What's New in HR Law

Diminished Expectation of Privacy: Employer Justified in Searching Employee's Computer

November 24, 2020

Bottom Line

On judicial review, the Divisional Court of Ontario upheld an arbitrator's decision allowing an employer's search of a grievor's personal email account, which had been accessed using an employer-issued laptop. This recent decision helpfully illustrates for employers that there are limits to a worker's reasonable expectations of privacy when using employer-issued technology.

Background

In the 2014-2015 school year, two teachers at Mount Joy Public School, an elementary school operated by the York Region District School Board, used a Board-issued laptop to create a log. The log was created and stored using their personal email accounts, and documented various negative interactions and experiences with their colleagues. The grievors were counselled by their union representative to maintain the log with a view to documenting the incidents they perceived as contributing to a toxic work environment at the School.

This update is for general discussion purposes and does not constitute legal advice or an opinion.

Filion Wakely Thorup Angeletti LLP www.filion.on.ca

Toronto

Bay Adelaide Centre
333 Bay Street, Suite 2500, PO Box 44
Toronto, Ontario M5H 2R2
tel 416.408.3221 | fax 416.408.4814
toronto@filion.on.ca

London

620A Richmond Street, 2nd Floor
London, Ontario N6A 5J9
tel 519.433.7270 | fax 519.433.4453
london@filion.on.ca

Hamilton

1 King Street West, Suite 1201, Box 57030
Hamilton, Ontario L8P 4W9
tel 905.526.8904 | fax 905.577.0805
hamilton@filion.on.ca

In fall 2014, as the grievors' relationships with their fellow teachers deteriorated, the School's principal found out about the log, and attempted to search the Board's online drives to locate it (the "First Search"). The First Search was unsuccessful.

Later, in December 2014, the School's principal entered one of the grievors' classrooms at the end of the day to notice that their Board-issued laptop was open. The principal touched the mouse and the log became visible on the computer screen. The principal read through the log, and used his phone to take pictures of the document (the "Second Search").

In late December 2014 and early January 2015, the Board conducted further searches of the laptop and its drives (the "Third Search") and commenced an investigation into whether the teachers' conduct was a breach of Board policies, and/or the standards of conduct set by the Ontario College of Teachers.

Ultimately, following the conclusion of the investigation, the two teachers were issued letters of discipline for failing to meet the requisite standards of practice set by the Ontario College of Teachers. The Elementary Teachers' Federation of Ontario grieved.

Employer Successful at Arbitration

Arbitrator Misra held that the grievors' expectation of privacy was not infringed by any of the Board's searches.

First, in applying the test from *R. v. Cole*, 2012 SCC 53, Arbitrator Misra assessed whether the grievors had a reasonable expectation of privacy with respect to the log based on the "totality of the circumstances". The Arbitrator found that the grievors had a subjective and objective expectation of privacy regarding the log, but, in the end, that expectation of privacy was "diminished" since the log was publicly left open on a Board-issued laptop.

Next, the Arbitrator considered whether the Board's First Search violated the grievors' diminished expectation of privacy stating:

> **224. I am satisfied that the above provisions of the Education Act authorize the principal to conduct a search in the appropriate circumstances.**
>
> [...]
>
> In all of the circumstances, and given the apparently toxic work environment within the Grade 2 teaching team, (the Principal) had ample reasonable cause for concern about the work and teaching environment, and the level of cooperation and coordination of effort within the Grade 2 teaching team. **It was his duty to maintain order and discipline in his school, and in all of the circumstances, I find that there was reasonable cause for the Board to then conduct a search of the Grievors' online Board**

This update is for general discussion purposes and does not constitute legal advice or an opinion.

> **files to see if they could find anything that both teachers were working on together.**

Third, the Arbitrator addressed whether the Second Search violated the grievors' diminished expectation of privacy stating:

> 242. **Since I have found that (the grievor's) leaving the log open on the Board's classroom laptop diminished her reasonable expectation of privacy, I have no trouble finding that when (the principal) found the log, he did not breach her diminished expectation of privacy.** It was a classroom laptop, and it had been left open in plain view for anyone coming by to activate and use.

Lastly, the Arbitrator was asked to consider whether the Board's Third Search was appropriate stating as follows:

> 256. To the extent that the Board searched both Grievors' classroom laptops for evidence of the log, for the reasons already articulated earlier for the Board's original search of its own platforms for evidence of shared documents between the Grievors, **I am satisfied that there was no breach of either Grievor's reasonable expectation of privacy when their respective classroom laptop were searched. Once (the Principal) had found the log on (one of the grievor's) classroom laptop(s), it was reasonable for the Board to think that it may have found the location of the log, and to therefore conduct a search for it.**

Accordingly, the grievance was dismissed.

Divisional Court Upholds the Arbitrator's Decision

In its decision, the Divisional Court held that the Arbitrator's decision was reasonable, and, in doing so, addressed several key issues.

First, the Court rejected the Union's argument that the Arbitrator unreasonably interpreted and applied the *Education Act*. The Union argued that the Arbitrator's decision may open the "floodgates" to allow school administrators to rely on the *Education Act* to justify an "unfettered right to conduct a search of any kind" on various property in the classroom. However, the Court held that on the facts of this particular case, the principal's searches were properly prompted by previous concerns raised about the grievors' conduct and, as such, were not an exercise of "unfettered" discretion.

This update is for general discussion purposes and does not constitute legal advice or an opinion.

Second, the Court was asked to determine if the Arbitrator unreasonably interpreted and applied privacy jurisprudence. In the end, the Court held that the Arbitrator's application of the test from *R. v. Cole* was wholly reasonable.

On this analysis, the Court dismissed the Union's application for judicial review, upholding the Arbitrator's decision to dismiss the grievance.

Check the Box

This decision confirms that an employee's reasonable expectation of privacy is not absolute, especially when using employer-issued devices, in the workplace, and during working hours.

This decision has several key takeaways for employers: (i) as a best practice, employers are encouraged to develop and enforce strong policies that address the use of, and expectations surrounding, employer-owned technology; (ii) an employee may have a diminished expectation of privacy where they use a personal email account on an employer-issued device; and (iii) employers should generally conduct searches of employer-issued devices only when there is a reasonable basis for doing so.

Date: June 17, 2020

Forum: Divisional Court of Ontario

Citation: *Elementary Teachers Federation of Ontario v. York Region District School Board*, 2020 ONSC 3685

Need more information?

For more information regarding workplace privacy or related litigation, please contact Janeta Zurakowski at 905-972-6876 or your regular lawyer at the firm.

Toronto
Bay Adelaide Centre
333 Bay Street, Suite 2500,
PO Box 44
Toronto, Ontario M5H 2R2
tel: 416.408.3221
fax: 416.408.4814
toronto@filion.on.ca

London
620A Richmond Street, 2nd Floor
London, Ontario N6A 5J9
tel: 519.433.7270
fax: 519.433.4453
london@filion.on.ca

Hamilton
1 King Street West, Suite 1201
Box 57030
Hamilton, Ontario L8P 4W9
tel: 905.526.8904
fax: 905.577.0805
hamilton@filion.on.ca

This update is for general discussion purposes and does not constitute legal advice or an opinion.