 9:30 a.m. (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: Mississauga Convention Centre, 75 Derry Road, Mississauga L5W 1G3

COST: Please be our guest

RSVP: By Friday May 18, 2012 at www.sherrardkuzz.com/seminars or to 416.603.0700
(for emergencies our 24 Hour Line is 416.420.0738)

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

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