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LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

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In this Issue

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Secretly Recording Your Coworkers and/or Supervisors Constitutes Cause for Dismissal

In *Shalagin v. Mercer Celgar Limited Partnership*, 2022 BCSC11, the BC Court ruled that a surreptitious recording of an employee's colleagues constituted just cause for dismissal based upon the breach of trust that is required in any employment relationship.

The plaintiff commenced employment with Mercer as a financial analyst in 2010. He signed a Code of Business Conduct and confidentiality policy as part of his employment. The Code of Business Conduct required that the plaintiff conduct himself with integrity and honesty, in his dealings with both customers and colleagues. The confidentiality policy restricted the disclosure of any confidential information outside the company. The plaintiff also held a Certified Professional Accountant (CPA) designation, which had its own professional code of conduct, which required CPAs to conduct themselves ethically and to protect confidential information related to their clients.

The plaintiff believed that his supervisor had discriminated against him because of his ethnic background. Notwithstanding his perceived conflict with the supervisor, the plaintiff was promoted to Senior Financial Analyst in 2016. He also received salary increases and bonuses throughout his employment. The plaintiff's 2019 discretionary bonus was not what the plaintiff expected to receive. The plaintiff threatened litigation over the disagreement surrounding his bonus. In response, the company determined that his employment would be terminated without cause due to his threat of litigation.

Following his termination, the plaintiff commenced a wrongful dismissal lawsuit, human rights complaint and employment standards complaint alleging that he had been discriminated against, that his supervisor had been dishonest with him and that his supervisor was rude, abrupt and

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dismissive of his concerns. As part of his human rights complaint, the plaintiff introduced a surreptitious recording he had taken during his employment. He had made several recordings during training sessions, during safety meetings, and of more than 30 one-on-one meetings with his supervisor. He explained that initially, the recordings were made to help him learn English, but he admitted that he never sought permission because it was not illegal.

Upon discovering this information, the Employer changed its position and took the position that there was just cause for his termination from employment. In order to establish just cause for dismissal, employers must prove that an employee engaged in conduct that was seriously incompatible with his or her employment. It is conduct that strikes at the core of the employment relationship. The test is an objective one, viewed through the lens of a reasonable employer given all of the surrounding circumstances. Conduct discovered after termination may constitute cause; however, the conduct must have occurred during the employment relationship and cannot have been known or condoned by the employer.

The Court held that surreptitious recordings fundamentally ruptured the employment relationship. The employer's witness testified that they felt violated by the recordings. The plaintiff argued that it was lawful to make the recording, and as long as one party to the conversation consents, such a recording is not a violation of the *Criminal Code*. This is true, but the Court rejected this argument stating that legality is not the sole barometer to the question of whether the employment relationship is fundamentally ruptured. In reaching its final conclusion regarding the after-acquired cause for dismissal, the Court stated: "*… he knew it was wrong, if not legally, at least ethically.*"

The Court also rejected the plaintiff's argument that the recordings were justified because of his concerns about discrimination, mistreatment or alleged financial improprieties by the company. The plaintiff offered no evidence to support a claim of discrimination, or any of his other allegations. In fact, the evidence suggested the contrary. In the final analysis, the Court determined that there was no legitimate basis to make the recordings based on a fear of discrimination and the plaintiff could not invoke an "*…an irrational concern to support the reasonableness of surreptitious recordings that would otherwise be treated as destroying the trust between the plaintiff, his colleagues and his employer.*"

The Court also acknowledged the growing importance of privacy rights in Canadian Society. The Supreme Court of Canada recognized that privacy has a fundamental value (*Sherman Estate v. Donavan*, 2021 SCC 25) and stated that privacy rights have a quasi-constitutional status. From a broad policy perspective, the Court stated that accepting the plaintiff's argument may encourage other employees who feel mistreated at work to start secretly recording co-workers and that this would not be a positive development from policy perspective, particularly given the growing recognition that courts have given to the protection of personal privacy.

Employers are entitled to make reasonable workplace rules to control and direct the workplace. Employers should establish workplace rules and policies that clearly prohibit any surreptitious recordings in the workplace. Given the emergence of at-home work and growing use of video conferencing as a workplace tool, it is very easy to record meetings and conversations, where confidential matters may be discussed. Secretly recording a supervisor or co-workers undermines the employment relationship and may provide a just cause for dismissal.

