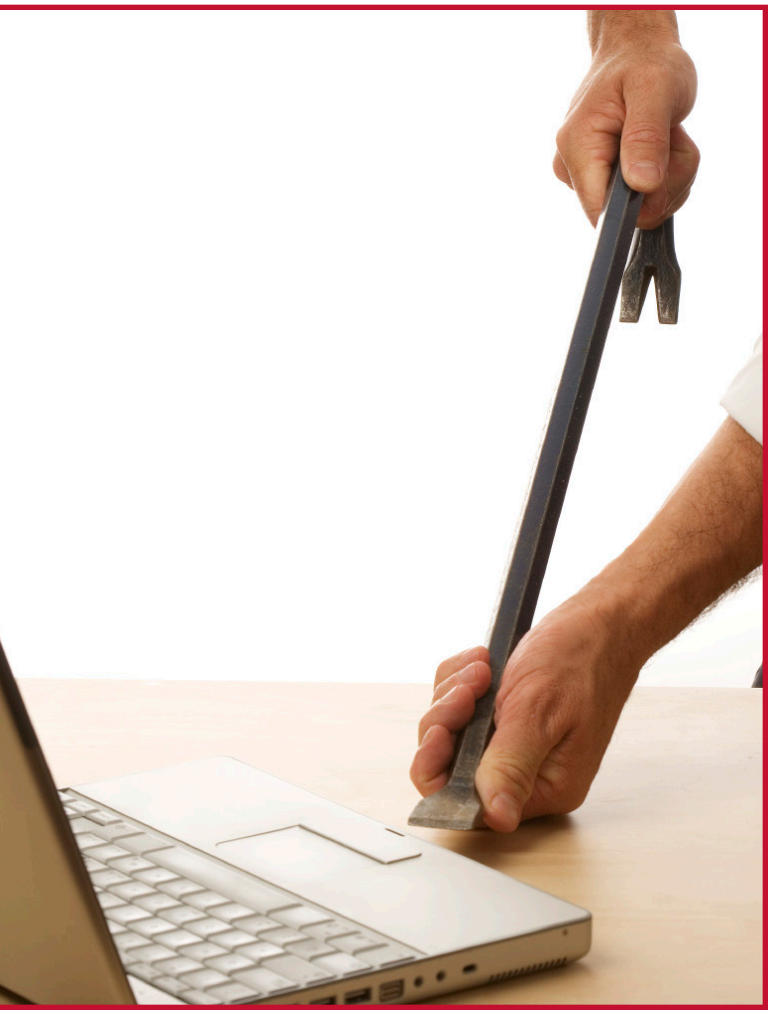
MANAGEMENT COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers



The defendant was a high school teacher charged with possession of child pornography after the school's computer technician found nude, sexually explicit images of a grade 10 student on the hard drive of the teacher's laptop computer.

Whose hard drive is it anyway?

In today's technological workplace, more and more employers are permitting, even encouraging, employees to use company-owned devices beyond the workplace and outside of working hours. While this may lead to an improved ability to respond to customer demands and increased flexibility in employee scheduling, it inevitably also leads to a heightened risk of computer misuse and abuse.

R. v. Cole

One of the ramifications of an increased reliance on portable technology is a more focused conflict between the privacy interests of employees in the personal, non-work-related information stored on "their" computers and the interests of employers in ensuring the technology they provide to employees is not misused. This conflict was recently considered by the Ontario Court of Appeal in its March 22 decision in *R. v. Cole.*

The defendant was a high school teacher charged with possession of child pornography after the school's computer technician found nude, sexually explicit images of a grade 10 student on the hard drive of the teacher's laptop computer. The teacher, who was a member of the school's technology committee and, consequently, able to monitor the school's network, was believed to have obtained the images by accessing a student's email account.

The computer technician came across the images while conducting routine maintenance. Upon finding the images, the technician took a screen shot of the laptop and reported it to the principal. The principal asked the technician to copy the photos onto a disk and provide it to him. The next morning, the principal asked the teacher to hand over the computer. The laptop and disks, as well as temporary internet files from the laptop's browsing history, were provided to the police which searched them without a warrant.

The teacher challenged the searches of his laptop by the technician, principal, school board and police, arguing they breached his *Charter* right to be free from unreasonable search and seizure.

The Court of Appeal wades in

The Court of Appeal held the teacher had a reasonable expectation of privacy in the personal use of his work laptop. Even though the laptop was a work computer owned by the school board and issued for employment purposes, a number of factors militated towards a finding of a reasonable expectation of privacy in its contents. In particular, the Court noted the school board gave teachers possession of laptops and granted them explicit permission (set out in the board's *Policy and Procedures Manual*) to use them for personal use and to take them home on evenings, weekends and summer vacations. The

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Court likewise noted that teachers invariably used their computers for personal use, stored personal information on their hard drives and used passwords to prevent others from accessing their laptops. Finally, and perhaps most importantly, the Court noted there was no "clear and unambiguous policy to monitor, search or police the teachers' use of their laptops".

