BIRD RICHARD
LAWYERS FOR EMPLOYERS

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Ontario Court of Appeal Clarifies Employee Privacy Rights at Work

The Ontario Court of Appeal recently released its judgment in *R. v. Cole*, in which it set out employee's privacy rights with respect to personal information stored on a work computer.

A school board had launched an investigation after noticing that there was a high level of activity between a teacher's work computer, which had been provided to the teacher by the board, and the board's server. A member of the board's IT group accessed the teacher's computer remotely to perform a virus scan and, while doing so, came across explicit photographs of a young student.

The technician reported the matter to the school principal and took a "screen shot" of what he had found. The principal asked the technician to save a copy of the screen shot and the photographs to a disc. The board obtained the laptop from the teacher and made a copy of the computer's temporary internet files, copying them to a second disc.

The discs and computer were provided to the police as part of their investigation. In conducting the search (without a warrant), the police created a "mirror image" of the computer's entire hard drive.

As a result of the police investigation, the teacher was charged with possession of child pornography and unauthorized use of a computer. In his defence, the teacher argued that evidence should be excluded under section 8 of the *Canadian Charter of Rights and Freedoms*, which protects individuals from unreasonable search and seizure.

The Court, presuming that the *Charter* applied to the school board, held that, even though the computer was owned by the board, the teacher had a reasonable expectation of privacy with respect to the contents of the laptop. The Court explained that the teacher was in exclusive possession of the laptop, that permission was given to teachers to use the laptop for personal use, and that the laptop could be taken

home on evenings, weekends, and for summer vacation. In addition, there was no clear policy with respect to the monitoring or searching of teachers' laptops. While the school board's policy on computer use did include a warning with respect to searches of e-mail communications, there were no warnings regarding other information that might be stored on the computer or on the board's network.

Concluding that the board's IT technician had stayed within "an implied right of access," the Court held that the school board had not violated section 8 of the *Charter*. In determining whether a search is properly authorized in the absence of a policy specifically granting authorization, the Court found that the test is whether the search was conducted for a purpose consistent with proper systems administration.

Based on the above test, the Court concluded that, when the IT technician took a screen shot, he created copies of the information discovered during the initial investigation. The Court found the actions of the IT technician reasonable due to the general obligation of the technician to ensure the health and safety of the school's students. The secondary search, wherein temporary internet files were copied, was also found to be reasonable.

With respect to the police investigation, however, the Court found that there had been unreasonable search and seizure under section 8 of the *Charter*. The teacher's reasonable expectation of privacy with respect to the contents of the laptop and the invasive nature of the search were the basis of the Court's determination. The evidence uncovered by the police search was therefore excluded, while the screen shot and photographs gathered by the school board were deemed admissible.

This decision highlights the importance of computer-use policies and procedures that outline the employer's right to monitor and control employees' personal content and usage of company-owned devices, such as laptops, blackberries and iPhones. Through such policies and procedures, employers have the ability to limit employees' privacy expectations. These policies and procedures should be brought to the attention of employees at the time of their hire and periodically during the employment relationship. Many employers have also created a screen shot which appears at each log-on warning employees regarding the monitoring of the company computer.

Who is the Employer?

Several recent decisions of courts and tribunals across Canada have answered the question "who is the employer?" In three recent decisions, a broad view was taken of the concepts of "employee" and "employment," while a recent decision of the Alberta Court of Appeal moves in a different direction.

Ontario Court of Appeal

In *Ontario (Ministry of Labour) v. United Independent Operators Limited*, a truck driver was seriously injured at work when he was crushed between two trucks. The Ministry of Labour investigated and determined that United had failed to establish a joint health and safety committee, contrary to the *Occupational Health and Safety Act*. The *Act* requires a joint health and safety committee to be established at a workplace where 20 or more workers are "regularly employed".