Arbitrator Decides that Employer can Place Employee on Unpaid Leave of Absence for Failure to Provide Vaccination Status

The recent decision of *Teamsters Local Union 847 v. Maple Leaf Sports and Entertainment* 2022 CanLII 544, has provided guidance on the outcome of a failure of a unionized employee to provide information regarding their vaccination status in light of a vaccination policy being implemented.

On September 2, 2021, the employer, Maple Leaf Sports and Entertainment, implemented a vaccination policy which required employees be fully vaccinated by October 31, 2021. As part of the policy, employees were required to disclose their vaccination status and/or underlying medical information regarding the status through a secure portal operated by a third party.

The grievor refused to disclose his vaccination status as required by the policy. The Employer responded to the refusal by placing the grievor on an unpaid leave of absence. The grievance asserted that by keeping the grievor out of the work in these circumstances the Employer has violated the grievor's seniority rights, as well as article 13.01 and 13.05 of the collective agreement. The most pertinent article 13.05 (a) stated the following:

> Except as is otherwise specifically provided in Sub-Clause 13.05 (b) hereof, an employee who is required to report for work shall receive at least eighty (80) hours pay at his gross rate, provided that he is available to perform eighty (80) hours of work in such pay period. Such guarantee shall only apply for a maximum of ten (10) pay periods commencing with the first pay period in November each year. Except for the period described herein the Company will otherwise schedule full-time

> employees to 40 hours of available work per week by seniority provided that the employees have made themselves available

The Union argued that the obligation on the Employer was to provide employees work opportunities by seniority and there was nothing which allowed the Employer to deny the employee's entitlement to work by seniority on the basis of a failure to disclose the vaccination status. Further, the Union submitted that an employee's vaccination status was private and it should not be subject to disclosure in the circumstances. The Union attempted to argue that instead, the employee could simply submit to regular antigen testing. The Union noted that it was not attempting to challenge the actual vaccine mandate, but just the requirement for disclosure of the status.

The Employer argued that the articles argued by the Union had no application as there was no guarantee of work when an employee is not required to attend the workplace. The right to work was also subject to an employee's ability to perform the work in question. The Employer further argued, that it had every right under the collective agreement to establish that a requirement that employees be fully vaccinated under its management rights clause. In light of the policy requirement, an employee who does not disclose their vaccine status is not able to establish their ability to perform the work in question.

In respect of the privacy rights argument, the Employer argued that privacy rights were not absolute and must be balanced against other legitimate interests including the duty and obligation to protect the health and safety of its employees.

The Arbitrator agreed with the Employer, at paragraph 19 and 20, the Arbitrator stated as follows:

> *It is clear that the weight of authority supports the imposition of vaccine mandates in the workplace to reduce the spread of Covid 19. That is particularly so where employees work in close proximity to other employees, as they do in this case. The authority to impose such mandates arises not only from management's right to implement reasonable rules and regulations but also form the duty of employers to take any necessary measures for the protection of workers as set out in OHSA…*
>
> *It seems to me that by opposing the disclosure of the vaccine status the Union is challenging the vaccine mandate. I do not see how the employer can enforce a vaccine mandate without requiring disclosure of an employee's vaccine status…In that regard the arbitral authority makes it clear that Employers are indeed entitled to seek disclosure of an employee's vaccine status to the extent necessary to administer a vaccine policy in the workplace.*

The Arbitrator noted that the policy for being vaccinated was reasonable given that the pandemic existed, and the policy was appropriate in order to fulfill its duties under OHSA to protect all the workers in its employ. The grievance was dismissed, and it was determined that the Employer did not violate the collective agreement or any other legislation by placing the grievor on unpaid leave of absence for failing to disclose his vaccination status.

While the question of whether or not the vaccination policy was not the central argument, the decision indicates that a vaccination policy where workers are in close proximity will be held to be a reasonable use of management rights. Further, the decision is helpful to employers seeking to have workers go on unpaid leave, where there is a failure to disclose their vaccination status. We would note that, despite this decision, collective agreements are vastly different, and before putting an employee on unpaid leave you should review your collective agreement.

It is notable that as we emerge from the pandemic, many employers have started eliminating mandatory vaccine policies or reducing the requirements of those policies. To the extent that society is clear of the pandemic remains in doubt. The presence of COVID-19 in our society remains a threat, and each employer must continue to evaluate whether or not a mandatory vaccine policy remains appropriate for your workplace. If you have any questions about this decision, or whether you have the appropriate circumstances to place an employee on unpaid leave, or require changes to your mandatory vaccine policy, please reach out to us.