That having been said, the Court found the teacher's privacy interest was subject to the limited right of access by the school's technicians performing work-related functions. According to the Court, the teacher had no expectation of privacy with respect to this limited type of access.

Employers should not assume since they own the equipment, the only privacy interests in play are their own

Based on this finding and in consideration of the school board's statutory obligations under the *Education Act* to ensure a safe school environment, the Court determined that neither the technician, principal, nor school board, had violated the teacher's *Charter* rights as they concern search and seizure. However, the same could not be said for the police investigation. The Court found the warrantless police search and seizure of the laptop and the additional disk containing the temporary internet files did breach the teacher's privacy rights under the *Charter*. In this regard, the Court went so far as to specifically note the teacher had "a privacy interest in his personal internet browsing history and what it revealed about his personal predilections and choices".

Lessons for employers

As *R. v. Cole* demonstrates, employers should not assume since they own the equipment, the only privacy interest in play is their own. As the Court of Appeal has confirmed, there may be legitimate, competing interests which should be defined in a "clear and unambiguous" information technology (IT) use policy.

A carefully crafted IT policy should outline an employer's right and ability to monitor an employee's computer, cell phone, or other electronic device provided by the employer; and put employees on notice of the fact that they should have no expectation of privacy when using company IT equipment and systems.

The specific content and implementation of the policy will depend on your work environment. In most non-unionized workplaces an employer will be able to unilaterally implement an IT use policy. In that case, courts would be expected to uphold and enforce it provided it is reasonable, employees have received sufficient notice of its implementation, and implementation would not be so significant as to constitute a change to a fundamental term of employment.

In a unionized workplace the provisions of an existing collective agreement may place additional obligations on an employer, such as a requirement to consult, or reach an agreement, with the union prior to implementation. It should also be noted that a majority of arbitrators have already recognized the existence of a "reasonable expectation" of privacy on the part of employees which must be "balanced" against the employer's legitimate interests in managing the workplace.

Regardless of the nature of the work environment, every employer should consider these tips in drafting and implementing an IT use policy:

- **Explain the purpose** – Employers, especially those in Canadian jurisdictions subject to comprehensive privacy legislation, should explain to employees the rationale behind the policy. This is also important in ensuring employee buy-in and acceptance.
- **Explain how the policy will apply** – Spell out for employees what types of technology and what specific IT applications will be covered, how the policy will apply, when it will take effect, the use that may be made of any information collected, and the potential consequences for a breach of the policy.
- **Ensure sufficient notice** – This means more than just posting a copy of the policy in the lunchroom. Ideally, to ensure enforceability, each employee should not only personally receive a copy of the policy but also confirm he or she has read and understood it and agrees to be bound by it.
- **Confirm there should be "no expectation of privacy"** – Any IT use policy should confirm the IT equipment at issue belongs to the employer and employees should have no expectation of privacy as it relates to its use.
- **Provide clear guidance on acceptable personal use** – Where personal use of IT equipment is to be permitted, an employer should specifically set out in the IT policy what types of personal use might be acceptable and what is off-limits.
- **Ensure consistent enforcement** – If you as an employer fail to consistently enforce an IT use policy or turn a blind eye to misconduct, it will become much harder for IT policy-related discipline to "stick" in the future.
- **Obtain legal advice** – While it is important to have an IT use policy, it is even more important the policy be done right. Before implementing a policy, consult with experienced counsel to assist you to better understand your rights and obligations.

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

DID YOU KNOW?

The Ontario Labour Relations Board and Ontario Superior Court of Justice recently confirmed the test for "wilful misconduct" under the *Employment Standards Act, 2000* is more difficult to meet than of "just cause" for termination at common law. These decisions remind employers a finding of "just cause" in a court proceeding will not automatically disentitle an employee to termination and severance pay under employment standards legislation.

Collective bargaining – a sword not a shield

In the current economic environment, employers should approach collective bargaining with a planned and aggressive mindset. The goal of bargaining should rarely, if ever, be to simply "get a deal"; but rather to negotiate an agreement that places the organization in the best position to achieve its business objectives. In some circumstances, to achieve its business objectives, an organization might even consider a temporary work stoppage. However, this decision is not to be taken lightly or made quickly. Preparation for a work stoppage requires methodical, strategic and well designed plans – particularly if the employer intends to continue to operate throughout the stoppage.

So, how can an employer put itself in the best position to use collective bargaining as a sword and not a shield?

Invest the Time & Resources

Preparation is a critical investment whose chief return will be a contract that places the organization in the *best* position to achieve its business objectives. It takes time and resources to stay on top of relevant legal developments, economic trends, recent settlements, internal union politics and industry standards; and to develop and implement a business continuity plan. Preparation also means being sensitive to and aware of organizational and human relations issues involving bargaining unit employees.