United argued that it did not have enough workers to warrant the establishment of a health and safety committee, as the truck drivers were not regularly employed, but were independent owners and operators. United stated that it essentially acted as a dispatch service, to which the drivers paid fees in exchange for dispatch services. The drivers owned their own trucks and were responsible for all of their own taxes, fees, tolls and workers' compensation coverage. They attended at United's offices only to submit the necessary paperwork for payment.

However, the Ontario Court of Appeal determined that independent contractors are "regularly employed" for the purposes of the *Act*. The Court explained that, as a remedial public welfare statute with the purpose of establishing minimum levels of protection for the health and safety of workers, the *Act* must be interpreted generously. A narrow interpretation of "regular employment" would be contrary to the purpose of the legislation. The Court also found that the truck drivers were "workers" pursuant to the definition under s. 1(1) of the *Act*: "a person who performs work or supplies services for monetary compensation".

Accordingly, the Court held that truck drivers who normally perform services for an organization are "regularly employed" by that organization, and must therefore be counted when determining whether the threshold number has been reached for the creation of a joint health and safety committee.

British Columbia Human Rights Tribunal

The British Columbia Human Rights Tribunal ("the Tribunal") recently found in *McCormick v. Fasken Martineau DuMoulin LLP* that an equity partner in a law

firm was an "employee" of the firm. The decision was the result of a complaint brought by a partner of the firm with regard to mandatory retirement provisions in the firm's partnership agreement.

The Court held that, although an equity partner at a large firm is not an employee in common law or for other statutory purposes, a partner is nevertheless an "employee" under the *Human Rights Code*. The Tribunal determined that a broad and liberal interpretation must be accorded to quasi-constitutional statutes, including human rights legislation. The Tribunal explained that, because the *Code* exists to provide protection against discrimination, the definition of employee must be interpreted generously.

Upon examining the facts of the case in light of the traditional factors to be considered in determining employment status, the Tribunal found that an employment relationship did in fact exist.

Alberta Labour Relations Board

The Alberta Labour Relations Board recently released four concurrent rulings which determined that taxi drivers, regardless of whether they are owner-operators or whether they lease vehicles from taxi companies or other owner-operators, are employees pursuant to Alberta's *Labour Relations Code*.

The Board found that the dispatch company had significant control over the taxi drivers and how they carried out their work. All drivers were required to sign an agreement and adhere to certain rules that could be enforced by the dispatch company. Further, the Board determined that the dispatch company had a substantial influence on the work made available to drivers, including deciding which taxi stands to contract for, how to operate the dispatch services, and how calls were distributed between the drivers. The taxi owner-operators also differed from other independent contractors in that they had entered in to an exclusive commercial relationship with the dispatch company, rather than establishing relationships with numerous customers.

As a result of the degree of control and supervision exercised by the dispatch company over the taxi drivers, the Board determined that the drivers must be treated as employees, and that they should therefore be allowed to form bargaining units and bargain collectively.

Alberta Court of Appeal

In a decision of the Alberta Court of Appeal in *Lockerbie & Hole Industrial Inc. v. Alberta*, the Court of Appeal took a different approach. The Court held that private landowners who employ contractors at arm's length to perform work are *not* "employers" under the *Alberta Human Rights Act* (*AHRA*). Consequently, the landowners are not the parties responsible for ensuring that site-access policies are non-discriminatory; rather, it is the arm's length contractor who bears the responsibility of ensuring compliance with the *AHRA*.

The complainant worked for Lockerbie & Hole, which was a subcontractor of Syncrude. Syncrude had a policy of drug testing workers before they were allowed on a Syncrude-owned site. When the complainant tested positive for marijuana, he was not permitted to work at the site for at least six months. The complainant then filed a complaint with Alberta's Human Rights and Citizenship Commission, alleging discrimination due to a drug addiction. The Human Rights Panel determined that Syncrude was an "employer" pursuant to the *AHRA*, despite the fact that Syncrude did not hire or pay the complainant, nor did it direct his work.

The Court of Appeal disagreed, and took a contextual approach to the issue of "Who is the employer?" Given that there was more than one possible co-employer, the Court considered additional factors, including the relationship between the two possible employers.