Union Refusal to Advance Mandatory Vaccination Policy Grievance Not in Breach of the Duty of Fair Representation

With mandatory vaccination policies ("MVPs") turning the modern workplace into a contentious battleground, labour boards across Canada have had to grapple with the question of trade unions' duty of fair representation ("DFR") in challenging such policies. Two decisions have recently confirmed that where there is opposition to MVPs, a union is not required to file a grievance every time an employee so requests to meet its DFR, but rather is entitled to communicate with its members regarding the legality of MVPs. These decisions add to the rapidly growing and evolving case law surrounding employers' mandatory COVID-19 policies in unionized settings.

On January 10 and 19, 2022, the Ontario Labour Relations Board ("OLRB") in *Bloomfield v. SEIU, Local 1* ("*Bloomfield*") and the Canada Industrial Relations Board ("CIRB") in *Watson v. CUPE* ("*Watson*"), respectively, dismissed the DFR complaints. In both cases, the applicant members were dissatisfied with their respective employers' MVPs and their respective unions' responses to these policies, seeking that their unions insulate them from the resulting adverse employment consequences for choosing to remain unvaccinated.

In *Bloomfield*, the OLRB held a consultation into an application brought by a group of personal support workers who were placed on unpaid leave for refusing to comply with the MVP of their home healthcare services employer. The applicant members alleged that the union breached its DFR by not communicating sufficiently with them and discouraging them from "taking action," not filing a grievance when the MVP was first issued, and not taking enough action regarding the grievance itself. Notably, the union had filed a group grievance on their behalf, but only after it had received legal advice, based on which it advised the members that the MVP would most likely be upheld and the grievance would be held in abeyance "pending case law" on this issue.

The OLRB concluded that the union's conduct was not arbitrary, discriminatory or in bad faith, and therefore, the union did not violate its DFR. In reaching its decision, the OLRB reasoned that it was "fair and prudent" that the union communicated the legal advice it had received and what it intended to do in response to the employer's MVP. The OLRB noted that the union had a duty to consider the interests of the membership as a whole. Ultimately, the OLRB declined to grant the applicants' remedial request that the union pursue the grievance more forcefully and quickly.

In *Watson*, the federally regulated airline employer was subject to a government order requiring that all of its employees be fully vaccinated by a specified date. In response, the union obtained two legal opinions which both indicated that the union's likelihood of success in challenging the MVP was low. The union regularly communicated with its membership about the employer's MVP and the likelihood that it would be upheld in grievance arbitration, as well as the consequences employees would face should they refuse to comply. Additionally, the union pursued individual grievances on behalf of its members, including the applicant.

Like in *Bloomfield*, the CIRB concluded that the union had not breached its DFR based on its decision not to pursue a policy grievance. The CIRB confirmed that a trade union does not necessarily breach the DFR when it makes a decision that favours one group of employees over another based on the reasoning in the following passage:

> The complainant and other members may be opposed to vaccination, but the scientific evidence overwhelmingly points to vaccination as the most effective tool to get us past these unprecedented global circumstances. The union took a stance that is aligned with this evidence. A large majority of the membership supports the vaccination policy, as is demonstrated by the high vaccination rate amongst the employees in the bargaining unit. There is simply no evidence to suggest that the union acted in bad faith in adopting a position that supports and favours vaccination for its members.

These cases add precision to the contours of the DFR where MVPs are concerned. In both cases, the OLRB and the CIRB confirmed that the union acted appropriately in following legal advice and communicating its position to its members. The lesson from these two cases: Unions are not required to pursue a grievance in relation to MVPs, especially if such policies are reasonable in the circumstances of a particular workplace.

Further Guidance on Policy Requirements – Revisiting the *Working for Workers Act*, 2021

On December 2, 2021, Bill 27, *Working for Workers Act*, 2021, became law in Ontario, introducing numerous legislative changes to the *Employment Standards Act* ("*ESA*") rules governing workplace conduct. A key change made by this legislation was the requirement for certain workplaces to have a disconnecting from work policy in place for all employees.

As part of the new rules, employers with at least 25 employees must create and implement a written policy on disconnecting from work by **no later than June 2, 2022**. A copy of the policy must also be provided to each employee **within 30 days** of the policy being prepared or updated, or to a new employee **within 30 days** of their start date.

In addition, employers should be aware that on February 28, 2022, the Ontario government introduced Bill 88, *Working for Workers Act,* 2022. If passed, Bill-88 will make further changes to various employment-related legislation, including a similar requirement that employers have an electronic monitoring policy in place.

If you have yet to introduce such policies or need help assessing whether existing policies meet these legislative requirements, please feel free to contact us.