Finally, the opportunity to prepare does not present itself only in the weeks immediately preceding negotiations; it arises every hour of every day. So stay on top of issues and keep detailed notes of everything seen and heard.

Source the Right Information

Do your homework. The following is a list of key information a prudent employer should source in preparation for negotiations:

- Issues Arising During the Life of the Collective Agreement: Identify provisions in the current collective agreement that have interfered with your organization's business objectives. How might you like those provisions modified? Consider as well potential 'trade-offs' with the union that may help the organization get where it needs to go; and develop leverage points by planning for business continuity in the event of a work stoppage.
- Bargaining History: Study the proposals from previous rounds of bargaining. This is the best indicator of what a union will ask for in the future, and all the more reason to keep accurate records of past negotiation sessions. This includes clause history and other relevant information such as union demands, arguments justifying proposals, and management's counterclaims.
- Collective Agreements: Develop an internal database of: a) collective agreements negotiated by the union with which you currently have a relationship; b) collective agreements within your industry; and c) up to date economic data including COLA, inflation rates and general economic trends. Having a well organized and up-to-date database will allow you to develop arguments that support your bargaining position and discount a position taken by a union. It is particularly important to have data that summarizes contract settlements among similar industries and unions to avoid being *whipsawed* into an uncompetitive contract.
- Internal Data: Although external data is critical, it is equally important to have reliable and credible data on internal issues pertaining to your own organization. This includes work force demographics, current wages and benefits, and worker behavior. The greatest value of this information is for contract costing. For example, the cost of a wage demand designed to maintain current wage differentials depends on current wage levels. Similarly, the cost of a new vacation proposal depends on current and future seniority levels. Data on employee behavior is also important. An employer may be able to effectively persuade a union it will not increase paid sick time if it can demonstrate absences regularly increase on Mondays or Fridays.
- Cost: To successfully prepare for negotiations, an employer should understand the cost implications of every aspect of the collective agreement, as well as incremental changes. Too often employers focus their energy on wages and benefits, forgetting the cost – often substantial – of so-called "non-monetary" issues such as layoffs, scheduling, hours of work, and transfers. However, a collective agreement that preserves employer flexibility on those and other items can save the organization untold dollars. For example, costs associated with restrictive scheduling language can significantly impact the ability of an employer to efficiently maintain productivity in the face of absenteeism. A similar analysis applies to hours of work; overtime; job postings; grievance procedures; WSIB assessments; and a range of insurance premiums.
- Communication: Many excellent bargaining strategies have failed because an employer has been unable to persuade employees the organization's position is beneficial for both the employer and employees. The key to success is communication – direct and clear. Good leaders communicate every day; not only in the weeks preceding negotiations. Even if you've been a bit remiss keeping the lines of communication open, it's never too late to start. Ask yourself, who are the leaders within the bargaining unit? While an employer is obliged to negotiate directly with a union, strategically consider how you can encourage employees to support the organization or at least its organizational objectives. Start early and be consistent with your message.

Lessons Learned

The process of collective bargaining need not be one of *give, give, give*. To the contrary, employers should aggressively prepare for negotiations and look forward to the opportunity to *achieve* business objectives. Thorough and strategic preparation is the key to success. With it, an employer will have put itself in the best position to negotiate confidently, using bargaining as a sword, not a shield.

To learn more and/or for assistance preparing to bargain, contact a member of Sherrard Kuzz LLP.

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Help! There's been an accident.

A workplace accident can be a stressful and confusing time for an employer. A worker has been injured and all energy is focused on assisting that individual. When the dust settles and immediate medical treatment has been given, an employer may face liability under the *Occupational Health and Safety Act, Criminal Code* and/or *Workplace Safety and Insurance Act*. However, an employer can take steps to minimize and in some cases avoid liability. The first step is to know your employer rights.

At this *HR*eview Seminar we will tackle these issues and more:

1. Help! There's been an accident!
- Guidelines for compliance with deadlines and forms
- Employer investigations

2. As the dust settles
- The return to work process
- Changes to WSIB non-compliance and re-employment obligations
- Ministry of Labour inspections and investigations

3. The aftermath
- Defending OHSA and criminal charges
- Are policies, programs and training enough?
- Proposed changes to the OHSA (Bill 160)

4. Keeping it together
- Tips, traps and best practices for dealing with workplace injuries
- Remaining sympathetic and smart

DATE: **Wednesday September 21, 2011; 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, Ontario, L5W 1G3

COST: Please be our guest

RSVP: **By Friday September 9, 2011** to 416.603.0700 or register on-line at *www.sherrardkuzz.com/seminars.php*

Law Society of Upper Canada CPD Credits: This seminar may be applied toward general CPD credits.

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

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