Ultimately, the Court determined that Lockerbie & Hole was the sole employer, and that no employment relationship existed between Syncrude and the complainant. As a result, only Lockerbie & Hole was held responsible for ensuring that the complainant's rights under the *AHRA* were respected.

Conclusion

Given the liberal and purposive interpretation that courts and tribunals have assigned to certain legislation, including laws related to occupational health and safety and human rights, it is possible for judges and arbitrators to find the existence of an employment relationship where one may not have expected it. However, the decision of the Alberta Court of Appeal in *Lockerbie* is clearly at odds with this approach, and has the effect of limiting the definitions of "employee" and "employer". It remains to be seen whether other courts and tribunals will be persuaded by the reasoning in *Lockerbie*. In all cases, however, the determination of who the employer is, and whether an employment relationship exists at all, will turn on the particular facts of the case.

$500,000 Arbitration Award to be Reviewed

In our Summer 2010 newsletter, we reported on an award of Arbitrator Owen Shime, in which he ordered the Greater Toronto Airports Authority (GTAA) to pay over $500,000 in damages for bad faith conduct in the termination of a PSAC employee for suspected abuse of sick leave. This unprecedented award included: damages for past and future loss of income until the date the employee would likely have retired, mental distress, pain and suffering damages, and punitive damages.

The GTAA applied for judicial review of this decision and, earlier this year, the Divisional Court released its decision. The Court found that the arbitrator's award was reasonable, with two exceptions. The Court accordingly allowed the application in part and referred the award back to Arbitrator Shime to review the two questionable elements of his decision:

1. the Court found that the employee's claim of pain and suffering was not supported by the evidence, and that this claim had been improperly combined with the mental distress damages. The Court therefore required the arbitrator to break down the global $50,000 he had attributed to mental distress, pain and suffering; and
2. the Court also ordered the arbitrator to reconsider the punitive damage award, finding that the arbitrator had failed to identify a requisite independent actionable wrong on which to base the award.

While the GTAA had requested that the matter be reconsidered by a different arbitrator, the Court found that, given the already protracted process, it would be impractical for another arbitrator to re-hear the case in its entirety.

Bird Richard will continue to keep readers apprised of the status of this case.

New Ontario Human Rights Commission Policy on Sexual and Gender-Based Harassment

The Ontario Human Rights Commission (OHRC) released a new policy on the prevention of sexual and gender-based harassment in early 2011.

The policy provides a general overview of sexual and gender-based harassment, and then offers more context-specific information for employers, as well as for housing providers and educators. The policy provides examples of conduct that has been found to constitute sexual or gender-based harassment in each of these contexts. It also contains a section outlining suggested content for an anti-sexual harassment policy.

One Year Later: Are You Compliant with Bill 168?

Last summer, Bill 168 was declared in force by the Ontario Government. This Bill made significant amendments to Ontario's *Occupational Health and Safety Act*, and placed onerous obligations on employers with respect to workplace harassment and violence prevention. The Bill made it mandatory for all Ontario employers to conduct risk assessments of their workplaces, create and implement workplace violence and harassment policies and programs, and train their employees on these policies and programs.

June 15th, 2011 marked the one-year anniversary of Bill 168 coming in to force. Now is the time for you to review the *Act*, as well as your workplace policies and programs, to ensure that you are taking the right steps to meet your new occupational health and safety obligations.

Even if you have had your workplace violence and harassment prevention policies and programs up and running since June 15, 2010, the one-year anniversary of your creation of these policies and programs triggers additional obligations. The *Act* requires you to review the policies at least annually. If a reassessment of workplace risks is necessary to ensure that the policies are protecting your employees, another risk assessment is required. The one-year mark is also a convenient time to train your employees on any changes to your policies and programs.

For more information, or for assistance in creating or reviewing your workplace violence and harassment policies and programs, please feel free to contact us.

Firm Announcement

The Firm welcomes our new Associate Katherine Symonds. Katherine completed her articles with the Firm and has recently been called to the Bar.